UNFAIR DISCRIMINATION
IN EMPLOYMENT

by

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SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
MAGISTER LEGUM
IN THE FACULTY OF LAW
AT THE
UNIVERSITY OF PORT ELIZABETH

SUPERVISED BY PROFESSOR J.A. VAN DER WALT
DECEMBER 2004
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SUMMARY

In this treatise the South African law relating to unfair discrimination is discussed. The development is traced from the previous dispensation and the few pronouncements of the Industrial Court on discrimination in employment.

Thereafter the actual provisions in the law presently applicable, including the Constitution is considered.

With reference to leading cases the issue of positive discrimination by adopting affirmative action measures is evaluated and reference is made to other defences like inherent requirements for the job and a general fairness defence.

The conclusion is reached that South African law is developing to give effect to the notion of substantive equality with a view to eradicate the systematic discrimination of the past.
CHAPTER 1
INTRODUCTION

The change in the South African constitutional order in 1994 and again in 1996 entailed inter alia the laying down broad parameters for the prevention of discrimination in society - representing a significant departure from the previous dispensation.

The Labour Relations Act 66 of 1995 was the first legislation to deal directly with discrimination in the workplace. It retained the residual unfair labour practices and codified some of the elements.\(^1\) Included in the residual unfair labour practice was a prohibition against unfair discrimination in employment.

Section 9 of the Constitution Act 108 of 1996 (hereafter “the Constitution”) provides an important constitutional context for employment equity and the prohibition of unfair discrimination. It provides as follows:

1. Everyone is equal before the law and has the right to equal protection and benefits of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.

3. The state may not unfairly discriminate against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age, disability, religion, conscience, culture, belief, language and birth.

\(^1\) Under the 1956 Act, “unfair labour practice” had been a catch-all category that included any conduct of employers, employees or their organisations which in the view of the Industrial Court fell within the definition of the term, eg unfair dismissal, unfair conduct related to employees’ terms of employment and employers etc.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

5. Discrimination on one or more of the grounds listed in section (3) is unfair unless it is established that the discrimination is fair.

The above entails that elimination of discrimination relies on two bases, *ie* formal and substantive equality. Formal equality is equality in treatment and is protected in subsection 9(3) and 9(4) whereas substantive equality is equality in outcome and is enshrined through adoption of positive measures such as affirmative action - to empower the previously disadvantaged groups in our society.²

Seen against this background, the purpose and structure of the Employment Equity Act³ becomes clear. Section 2 of the Employment Equity Act provides that

“[The purpose of this Act is to achieve equality in the workplace by:]

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in workforce.”

Furthermore section 3⁴ provides that the Act must be interpreted:

“(a) in compliance with the Constitution;

(b) so as to give effect to its purpose;

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

(d) in compliance with international law obligations of the Republic,⁵ in particular those contained in International Labour Organisation Convention (No 11) concerning Discrimination in Respect of Employment and Occupation.”

² S 9(2).
³ Act 55 of 1998 (hereafter “the EEA”).
⁴ The EEA replaced Act 3 of 1983 and repealed the Wage Act 5 of 1957. It came into operation on 1 December 1998.
⁵ The Republic of South Africa Constitution Act 108 of 1996 (hereafter “the Constitution”).
Having set out the legal basis for unfair discrimination, an attempt must now be made to define the concept. To discriminate in general means no more than to differentiate or to treat differently by including some and excluding others, preferring some over the others. There may be a number of reasons for differentiating between employees, such as educational qualification experience, seniority etc, but do all of them amount to discrimination? It can therefore be said that when differentiation is based on acceptable reasons as listed in section 6(1) of the Employment Equity Act\(^6\) - it can therefore be said that an unlisted differentiation would amount to unacceptable discrimination was set out as follows:

“This whether, objectively, the ground (reason) 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 comparably serious manner.”\(^7\)

This in essence means that if the differentiation impairs the dignity of the person concerned, then it amounts to discrimination.

It is the objective of this study to examine the scope of the prohibition of unfair discrimination, to show that not all discrimination is unfair, \textit{ie} there are certain circumstances where discrimination can be pardoned or condoned or where discrimination is justified and the distinction between direct and indirect discrimination will be drawn. The case law and literature on the topic will also be discussed to determine how far we have come since the promulgation of the Constitution and the Employment Equity Act, and their impact at the workplace. Comments by different authors on the topic will also be considered.

\(^6\) An even wider list is contained in s 9(3) of the Constitution \textit{supra}.

\(^7\) 1998 (1) SA 300 (CC).
CHAPTER 2
THE DEVELOPMENT OF THE CONCEPT
IN SOUTH AFRICAN LAW

2.1 DISCRIMINATION: BEFORE THE CONSTITUTIONAL DISPENSATION

2.1.1 THE 1956 LABOUR RELATIONS ACT

It was not long ago that it had to be acknowledged that “[n]othing ... prevents an employer from refusing to appoint someone on the basis of, eg, gender, race, or trade union membership”. The Wiehahn Commission, appointed in 1977 to investigate South Africa’s labour legislation, recommended the incorporation of anti-discrimination principles into South African labour legislation:

“The commission cannot avoid the conclusion that in due course discrimination in the field of Labour on the grounds of race, colour, sex, political opinion, religious belief, national extraction or social origin will have to be outlawed and criminalized in South Africa’s labour dispensation.”

However, the Commission was well aware that this recommendation would face considerable opposition from forces ranging from “the reluctantly reforming government through the intractably racist white unions.” It was therefore felt that the timing for the introduction of an anti-discrimination provision be postponed until a

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9 The Complete Wiehahn Report (1982) part 5 para 4.127.14 (own emphasis) (hereafter Wiehahn Report). In the introduction to the published report, the Chairperson of the Commission, Professor Wiehahn, writes as follows: “Merit must continue to be overriding criterion when it comes to employment, training, promotion and remuneration in the system of Industrial relations ... Equality and equal opportunity must be main characteristics of the system, with a statutory prohibition on discrimination on the grounds of factors beyond the control of a person, such as skin colour, race and sex, and on the grounds of factors which, according to the general view of the society, would be unreasonable to use as grounds for discrimination, eg religion, citizenship, language, culture, etc.” (Wiehahn Report “Notes”3.9.2 and 3.9.3) When the Commission was appointed, labour legislation explicitly discriminated against African workers by excluding them from the definition of “employee” and therefore from belonging to the trade unions. The 1956 Industrial Conciliations Act also introduced statutory job reservation which allowed the Minister of Labour to reserve any job for Whites. However, closed shop agreements had an even greater effect on the employment prospects of African workers than job reservation. These agreements reserved “skilled jobs” for registered union members, and because African workers could not belong to registered unions, they were automatically barred from these jobs. See Friedman Building Tomorrow Today (1987) 34.
10 Thompson “Borrowing and Bending: The Development of South Africa’s Unfair Labour Practice” (1993) International Journal of Comparative Labour and Industrial Relations 188.
“careful study” in this regard could be undertaken. In the meantime, the commission recommended that the burden for developing employment practices on the basis of fairness and equality be placed in the laps of employers and employees as well as the newly established Industrial Court. The main vehicle provided to the Industrial Court for the development of fair and equitable labour standards was the unfair labour practice definition, introduced in 1979. The initial definition was embarrassingly indeterminate, and it gave the court the power to challenge “virtually any conduct by an employer, union or employee”. The definition was tightened up one year later but still left the court with quasi-legislative powers.

In theory, it should not have mattered that the definition did not include an explicit prohibition of discrimination. The suppleness of the definition coupled with the fact that the Industrial Court was empowered to take decisions on the basis of fairness and equity, should have been enough to result in the creation of a comprehensive and sophisticated discrimination jurisprudence in South African labour law. From the start the court even understood its own role as being (among other things) “to strike down discriminatory practices”. On a number of occasions, the court acknowledged that the definition was broad enough to include unfair discrimination. However, despite this acknowledgement, the comprehensive jurisprudence on discrimination never materialized. One of the main reasons for this was the fact that

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11 Wiehahn Report part 5 para 4.127.15. Despite the reluctance to recommend the enactment of a general anti-discrimination provision targeting all employment policies and practices, some specific anti-discrimination provisions were included in the Amended Industrial Conciliation Act. For instance, ss 24(2) and 51(9) of the Act were amended to prohibit differentiation or discrimination in Industrial Council agreements on the basis of sex (in addition to the existing grounds of race or colour).

12 The Commission was of the opinion that industrial council agreements could be a vehicle for setting fair labour standards in particular sectors. Wiehahn Report part 5 para 4.127.15.

13 It was felt that the Industrial Court could use its mandate to take decisions on the basis of fairness and equity to develop fair labour practices. Wiehahn Report part 5 para 4.127.17.

14 It was defined as “any labour practice which is in the opinion of the court is an unfair labour practice”.


16 Except for a brief period between 1988 and 1991, when the unfair labour practice definition ushered in by the controversial Labour Relations Amendment Act 83 of 1988 provided in s (i) that “the unfair discrimination by any employer against an employee solely on the grounds of race, sex or creed …” constituted an unfair labour practice.

17 Wiehahn Report part 1 para 4.25.14; part 5 para 4.127.17.


19 For instance, in SACWU v Sentrachem (1988) ILJ 410 (IC) at 429F, the court held as follows: “There is no doubt that wage discrimination based on race, or any other differences between the workers concerned other than their skill and experience is an unfair labour practice.”
very few discrimination claims ever reached the court for adjudication in terms of unfair labour practice definition.

Many reasons have been offered for this phenomenon. O’Regan suggests a range of possibilities:

“Perhaps workers have come to accept entrenched discrimination as a fact of life; perhaps union have given discrimination issues a low priority; perhaps union lawyers are not sensitive and skilled in discrimination law; perhaps the cases are difficult and expensive to launch and prove; or perhaps the very fragmentation of our labour market is such that it is often hard to find whites or men in similar places to blacks and women to show the discrimination. More likely than not all these factors have played some part.”

Although not numerous, the Industrial Court nevertheless made some announcements on unfair discrimination during this period. It for instance declared differential pay for equal work, the “separate but equal” doctrine, sexual harassment, the refusal to provide training to the employees of certain races, and the dismissal of an employee on the basis of her pregnancy, to be unfair labour


21 Between 1980 and 1994, when the interim constitution came into effect. The interim Constitution had an impact on how the courts approached discrimination claims, and this is discussed separately below.

22 SACWU v Sentrachem Ltd (1988) 9 ILJ 410. In this case the employer acknowledged that its employees had been discriminated against in respect of wages, but requested time to address the matter. The court held that greater efforts should have been made by the employer to ensure wage parity, and issued an order calling upon the employer to remove discriminatory practices within period of six months. Although the decision was overturned on appeal by the Supreme Court (the court found no evidence had been adduced that the wage differential amounted to discrimination based on race, the court confirmed that the wage differential between black and white workers doing the same jobs, having the same length of service, qualifications and skill constituted an unfair labour practice.

23 “… the Industrial Court should strive under its unfair labour practice jurisdiction to eradicate racial discrimination. In this regard the court accepts, inter alia, the doctrine of ‘separate but equal’ is inherently unequal …”. (Chamber of Mines of SA v Council Mining Unions (1991) 11 ILJ 52 at 71). See also SAISAIU v Chief Inspector, Department of Manpower (1987) 8 ILJ 303.


25 Chamber of Mines v Mineworkers Union (1989) 10 ILJ 133. The respondent, a racially exclusive union, instructed its members not to train workers of a different race.

26 Randall v Progress Knitting Textiles Ltd (1992) 13 ILJ 200 (IC). The decision ultimately turned on the fact that the employer had in the past allowed a “white female employee” to take maternity leave and had kept her position for her during her absence, thereby creating a clear precedent from which they deviated in casu. No allegation of discrimination was made in the case. Dismissal of an employee for any pregnancy-related reason now constitutes an automatically unfair dismissal in terms of s 187(1)(e). But see CCAWUSA v Ranch Motel (Pty) Ltd (1990) 1 SALLR 8. See also Collins v Volkskas Bank (Westonaria Branch) (1994) 15 ILJ
practices. The Industrial Court declared the dismissal of the female employee after an affair with a senior managerial employee to be discriminatory and unfair.\textsuperscript{27} It furthermore declined to declare an employer’s refusal to extend recognition to a racially-exclusive union to be unfair labour practice.\textsuperscript{28} The Supreme Court also held that race cannot constitute a valid industrial interest for the purposes of recognising unions or determining bargaining units, unless employees of a particular race can show that they have common industrial interest which differ from employees of other races.\textsuperscript{29} However, when confronted with a collective agreement that discriminated against women, the court refused to intervene and instead stressed the inviolable nature of collective agreements.\textsuperscript{30}

2.1.2 THE INFLUENCE OF THE INTERIM CONSTITUTION

Since 27 April 2004, the date the interim Constitution\textsuperscript{31} came into operation, equality has assumed a central position in South African law.\textsuperscript{32} Section 8, the equality provision of the interim constitution, contains a guarantee that the law will protect and benefit people equally and also contains a specific prohibition on unfair discrimination.\textsuperscript{33} In addition, it provides that measures designed to achieve the protection and advancement of people disadvantaged by unfair discrimination, may be taken.\textsuperscript{34} The anti-discrimination provision proved instructive to the Industrial Court, and reads as follows:

*No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following*

\begin{itemize}
\item \textsuperscript{1398 (IC), in which the court incorrectly stated that discrimination on the basis of pregnancy amounted to indirect discrimination.}
\item \textsuperscript{27} \textit{G v K (1988) 9 ILJ 314.}
\item \textsuperscript{28} \textit{Mineworkers Union v East Rand Gold and Uranium Co Ltd (1990) 11 ILJ 1070.}
\item \textsuperscript{29} \textit{MAWU v The Minister of Manpower (1983) 4 ILJ 99. In terms of s 4 of the 1956 LRA, the registrar was entitled to permit registration of a union on a racial basis provided such employees had industrial interesting common that were distinct from the interest of other employees. The court held that a mere difference in race does not justify the inference that each race has different industrial interests.}
\item \textsuperscript{30} \textit{Ntsangani v Golden Lay Farms (1992) 13 ILJ 1199 (IC). For criticism of this decision, see Christie “Majoritarianism, Collective Bargaining and Discrimination” (1994) 15 ILJ 708 at 716-718.}
\item \textsuperscript{31} Constitution of the Republic of South Africa Act 200 of 1993.
\item \textsuperscript{32} See the preamble and s 8 (“equality”) of Act 200 of 1993.
\item \textsuperscript{33} Ss 8(1) and 8(2) of Act 200 of 1993.
\item \textsuperscript{34} S 8(3) of Act 200 of 1993.
\end{itemize}
grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.\footnote{35}

After the enactment of the interim Constitution, a number of discrimination claims reached the Industrial Court for consideration. Even though the interim Constitution did not confer constitutional jurisdiction on the Industrial Court,\footnote{36} the Industrial Court nevertheless heeded section 35(3) of the interim Constitution, which required a court,\footnote{37} always to have a “due regard to the spirit, purport and objects” of the chapter on fundamental rights when interpreting any law and when applying and developing the common law and customary law.\footnote{38} This was expressed in the following manner by the Industrial Court:

“If the Constitution governs the interpretation of the ELRA (Education Labour Relations Act), which we believe it does, then in exercising its unfair labour practice jurisdiction the Industrial Court will also be called upon to infuse the very wide definition of the unfair labour practice definition with meaning in accordance with the provisions of the chapter of the Constitution setting out our Bill of Rights. It would be incumbent on the court to interpret, give body to and apply the concept of an unfair labour practice within a human rights culture.”\footnote{39}

This sentiment was echoed in \textit{George v Liberty Life},\footnote{40} where the courts stated:

“In giving contents to the unfair labour practice, it is in my view, imperative to take the values of the broader community. An important source of such values, which will guide this court, are the rights enshrined in the interim Constitution.”\footnote{41}

\footnote{35} The significance and meaning of the definition will be discussed in more detail, infra.
\footnote{36} Which is an administrative tribunal, and not a court of law. See \textit{SA Technical Officials' Association v President of the Industrial Court} 1985 (1) SA 597 (A).
\footnote{37} In \textit{Association of Professional Teachers v Minister of Education} (1995) 9 BLLR 29 (IC), the Industrial Court stated that s 35(3) of the interim Constitution refers to “a court”, unlike s 35(1) which refers to a “court of law”. This, the court argued, meant that a tribunal such as the Industrial Court would be included under the definition of “a court” and therefore, when called upon, be obliged to interpret laws with due regards to the Bill of Rights (at 56D-F). The explicit reference to “every court, tribunal or forum” in the corresponding section of the final Constitution renders this an issue of mere academic value. See s 39(2) of the 1996 Constitution.
\footnote{38} The 1996 Constitution (hereafter “the final”, “the 1996” or “the permanent” Constitution), contains a similar “interpretation” provision in s 39(2). In addition, s 39(1) instructs courts interpreting the Bill of Rights to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” (own emphasis).
\footnote{39} \textit{Association of Professional Teachers v Minister of Education} (1995) 9 BLLR 29 (IC) at 56. The unfair labour practice definition contained in the ELRA was (except for one word) the exact replica of the definition contained in the 1956 LRA.
\footnote{40} (1996) 8 BLLR 985 (IC). See also \textit{Collins v Volkskas Bank (Westonaria Branch) supra} at 1410. \textit{George} 1998.
In *Association of Professional Teachers v Minister of Education*\(^{42}\) and *George v Western Cape Education Department*\(^{43}\) the Industrial Court had to investigate the basis on which housing subsidies in the public service were granted to married women. The relevant provision in the Public Service Staff Code stipulated that a housing subsidy could only be granted to a legally married woman, if “her husband was permanently medically unfit to obtain paid employment”. The court in both judgments accepted that it had to take the equality provision of the interim Constitution into account in determining whether the housing subsidy policy amounted to an unfair labour practice. The court in both instances held that the policy directly discriminated against a class of women on the basis of their sex and their marital status.\(^{44}\)

In *George v Liberty Life*\(^{45}\) the applicant claimed that the choice of an “affirmative action candidate” over him for a position amounted to an unfair labour practice. Mr George, a white male, was an internal candidate for the position in question. The court acknowledged that an unfair labour practice definition had on occasion been interpreted as prohibiting discrimination on arbitrary grounds. The court referred to this as “negative discrimination”.\(^{46}\) However, the court had never before considered whether “positive discrimination”\(^{47}\) is a legitimate exception to the right not to be unfairly discriminated against. In order to answer this question, the court had to take the values of the broader community into consideration. An important source of such values, the court continued, are the rights enshrined in the interim Constitution.\(^{48}\) The court accepted the necessity of affirmative action measures in order to assist those who have been historically disadvantaged, even though it amounted to a form

\(^{42}\) (1995) 9 BLLR 29 (IC); (1995) 16 ILJ 1048 (IC).
\(^{43}\) (1995) 16 ILJ 1529 (IC).
\(^{44}\) The *George* judgment was eventually upheld on appeal (cf *Western Cape Education Department v George* (1996) 17 ILJ 547 (LAC)). The Labour Appeal Court found that the application of the discriminatory provision in the Public Service Staff Code was *per se* an unfair labour practice. It was therefore not even necessary for the Industrial Court to rely on the constitutional provisions in this regard (at 556E).
\(^{45}\) (1996) BLLR 985 (IC); (1996) 17 ILJ 571 (IC).
\(^{46}\) (1996) 17 ILJ 571 (IC) at 589.
\(^{47}\) *George* 590.
\(^{48}\) *George* 584. The court also referred in the (final) Constitution and the Labour Relations Act 66 of 1995, even though they did not pertain directly to the case in question.
of discrimination. On the basis of number of criteria the court found that the employer’s affirmative action programme could be justified.

2.2 RECENT HISTORY OF THE PROHIBITION AGAINST UNFAIR DISCRIMINATION

The prohibition of unfair discrimination is a mechanism designed to protect the individual employee. The change in the South African constitutional order in 1993 and again in 1996 entailed laying down broad parameters against discrimination in society, representing a significant departure from the previous dispensation. The Labour Relations Act was the first piece of legislation to deal with discrimination in the workplace, for example, section 187 provides that dismissal based on discrimination is automatically unfair. In addition Schedule 7 used to include discrimination as an unfair labour practice in the following terms and the earlier employment discrimination cases were determined under this section. It has now been replaced by the provisions of the Employment Equity Act.

Unfair discrimination was for the first time proscribed in comprehensive terms by the interim Constitution. Section 8 of the interim Constitution has now been superseded in very similar terms by section 9 of the 1996 final Constitution. Section 9(2) of the Constitution provides that:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.”

The Employment Equity Act is a legislative mechanism designed to promote the achievement of equality. It places a duty on employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. It also provides for the institution of employment

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49 The wording of the interim Constitution differed from the wording of the 1996 Constitution as far as affirmative action is concerned. The interim Constitution considered affirmative action to be an exception to the rights to equality, whereas the final Constitution makes it clear that affirmative action measures do not infringe the right against unfair discrimination, but should be seen as manifestations of the right to equality in the substantive sense. See De Waal et al The Bill of Rights Handbook (1998) 158.

50 Act 200 of 1993.
equity plans. One can argue that the basic protection of employees and work seekers/applicants is defined in similar terms to those of item 2(1)(a) of the Labour Relations Act but with three main differences:

(a) Whereas the prohibition contained in item 2(1)(a) related only to employers, section 6 of the Employment Equity Act prohibits all persons from discriminating unfairly against employees and applicants for employment.

(b) Section 11 of the Employment Equity Act reverses the onus of proving unfairness and discrimination. It provides that when discrimination is alleged, it is the duty of the employer to establish that such conduct was fair.

(c) Employers now have a duty to eliminate unfair discrimination in any employment policy or practice.

Furthermore the Employment Equity Act specifically regulates harassment, disproportionate income differentials, medical and psychological testing. The concept itself, its meaning, overview of the case law in South Africa, procedures and institutions and/or forums used in unfair discrimination disputes will be discussed in the next chapter.

2.3 DEFINITION OF UNFAIR DISCRIMINATION

When a meaning is attached to the word discrimination, the word “differentiation” springs to mind - *ie* treating employees differently by including some and excluding others, preferring some over others. It can be said that when differentiation is based on an unacceptable reason, it is discrimination. Section 6(1) of the Employment Equity Act and section 9(3) of the Constitution contain lists of the reasons which are unacceptable.

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52 S 6(1).
53 S 6(3).
54 S 27.
55 S 7.
56 S 8.
Section 9(3) provides that “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”. Subsection 5 further provides that “discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.

Section 6(1) of the Employment Equity Act goes further and provides that

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

It is interesting to note that the list in section 6(1) of the Employment Equity Act is more comprehensive than the one in the Constitution. In both definitions the grounds of unfair discrimination are not exhaustive, but constitute examples. They are the so-called “listed” grounds. Other non-listed grounds of unfair discrimination are also possible. In such a case the applicant must prove that the ground (of differentiation) existed and, importantly, that it affected the dignity of the applicant.

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57 S 9(3).
CHAPTER 3
THE PROHIBITION

3.1 INTRODUCTION

In the previous chapter the history of the concept of discrimination was discussed. This chapter will be dedicated to the discrimination itself, its types, the tests applied in determining it and the burden of proof.

The Employment Equity Act focuses essentially on discrimination past and present. Its stated objectives include elimination of employment discrimination, ensuring employment equity to redress the effects of discrimination and to achieve a representative workforce. The Act contains two parts: Chapter 2 concerns the prohibition of discrimination while Chapters 3, 4 and 5 concern affirmative action and the ways in which it is to be implemented and enforced in practice.

The part dealing with discrimination proceeds from the premise that all citizens are equal before the law and that any unfair discrimination against any employee on any ground is prohibited. Section 6(1) provides that “no person may unfairly discriminate directly or indirectly against any employee in any employment policy or practice on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, language and birth”. Subsection(3) further provides:

“Harassment of an employee is a form of unfair discrimination and is prohibited on any one or a combination of any grounds for unfair discrimination listed in sub-section 1.”

Pregnancy as mentioned in subsection (1) is defined as including intended pregnancy and any medical circumstances relating to pregnancy. O'Sullivan in her Submission on Employment Equity Bill to the Portfolio Committee on Labour\footnote{(1998) Unpublished paper of the Women and Human Rights Project, Community Law Centre, University of the Western Cape 10-11.} is of the opinion that this does not include potential pregnancy, that is, the fact that a
woman is capable of bearing children or is perceived as being likely to become pregnant.

The prohibition as contained in section 6(1) is confined to unfair discrimination occurring within the scope of an “employment policy or practice”. Grogan\textsuperscript{59} states that the term includes but is not limited to:

- Recruitment procedures, advertising and selection criteria.
- Appointments and appointment process.
- Job classification and grading.
- Remuneration, employment benefits and terms and condition of employment.
- Job assignment.
- Working environment and facilities.
- Training and development.
- Performance evaluation systems.
- Promotion.
- Transfer.
- Demotion.
- Disciplinary measures other than dismissal.

### 3.2 DIRECT AND INDIRECT DISCRIMINATION

Section 6(1) of the Employment Equity Act and section 9 of the Constitution prohibit indirect as well as direct discrimination. Direct discrimination occurs when a reason for discrimination is explicit. This means that it is relatively easy to recognise and occurs where differentiation or distinction between employees is clearly and expressly based on one or more grounds listed in section 6 of the Act. It would, for example, be established where an employer treats a woman less favourably than a man in the same position would have been treated simply because the employee is a woman. The discrimination is often not based on one ground but on several. In \textit{Association of Professional Teachers v Minister of Education}\textsuperscript{60} a female teacher was denied a housing subsidy in terms of a policy which provided that female teachers

\textsuperscript{59} Workplace Law (1999) 4\textsuperscript{th} edition 191-193.

\textsuperscript{60} (1995) 16 IJLJ 1048 (IC).
were not entitled to a housing subsidy unless their spouses were permanently and medically unfit for employment. The court held that the policy did not apply to male teachers and this exclusion was based on sex and marital status and therefore amounted to an unfair discrimination. In *Swart v Mr Video (Pty) Ltd*\(^6^1\) the refusal to employ a job applicant because she was over 25 years of age, had small children and was therefore considered to be unreliable, was found to discrimination on the basis of sex, age and family responsibility.

Indirect discrimination, on the other hand, takes place where an employer applies a rule which on the face of it appears to be neutral to all employees, but the application of that rule has a disproportionate effect on certain groups of employees, or is not sufficiently relevant to workplace needs to justify its impact. Examples of such criteria are educational qualification, physical characteristics (such as height or weight), in situations where the employer is unable to justify the required standard.

In the USA case of *Dothard v Rawlinson*\(^6^2\) where the Alabama Board of Corrections (the employer) required that applicants for the post of prison guard must be at least 5 feet 2 inches tall and 120 pounds in weight, Ms Rawlinson, who had studied correctional psychology, failed to meet the requirements but passed all other tests. The American Court indicated that a combination of the height and weight requirements would exclude 41.13% of the female population but only 1% of males, that is more women would be excluded. The court further held that the requirement was not sufficiently relevant to the needs of the employment. It found that Ms Rawlinson had been indirectly discriminated against. In *Griggs v Duke Power Company*,\(^6^3\) the US Supreme Court held that a requirement relating to high school certificates and passing scores on general aptitude tests constituted indirect discrimination.

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\(^6^1\) (1997) CCMA 10.8.20.  
\(^6^3\) 401 US 424 1971.
In South Africa, *Adriaanse v Swartklip Products*\(^6^4\) the CCMA held that an employer who required a standard 8 qualification for appointment indirectly discriminated against the applicant.

Less obvious are criteria based on seniority, length of service, full time or part time work. Fitzpatrick\(^6^5\) is of the opinion that the application of such criteria tends to discriminate against women with family responsibilities. In *R v Secretary of States for Employment Ex Parte Equal Opportunities Commission*\(^6^6\) it was shown that differential periods of service to qualify for state redundancy amounted to indirect discrimination against women who made up the overwhelming majority of part time workers. In *Roinner-Kuhn v Fuhr Spezial Gebaudereinigung*\(^6^7\) the European Court of Justice ruled that the state legislation which granted lower benefits to part time workers breached article 119 of the European Treaty on the grounds that it indirectly discriminated against women. In Australia the imposition of a four-week limit for employees to return to work following a restructuring exercise left women on maternity leave unable to comply and was found to impact disproportionately and unjustifiably on women. Hunter\(^6^8\) submits that is difficult to justify collegiality which might, for example, exclude physical characteristics such as Rastafarian dreadlocks, if the dominant style in the workplace is grey suits and black shoes.

The leading case in South Africa is *Leonard Dingler Employee Representative Council v Leonard Dingler Pty Ltd*\(^6^9\) in which the employer differentiated between monthly-paid employees and weekly-paid to determine the eligibility for membership of a staff benefit fund. Given the fact that all black employees were weekly-paid and nearly all monthly-paid employees were white, the court found that the criterion of monthly-paid status amounted to indirect discrimination on the grounds of race and that it had a disparate impact on the company’s black employees. It was furthermore held that “there is no objective justification for only permitting monthly-paid staff to join the Staff Benefit Fund. The company did not provide any financial or business

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\(^6^4\) (1999) BALR 649 CCMA.
\(^6^6\) (1993) IRLR 10 HL.
reasons for this policy. In the circumstances there is no reason for the discrimination sufficiently related to the protectable interests of the employer. In this sense the monthly-paid criterion is an arbitrary ground for discrimination”.

The discrimination was accordingly unfair.

To summarise: indirect unfair discrimination results from a standard which applies equally to all persons, but:

1. is such that the proportion of a particular class of person (for instance, women) who can comply with it is considerably smaller than the proportion of that class within the population as a whole;

2. cannot be shown to be justifiable in the circumstances; and

3. operates to the complainant’s detriment because he or she cannot comply with it.

To determine whether discrimination was unfair or not, the courts or the CCMA have to apply a test. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in section 8(2), which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair. In *Harksen v Lane*\(^{70}\) the Constitutional Court formulated a test for unfair discrimination as follows: “The determination as to whether differentiation amounts to unfair discrimination under section 8(2) (of the interim Constitution, now section 9(1) of the final Constitution) requires a two stage analysis, firstly, the question arises whether the differentiation amounts to discrimination and if it does, whether secondly, it amounts to unfair discrimination. It is as well to keep these two stages of the enquiry separate.”

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\(^{70}\) 1998 (1) SA 300 (CC).
In *President of the Republic of South Africa v Hugo*\(^{71}\) Goldstone J expounded on the concept as follows:

“We need therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”

A similar approach was adopted by the Industrial Court in *George v Liberty Life Association of Africa Ltd*\(^{72}\) and endorsed by the Labour Court in *Leonard Dingler Employee Representative Council v Leonard Dingler Pty Ltd*\(^{73}\) where Seady AJ held that by distinguishing the prohibition of unfair discrimination from impermissible discrimination “the legislation recognises that discriminatory measures are not always unfair”. This entails that a distinction should be drawn between differential treatment which carries no negative connotation, and discrimination. In *Prinsloo v Van der Linde*,\(^{74}\) it was held that differential treatment becomes discrimination in the legal sense only if it is pejorative, that is, it amounts to treating persons differently in a way which impairs their fundamental dignity as human beings.

In *Kadiaka v Amalgamated Beverage Industries*\(^{75}\) this principle was illustrated in respect of differentiation on the basis of previous employment. The respondent had refused to employ the applicant on the grounds that the latter had previously worked for rival company, New Age Beverages. The reason offered was that “[b]ecause of the manner in which New Age Beverages and its employees acted towards [the respondent], the trust required for the employment relationship will not be present between ABI and any ex-NAB employee”. The applicant alleged that this constituted unfair discrimination in terms of item 2(1)(a) of Schedule 7 to the LRA.

\(^{71}\) Supra.
\(^{72}\) (1996) 17 ILJ 571 (LC).
\(^{73}\) (1998) 19 ILJ 285 (LC) at 2941-J.
\(^{74}\) (1997) 6 BLLR 759 (CC).
The court found that ABI’s policy amounted to differential treatment of former NAB employees but that it did not constitute discrimination in a pejorative sense because it made “commercial sense”, it was temporary, not vindictive and not inimical to the values of society at large.

Discrimination may consist of either an act or an omission. An intention to discriminate need not be present; the only question is whether in fact it took place. This inquiry, however, does not pre-empt the question of whether such discrimination is unfair. Imprisoning persons convicted of criminal offences, for example, may be considered a pejorative form of differential treatment capable of impairing a person’s dignity, but is nonetheless sanctioned by social norms of fairness as well as by the Constitution.

The second step is to establish accordingly whether an act of discrimination is unfair. Discrimination is presumed to be unfair if it happens on any of the grounds listed in section 6(1), unless a fair reason can be established.

In Kadiaka v Amalgamated Beverage Industries it was held that the list is not exhaustive and does not limit the general or primary concept of unfairness.

In Larbi-Orbidam v MEC for Education (North West Province) the Constitutional Court considered the fairness of discrimination on the basis of citizenship. At issue was the constitutionality of regulations purporting to exclude non-South African citizens from permanent employment as educators. The court found that differentiation of such a nature amounted to discrimination.

For practical purposes the test for unfair discrimination requires the applicant to prove both discrimination and unfairness on an unlisted ground. The applicant must show a link between the differentiation and the listed ground (of discrimination). It is then presumed to be unfair and the employer must show the fairness. If there is no link the applicant must prove both. The following case will illustrate this further:

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76 S 10(2), EEA.
77 Supra.
78 1998 (1) SA 745 (CC).
In *Crotz v Worcester Transitional Local Council*, the applicant, a coloured employee, alleged unfair discrimination where an African employee was appointed instead of him. He had acted in the post on several occasions and during the interviews he and the African male scored the highest points. The council argued that it believed that affirmative action required the appointment of an African to the post. The court held that the council had clearly differentiated the candidates on the basis of race because the applicant and D came from the same designated group, black, and there was no evidence by the council that it had canvassed the relative disadvantage of the two men. In *SAPU obo Du Toit v South African Police Service*, a white male applicant, applied for a post advertised by the employer as a non-designated post. He achieved the highest score of all applicants for the post, but was not appointed. He claimed discrimination on the basis of race as the male who was appointed was a coloured who had achieved lower points than him. The employer argued affirmative action, but failed to provide evidence that it had acted fairly and had applied its principles.

The Commissioner found that the failure to promote the applicant constituted unfair discrimination. In *Kruger v South African Police Service* where a white female inspector, who despite attaining highest marks was not promoted because the employer contended that its employment equity profile showed an abundance of white females, the arbitrator found that denying her promotion was unfair discrimination because the employer had invited applications for posts earmarked for designated groups without indicating the restrictions. In *Coetzer v Minister of Safety and Security* the applicants applied for posts earmarked for designated group, notwithstanding the fact that there were no applicants from the designated groups, the members were refused the promotions. The Labour Court was then called upon to determine, in terms of section 6 of the Employment Equity Act, whether the SAPS had unfairly discriminated against them on a racial basis, by not promoting them to posts retained for the designated groups. The SAPS contended that the

discrimination was in accordance with its affirmative action plan and therefore not unfair. Landman J held that the affirmative action justification must not only be adjudicated within the compass of the section but the state employer must show that the affirmative action measures are in harmony with the other constitutional measures, particularly section 205. The court found that the SAPS justification failed in two respects, firstly because there was no specific action plan for the unit itself and secondly, that there were no applicants from the designated groups. The court accordingly found that the discrimination was unfair and ordered the promotion.

With regard to HIV-status discrimination the leading case is *Hoffman v South African Airways*. The applicant had applied for employment as a cabin attendant and was found to be a suitable candidate for the job.

He was found clinically fit after medical tests, but was HIV-positive. He was thereafter regarded as unsuitable and not employed. He challenged the constitutionality of the refusal to employ him, alleging that it amounted to unfair discrimination and violated his constitutional right to equality, human dignity and fair labour practices. SAA alleged that its flight crew had to be fit for worldwide duty and that HIV-positive people could react to some vaccines and could pass certain diseases on to their passengers. Furthermore, HIV-positive people were liable to contract opportunistic diseases and when they fell ill they would not be able to perform emergency duties. The High Court found for SAA whereafter Hoffman appealed directly to the Constitutional Court. The court held that SAA had discriminated against Hoffman because of his HIV status and ordered SAA to employ him.

However, in *Stulweni v SAPS* the applicant, a Muslim, had applied for three advertised posts of chaplain to the SAPS but was unsuccessful. He claimed before the CCMA that he had been discriminated against on the ground of his religion, as the people who had been appointed to the posts were of Christian faith. The Commissioner found that he had misinterpreted the provisions of the Act. His claim, the Commissioner found, was not so much based on discrimination against him but

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rather on the fact that he was not given special consideration because of his religion. The Commissioner found that the respondent had no reason to apply positive discrimination or affirmative action to the applicant on the basis of his religion. The application was therefore dismissed.

In *Middleton v Industrial Chemical Carriers Pty Ltd*\(^{85}\) the issue to be decided upon was whether differentiation between payroll employees and salaried staff was unfair discrimination. The court found that the respondent’s decision to treat payroll employees differently from the salaried staff on termination of employment, was neither arbitrary nor unfair. The court further held that implicit in the notion of unfair discrimination was the requirement of disadvantage and prejudice. The test set out in *Harksen v Lane* was used.

Section 9 of the Employment Equity Act extends the meaning of employee for the purposes of section 6, 7, and 8 to include applicants for employment. The definition of employee is to be found in section 1 of the EEA, 23 of the LRA and the BCEA. Excluded from this protection or application in terms of section 9 are independent contractors. The Promotion of Equality and Prevention of Unfair Discrimination Act\(^{86}\) covers soldiers. In *Whitehead v Woolworths (Pty) Ltd*\(^{87}\) the court held that an applicant becomes an employee only when the work has commenced or when the services are tendered or offered but refused. Most of the grounds in section 6(1) are not capable of application by job applicants but the most common is failure to appoint because of unfair discrimination.

### 3.3 HARASSMENT AS DISCRIMINATION

Section 6(3) of the EEA provides that harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection D. The most prevalent forms of harassment encountered in the workplace are sexual harassment, racial harassment, sexual

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\(^{85}\) (2001) 22 *ILJ* 472 (LC).
\(^{86}\) 3 of 2000.
orientation harassment and religious harassment. Of these sexual harassment, particularly harassment of women by men, is by far the most prevalent.

In *J v M Ltd*\(^88\) it was stated that “sexual harassment, depending on the form it takes, will violate that right to integrity of the body and personality which belongs to every person and which is protected in our legal system both criminally and civilly. An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation within the workplace because it creates an intimidating, hostile and offensive work environment”. In *Reddy v University of Natal*,\(^89\) Myburg JP stated that in terms of the Constitution sexual harassment infringes the right to human dignity as contained in section 6 of the Constitution.

In *J v M Limited*\(^90\) De Kock M defined sexual harassment as follows:

“In its narrowest forms sexual harassment occurs when a woman (or man) is expected to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view it is however any unwanted sexual behaviour or comments which have a negative effect on the recipient.”

The Code of Good Practice on the Handling of Sexual Harassment Cases published in 1998, issued in terms of section 203 of the Labour Relations Act, lists three types of conduct that could constitute sexual harassment:

1. **(a)** Physical conduct ranging from touching to sexual assault and rape and including a strip search by or in the presence of the opposite sex.

2. **(b)** Verbal conduct including innuendos, suggestions, hints, sexual advance, comments with sexual overtones, sex related jokes or graphic insults, graphic comments about a person’s body made to that person or in their presence, enquiries about a person’s sex life or even whistling at a person or a group of persons.

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\(^{88}\) (1989) 10 *ILJ* 755 (IC).

\(^{89}\) (1997) 2 *LAC*.

\(^{90}\) *Supra.*
(c) Non-verbal conduct including gestures, indecent exposure or the display of sexually explicit picture and objects.

From the above we can deduce that there are three types of sexual harassment by looking at the effects of the harassment, namely:

(a) *Quid pro quo* harassment, which occurs where a man or a woman is forced into surrendering to sexual advances against his or her will, the reason being the fear of losing a job-related benefit. This occurs when one party is powerful enough to affect job-related benefits.

(b) Sexual favouritism occurs when a person in authority rewards only those who respond to his or her sexual advances.

(c) Hostile working environment harassment occurs when an abusive working environment is created in which the employee finds it difficult to work. It could be created by jokes, sexual propositions, pornographic pictures on the office wall etc.

To determine whether a conduct constitutes harassment a test has to be used. The courts in the US have asked the question: “From whose side is it viewed?” Is it then the (a) perpetrator, (b) the victim, (c) reasonable man, or (d) a reasonable victim’s point of view?

If it is looked at exclusively from the way the victim experienced the situation, this would mean that a subjective test would be in operation. This may create problems where the victim may be over-sensitive, as this test may cast the net of harassment too wide.

This subjective test has been criticised for creating a form of strict liability.

Again, the reasonable man test implies looking at all the circumstances of the case and the values of the society, and trying to determine whether the perpetrator foresaw or should have reasonably foreseen that his or her conduct would constitute
harassment. The critics of this test argue that it places reliance on male dominated values.

However, the reasonable victim test tries to reach a compromise between these two tests. It takes into account the experience or perspective of the victim, the surrounding circumstances and fault on the part of the perpetrator, but also discounts over-sensitive victims. This entails that if the harassment behaviour was persistent, and the victim had made it clear that it was unwanted, but the perpetrator continues despite that objection, there is no way that he can claim that he/she did not know that the conduct was wrong.

Section 60 of the Employment Equity Act places a duty on the employer to take the necessary steps in dealing with harassment cases and the procedure to be followed is laid down. This section creates a form of vicarious liability on the employer but if the employer can prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the Act, then liability for the conduct of the harassing employee cannot be placed on it.

The Code proposes steps and procedures on how to deal with such matters. Landman\(^91\) states:

> “The employer must show that the alleged harasser committed an act knowingly ie with intent. Negligence does not constitute the infraction. There must be an act and the intention to act. The two must co-exist to constitute the offence of sexual harassment. Intent means that the perpetrator must have the intention (will) to do the act and to cause the result, which he or she knew would follow or foresaw the possibility of it happening.”

From the above it is clear that the employer can no longer watch from the sideline with regards to the issue of harassment; he/she needs to play an active role in its prevention, guided by the Code.

\(^91\) “The Code of Practice on Sexual Harassment” Vol 8 *Contemporary Labour Law*. 
3.4 MEDICAL AND PSYCHOLOGICAL TESTING

Section 7 of the EEA prohibits medical testing of an employee unless legislation requires or permits the testing or the testing is justifiable. Testing may be justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or inherent requirements of a job. In considering whether testing is justified, the following are some of the criteria to be taken into account whether:

(a) the work involves physical activity,

(b) the test relates to actual reasonable requirements of the job,

(c) persons with disabilities are reasonably accommodated in carrying out the test, and

(d) the applicants have been adequately informed as to the nature and purposes of the test and the fact that the results will be confidential.

Job applicants are also protected in terms of section 9. Section 6 prohibits discrimination on the basis of HIV-status. Until recently South African Airways had a policy of not employing HIV-positive employees as cabin attendants, partly because SAA believed that HIV-positive people could not have vaccinations which are a requirement for international travel, and that they were at risk of catching infections which may be transmitted to others. The medical evidence before the court showed that this was not true of all HIV-positive persons and it was not true of Hoffman. In finding that this policy constituted unfair discrimination on the basis of Hoffman’s HIV status, Ngcobo J of the Constitutional Court explained that people living with HIV constitute a minority and society has responded to their plight with such intense prejudice. In view of the prevailing prejudice against HIV-positive persons, any discrimination can be interpreted as a fresh instance of stigmatisation and an assault to their dignity.
Section 7(2) of the Act provides that testing an employee to determine the employee’s HIV status is prohibited unless the testing is held to be justifiable by the Labour Court. Section 50(4) provides that in making the order, the Labour Court may impose various conditions on the employer in testing for HIV status, including the provision of counseling, the maintenance of confidentiality, the period for which the court authorises the counselling or the category of job or employees in respect of which the court authorises testing.

The Code of Good Practice: Key Aspects of HIV Aids and Employment provides guidelines to employers and employees on how to deal with HIV/ Aids and guidelines relating to testing of employers.

Psychological testing and other similar assessments are also prohibited by section 8 of the EEA unless the test or assessment has been scientifically shown to be valid and reliable, it is applied to all employees and the test or assessment is not biased against any employee or group of employees.

Du Toit et al submit that the term “other similar assessments” includes aptitude and intelligence tests. They are of the view that the section is aimed at prohibiting tests which are likely to discriminate unfairly against any employees or applicants from particular language, cultural or other backgrounds.

As in the case of medical testing, the onus is on the employer to show that the tests meet the stated criteria. Section 8 requires that all the criteria mentioned must be met. The employer must show that the test is designed to measure skills or characteristics which are relevant in terms of the requirements of the job or position in question. It must also be proved that the test is reliable by showing its substantive value and its accuracy in measuring that which it sets out to measure. If the two can be shown, the test may be objectively justified. To establish fairness and lack of bias, employers may be expected to do everything reasonably possible to ensure that the tests are comprehensible and accessible to all employees and work-seekers to whom they are applied.

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GG R1298 of 2000-12-01.
Schedule 7 of the LRA has been silent as to the burden of proof in cases of alleged unfair discrimination. In *Leonard Dingler Employee Representative Council v Leonard Dingler* the Labour Court referred to section 8 of the interim Constitution and concluded that the burden of proving fairness should likewise shift to the respondent once the applicant had proved discrimination.

This has not been followed consistently as can be seen in the cases *Louw v Golden Arrows Bus*\(^{93}\) and *Swanepoel v Western Region District Council*,\(^ {94}\) and *Fouche v Eastern Metropole*.\(^ {95}\)

Section 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegation is made must establish that it is fair. This entails that as soon as the applicant establishes that there was a discrimination and that it was unfair, the onus then passes to the respondent to prove that no discrimination took place or that such discrimination was fair, within the meaning of section 6(2). The defences afforded to the employer in discrimination cases will be discussed in the next chapter.

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93 (1999) 8 (LC) 6.12.5.
CHAPTER 4
DEFENCES

In the previous chapter it was mentioned that not all discrimination is unfair. Section 6(2) of the Employment Equity Act sets out two grounds on which discrimination in general will be permissible, namely affirmative action and the inherent requirements of the job.

4.1 AFFIRMATIVE ACTION

Chapter 3 of the Employment Equity Act emphasises equity in the group context. Its aim is to eliminate disparities and inequalities caused by the discriminatory work practices and laws of the past and to ensure that suitably qualified employees falling within designated groups as defined in the Act, i.e. black people, women and people with disabilities, will have equal opportunities and will be equitably represented in all occupational categories and levels within a designated employer’s workforce.

The fact that some individuals within a group may not have suffered disadvantages, or that some groups may have been exposed to lesser disadvantage, is irrelevant. The emphasis is on the representivity of the designated groups within the workforce. However, many employees who do not fall within the designated groups will almost inevitably expect and demand that their needs and interests as individuals be considered.

Affirmative action presents itself within the context of the Employment Equity Act both as a duty and as a defence. In terms of Chapter 3 of the Employment Equity Act employers are under a duty to implement affirmative action measures. Here we are concerned with affirmative action not as a duty but in the permissive sense, that is, as a defence to a claim of unfair discrimination allegedly suffered by a person or persons on the grounds of race, gender, or other characteristics referred to in section 6(1) of the Employment Equity Act.
Legal space for affirmative action in this sense was entrenched by section 8(3)(a) of the interim Constitution,96 which sanctioned measures designed to achieve protection and advancement of persons, or groups or categories of persons, disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. The Labour Relations Act97 gave effect to this provision in the employment context by providing in almost identical terms that “an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms”.

It is inevitable that the interests of individual will clash with the aims and objectives of Chapter 3 of the Employment Equity Act. Both the Labour Court and the CCMA have dealt with and will still have to deal with disputes that have arisen in this regard.

An attempt will be made to analyse the provisions of the Employment Equity Act in the following categories:

(a) Disputes arising from failure to employ or promote a person who does not fall within one of the designated groups in circumstances where the employer has employed a person falling within one of the designated groups.

(b) Disputes arising from dismissal of an employee falling outside the designated groups to make room for the affirmative action promotion or employment of a person from a designated group.

(c) Disputes arising from failure to employ or promote an employee falling within the designated group.

The first decision specifically dealing with affirmative action was that of the Industrial Court in George v Liberty Life Association of Africa Ltd.98 In this case an employee

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96 Act 55 of 1993.
97 Schedule 7 item 2(2)(b).
98 (1996) 17 ILJ 571 (IC).
already in the employment of the employer had applied for a post advertised by the employer. His application had been turned down in favour of an affirmative action appointment. He approached the Industrial Court alleging that the employer had committed an unfair labour practice. Because of the wide definition of an unfair labour practice at that time, the court had a free hand to determine the applicable legal principles. The court found that the affirmative action policy amounted to discrimination, however this discrimination was not unfair. It held that affirmative action measures provide a defence to employers and do not give a right of preferential treatment to employees.

In Public Servants Association of SA v Minister of Justice99 the applicant challenged the decision of the Department of Justice to reserve certain posts for affirmative action candidates.

The case revolved around the interpretation of various statutory provisions. The first was section 212 of the interim Constitution which stated that the Public Service should promote an efficient public administration broadly representative of the South African community. The second was section 8 of the interim Constitution which entrenched equality rights and prohibited discrimination of particular importance was section 8(3)(2) which did not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms.

The court adopted the formal approach to equality and accepted that affirmative action measures constituted discrimination but that they could in the correct circumstances be fair. The court formulated the following principles with regard to affirmative action measures:

(a) The affirmative action measure must be specifically designed to achieve the goal of the adequate protection and advancement of persons subject to past unfair discrimination. The action must not be haphazard or random.

(b) There must be a causal connection between the affirmative action measures that have been designed and their objectives.

(c) Although the affirmative action measures must be designed to achieve adequate protection and advancement, the rights of others and interests of the community should also be taken into account.

(d) The requirement that the Public Service must ensure an efficient public administration should not be compromised.

The court found that the above principles had not been adhered to and that the affirmative action measures adopted by the Department of Justice were therefore invalid.

In *Abbott v Bargaining Council for the Motor Industry (Western Cape)*\(^{100}\) the applicant had applied for employment as a designated agent. He was refused employment and he claimed that he had been discriminated against on a prohibited ground. The court found that there had been no such discrimination. It then considered whether the applicant could claim employment on the grounds of affirmative action and it accordingly rejected the argument. It stated that the defence of affirmative action is a shield for the employer and not a sword in the hands of the applicant.

Also of importance is the decision in *MWU obo Van Coller v Eskom*.\(^{101}\) Here a white male employee had applied to be promoted into the post in which he had been acting for some time. He was recommended, but this was overruled by the management. Another person was appointed in terms of an affirmative action policy. He challenged the decision and the dispute was referred for arbitration. The employer raised the affirmative action defence was available provided that the policy met certain requirements. The court referred to the *PSA v Department of Justice*-case\(^{102}\)

\(^{100}\) (1999) 20 ILJ 30 (LC).

\(^{101}\) (1999) 9 BALR 108 9 (IMSSA).

\(^{102}\) *Supra.*
and held that the requirements set down in that case had not been met by Eskom and that the failure to promote the employee constituted unfair discrimination.

Although the affirmative action defence in item 2(2)(b) did not apply to unfair promotion disputes dealt with in item 2(1)(b), arbitrators and CCMA commissioners have been prepared to consider and uphold an affirmative action defence raised by an employer when considering an allegation of an unfair refusal to promote.

See in this regard Public Servants Association v Free State Provincial Administration\textsuperscript{103} and Herbert v Department of Home Affairs\textsuperscript{104} where the decisions not to promote were held to be fair on the basis of affirmative action policies. In Public Servants Association, Free State v Department of Correctional Services\textsuperscript{105} the commissioner was also prepared to consider this defence but found that the relevant policy was too wide and was not prepared to uphold it.

Let us now deal with the categories of the disputes raised mentioned earlier on.

4.1.1 FAILURE TO EMPLOY OR PROMOTE A PERSON WHO DOES NOT FALL OUTSIDE THE CATEGORY

In practice, the most typical example is a where a white male who is refused employment and the person employed falls within one of the designated groups. The statutory basis for a claim by the unsuccessful white male applicant is based on unfair discrimination in terms of section 6(1) of the Employment Equity Act. Section 6(1) provides that “no person may unfairly discriminate, directly or indirectly against any employee in any employment policy or practice on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth”. Section 9 of the same Act states that for the purpose of section 6, the term employee includes an applicant for employment. Section 1 defines any employment policy or practice to

\textsuperscript{103} FS3915 21/5/98.
\textsuperscript{104} KN 10413 21/4/98.
\textsuperscript{105} FS1394 4/9/97.
include recruitment procedures, appointments, advertising, selection criteria, promotions and dismissals.

An employer faced with a claim of discrimination based on race and sex may argue that there was no discrimination on this basis and that the person who was employed was simply the better candidate on merit. The fact that the successful applicant was a member of a designated group was irrelevant in the selection process. If this can be established, there will be no discrimination. However the employer could also admit that the successful candidate was appointed on the basis of the fact that he/she was black, a woman or a person with a disability, and the applicant was not considered because he was white and male, and argue that this was done as an affirmative action measure. This means that the employer would be relying on section 6(2) of the Employment Equity Act.

Section 15 of the Employment Equity Act states that affirmative action measures are “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of a designated employer”.

Section 15(2) spells out in more detail what affirmative action measures an employer must implement when drawing up affirmative action plans in terms of Chapter 3 and they include:

(a) measures to further diversity in the workplace,

(b) measures to identify and eliminate employment barriers, including unfair discrimination which adversely affects people from designated groups, and

(c) measures to ensure the equitable representation of suitably qualified persons from designated groups in all the occupational categories and levels in the workplace including preferential treatment and numerical goals.

The Labour Court will usually scrutinise affirmative action measures to determine whether they meet the requirements of section 15, that they are consistent with the
purposes of the Employment Equity Act and whether the requirements of the Employment Equity Act are met. The decisions in Public Servants Association v Minister of Correctional Service\textsuperscript{106} are still regarded as providing some guidelines by the courts.

In MWU obo Van Coller v Eskom\textsuperscript{107} the employer had appointed a black candidate to a post rather than a better qualified employee who was recommended for the position. The arbitrator held that the employer wishing to rely on affirmative action as a defence against a charge of unfair discrimination must prove that it acted according to the standards developed to achieve specific objectives, that those standards are aimed at adequate protection and advancement of groups or categories of persons and that rights of other persons and efficiency of the employer are not undermined. The employer failed to prove the above and its refusal to promote the employee was held to be unfair. However in Department of Correctional Services v Van Vuuren\textsuperscript{108} where after 12 years of service with the appellant, the respondent applied for a higher position in the department and was highly recommended, the Commissioner of Prisons decided to appoint a recommended candidate, a black man. The Industrial Court held that the appellant had committed an unfair labour practice against the respondent on the basis that the affirmative action policy upon which the Commissioner of Prisons had relied had not yet been registered with the Public Service Commission (PSC). It further held that such registration was necessary before the Commissioner could make a decision based on the guidelines set out in the policy. On appeal the court held that the Commissioner was competent to decide whom to appoint to the post.

The court further held that while the Constitution prohibits discrimination based on race, it also provides that the right to equality does not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms. It further held that a state department is not acting unfairly by appointing a black man in preference to a white

\textsuperscript{106} Supra.
\textsuperscript{107} Supra.
\textsuperscript{108} (1999) 1 BLLR 1132 (LAC).
woman merely because the affirmative action policy was not yet registered with the Public Service Commission.

In *NEHAWU obo Thomas v Department of Justice*\(^{109}\) the grievant referred a dispute to the relevant bargaining council to determine whether the department’s failure to promote him to the post of Assistant Director: Employment Equity constituted an unfair labour practice in terms of item 2(1)(b) of Schedule 7 to the LRA.

The arbitrator first considered whether the dispute fell within the council’s jurisdiction to arbitrate, and concluded that it did after noting that the grievant and his union did not base his case on alleged discrimination, which would fall outside the council’s jurisdiction.

The department advertised the post in July 1999. The grievant applied and, with three other candidates, was short-listed and interviewed. Although the grievant achieved the highest score at the interview and had been working in the department on similar issues, a Mrs M was appointed to the post. The department defended the appointment on the ground that it was not bound by any rule to appoint the candidate with the highest score and that the score difference was small; that Mrs M had shown a fair knowledge of relevant issues and the directorate, which was responsible for implementing the department’s policy to promote representivity; and that the appointment of Mrs M, an Indian, would improve its representivity.

The arbitrator found in favour of the department on the foregoing three points, and ruled that the union’s objection to the selection committee, because it consisted of three women and only one man, amounted to an allegation of gender discrimination, which the council lacked jurisdiction to consider.

The arbitrator further considered but rejected the union’s argument that when applying affirmative action measures, the department was not entitled to differentiate between two candidates who both fell within designated groups as defined in the Employment Equity Act. The department’s answer that a directorate working with

employment equity should implement the policy in its own ranks deserved consideration. It was likely that a directorate responsible for implementing employment equity which was itself unrepresentative would find it difficult to do so. It might even be argued that the appointment of people who would render the directorate more representative was an inherent operational requirement.

Finally the arbitrator rejected the union’s argument that the directorate was not entitled to use measures of the EEA before it had completed its own employment equity plan. This argument, based mainly on the Labour Court decision in *Eskom v Hiemstra NO*,¹¹⁰ involved the allegation that the grievant had been discriminated against, which fell outside the council’s jurisdiction. In any event, the arbitrator was satisfied that, as required in the *Eskom* decision, the department had acted in terms of its own policies and that its decision to appoint Mrs M was not haphazard or *ad hoc*. After reference to certain other arguments, the arbitrator found that the union had failed to prove that the grievant was the victim of an unfair labour practice.

In *Germishuys v Upington Municipality*,¹¹¹ the applicant, a white male, applied for the vacant position of Assistant Town Treasurer in the respondent municipality. He was unsuccessful. A black male was appointed to the post. The applicant alleged that he was the victim of race discrimination, and claimed compensation equivalent to the amount he would have received had he been appointed to the position.

The court noted that the respondent was bound by an agreement concluded in the National Labour Relations Forum for Local Government. That agreement had among its objectives the transformation of local government authorities, the promotion of equal opportunities, and the advancement of affirmative action programmes. The position in question had been advertised, and had attracted a number of applicants, none of whom were considered suitable. The position was then re-advertised. Four candidates, including the applicant, were short-listed. Two were whites, and two blacks. The applicant claimed that when he met the black applicants, he concluded that neither had the requisite experience. The candidates wrote a test, and were interviewed individually by a selection committee made up of councillors, senior

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¹¹⁰ *(1999) 20 ILJ 2362 (LC).*
¹¹¹ *(2001) 3 BLLR 345 (CC).*
officials and trade union representatives. When the applicant was informed that he had been unsuccessful, he took legal advice and sought the reasons for his non-appointment.

The court held that the applicant bore the onus of proving that the respondent had unfairly discriminated against him on the basis of race. In attempting to discharge this onus, the applicant had relied on the claim that he was the “best” candidate and on his own subjective interpretation of what constituted “relevant experience” for the position. The applicant’s suggestion that the black members of the selection committee were “backward” demonstrated not only the applicant’s arrogance and racial prejudice, but also implied that the individuals concerned were unable to reach a reasoned conclusion on the merits when deliberating as members of the selection panel. The applicant’s inability to accept that he was not the most suitable candidate for the job lay at the root of the dispute.

He had attempted to advance a case of alleged racial discrimination on the basis of speculation, unjustified inferences and a refusal to accept that he was not suitable. An employer who selects one of several applicants necessarily “discriminates” against the unsuccessful candidates. However, such “discrimination” should more properly be termed “differentiation”. Even if the applicant had been discriminated against, he had not proved that he was discriminated against on arbitrary grounds.

In *Walters v Transitional Local Council of Port Elizabeth* the applicant, a white woman who was employed by the first respondent, was one of several applicants for a position of principal personnel officer. After an interview, the selection panel decided to appoint the second respondent, a black man. The applicant claimed that the first respondent’s failure to appoint her constituted an “unjustified act of favouritism” towards the second respondent, or that the first respondent had discriminated against her on the basis of her race and/or political opinion. The applicant contended further that the first respondent was not entitled to rely on the defence of affirmative action, as it had no affirmative action policy in place at the time of the second respondent’s appointment.

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112 (2001) 1 BLLR 981 (C).
The court noted that the applicant relied on two causes of action:

(i) an alleged infringement of her constitutional rights to equality; and

(ii) an alleged unfair labour practice as contemplated under the LRA.

The first cause of action relied directly on the Constitution; the second was statutory, but enshrined in legislation that seeks to give expression to the fundamental rights ensconced in the Constitution. The Act seeks to give effect not only to labour rights enshrined in the Constitution, but also to various other civil rights.

The court noted further that, insofar as the applicant sought to enforce civil rights, the court had concurrent jurisdiction with the High Court over alleged violations of any fundamental right arising from employment and labour relations, from any dispute over the constitutionality of any law administered by the Minister of Labour.

The applicant had alleged an infringement of her right to equality. She contended further that the action was against a local authority, which forms part of the State. The court accordingly had jurisdiction to entertain the first cause of action. The next question was whether the legislature intended that a person can institute a civil rights claim by directly relying on the Constitution, even though the Act provides similar and adequate relief. There was no reason why a public sector employee who is entitled to bring a cause of action under a statute such as the Act, should thereby be confined to that legislation. It may well be that the legislation is too restrictive, or that the remedies provided are inadequate. However, the court held that in the applicant’s case the Act gave her sufficient scope to pursue her cause of action, and afforded her sufficient relief.

Turning to the applicant’s unfair labour practice claim, the court noted that she had claimed *inter alia* that she was discriminated against on the basis of “favouritism”, political opinion and race. The court assumed that the allegation of “favouritism” was linked to the allegation of discrimination on the basis of political opinion. Apart from a reference in the discussions prior to the appointment of the second respondent to his
affiliations to a certain organisation, and to an alleged statement by one of the committee members that the second respondent’s appointment was “political”, there was no evidence to prove that the applicant was discriminated against on the basis of her political opinion.

However with regard to the applicant’s allegation that she was discriminated against on the basis of her race, the court noted that, in one breath, the applicant denied that the respondent could rely on affirmative action to appoint the second respondent, and in the next breath, claimed that the respondent had acted unfairly by not applying affirmative action principles to her. Furthermore, the applicant had relied on affirmative action for the contention that she should have been appointed on the basis of gender. However, from the respondent’s evidence it was apparent that the applicant had fared best in responding to questions from the selection panel, and that the second respondent had displayed a lack of understanding of the basic concepts of job evaluation, which was a central function of the post in question. On the first respondent’s own evidence it was apparent that the predominant reason for not appointing the applicant was her race. The respondent could not justify such a decision in terms of its own affirmative action policy. The first respondent’s failure to appoint the applicant to the position therefore amounted to an unfair labour practice and therefore unfair discrimination.

Turning to relief, the court noted that the respondent had appointed the second respondent on a permanent basis even though it was aware that litigation was pending. This action was irrelevant to the relief claimed by the applicant, which was an order appointing her to the position. However, her “delictual” claim for infringement of her constitutional right to equality was rejected.

In *Harmse v City of Cape Town*\(^{113}\) where the applicant alleged he was discriminated against by the respondent’s decision not to shortlist him for any of the three posts to which he applied, the grounds upon which he based his claim were race, political belief, lack of relevant experience and/or other arbitrary grounds. The applicant

\(^{113}\) (2003) 24 ILJ 1130 (LC).
further alleged that the respondent did not adhere to its affirmative action policies. The court held that there was discrimination.

In a more recent decision, in Coetzer v Minister of Safety and Security, the applicants were white inspectors in the explosives unit (the bomb squad) of the SA Police Service.

They were highly trained in this specialised unit. In terms of the general SAPS Employment Equity Plan (EEP) they belonged to the non-designated group, for whom there were limited promotional posts in the explosives unit. Once all the non-designated posts were filled, the applicants applied for posts reserved for the designated group. Notwithstanding the fact that no applications for these promotional posts were received from members of the designated group, the applicants were refused promotion. The applicants called upon the Labour Court to determine whether the SAPS had unfairly discriminated against them on a racial basis by not promoting them to posts retained for the designated group. The SAPS contended that its discrimination was not unfair as it was in accordance with its affirmative action plan contained in the EEP. The forensic laboratory unit under which the bomb squad fell did not have its own EEP as was required in terms of general SAPS EEP. The court held that the SAPS justification failed in two respects. First there was no specific action plan for the explosives unit. Secondly, the national Commissioner’s failure to promote representivity. His decision overlooked a consideration of the constitutional imperative that the service maintains its efficiency. The SAPS was found to have unfairly discriminated against the applicants and was ordered to promote the applicants to the ranks of captains.

4.1.2 DISMISSALS TO MAKE ROOM FOR AFFIRMATIVE ACTION APPOINTMENTS

It is not unusual, especially within the more senior ranks, for an employer and an employee to agree that an employee will take early retirement to make way for an affirmative action appointment. After this the employee will act as a mentor to the newly appointed employee for a period of time and he or she may be compensated

114 Supra.
for the early termination of his/her employment. In most cases the employee is selected for dismissal because he is white and/or male.

At first glance, this dismissal is prohibited by section 6(I) of the EEA. However it can also be argued that such a dismissal constitutes an affirmative action measure as defined in section 6(I) of the EEA. It can further be argued that such a dismissal constitutes an affirmative action measure as defined in section 6(2) as the formulation is wide enough in that it includes measures to ensure the equitable representation of suitably qualified persons in all job categories and levels. Section 15(4) states that nothing in section 15 itself requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from the designated groups.

This entails that an employer is not compelled when designing and implementing affirmative action measures never to appoint, continue to employ or to promote people from outside the designated groups.

There is therefore, generally speaking, no need to dismiss an employee and a good argument can be made that such a dismissal contravenes section 6 and the employee’s constitutional right to fair labour practices falling outside the ambit of an affirmative action measure.

The Employment Equity Act did not repeal section 187(11)(f) of the LRA which provides that it is automatically unfair to dismiss an employee if the reason for the dismissal is unfair discrimination against the employee on any arbitrary ground including but not limited to race, sex, gender, etc. In *Van Zyl v Department of Labour*\(^\text{115}\) the Commissioner argued that a dismissal in these circumstances could not be based on the operational requirements of the employer in that there was no need to reduce personnel. This decision has been criticized as giving too narrow a conception of operational requirements.

\(^{115}\) (1998) 4 BALR 438 (CCMA).
In McInnes v Technikon Natal\textsuperscript{116} the applicant was employed by the respondent on a “locum” basis as a lecturer in 1996. Her one-year contract was then renewed three times before the post was advertised on a permanent basis. The applicant applied for the position and was short-listed with two other candidates.

The selection committee recommended that the applicant should be appointed.

However, the respondent’s Vice-Chancellor, reaffirming its preference for the applicant, recommended a black male candidate, who was appointed at a salary much higher than that which had been advertised and, indeed, higher than that of the head of department.

The applicant’s contract was not renewed. A proposal by the applicant’s head of department that an additional post be created for the applicant was not acted upon. The applicant claimed that she had been unfairly dismissed, alternatively, unfairly discriminated against on the basis of race and/or sex. At the time of the application, the affirmative action candidate had already left the services of the respondent. The respondent challenged the court’s jurisdiction, and denied that the applicant had been dismissed.

With regard to the jurisdictional issue, the court held that if an applicant alleges that a dismissal is automatically unfair then the court assumes jurisdiction, provided only that the allegation was made seriously and in good faith. The court did not assume jurisdiction only when the allegation was proved. In any event, it was common cause that the applicant had not been appointed to the position because of her race.

Turning to the question of whether the applicant had indeed been dismissed, the court noted that the answer entailed a two-stage inquiry: first, to determine whether the applicant had an expectation that she would be appointed; second, to determine whether the expectation of appointment upon which the applicant relied was reasonable in the circumstances. In the first inquiry, the applicant was required to

\textsuperscript{116} (2000) 6 BLLR 101 (LC).
prove that she subjectively believed that her contract would be renewed on the same or similar terms.

The applicant had pleaded in this regard that she had expected her contract to be renewed on a permanent basis, alternatively, that it would be renewed for a further period of one year. The court noted that it was not possible to hold two subjective expectations at the same time. However, although the applicant was somewhat vague about the details of what she expected, the crux of her evidence was that she had expected to continue doing the same work after the date on which her employment was terminated, albeit on a permanent basis.

The court rejected the respondent’s contention that an expectation of the renewal of a fixed-term contract of employment on a permanent basis did not amount to a reasonable expectation of renewal for purposes of the Act, and held that an earlier decision by the court which held this to be the case was plainly wrong.\textsuperscript{117} The main focus is on the nature of the expectation and on whether in the circumstances the expectation was reasonable.

It is quite conceivable that an employee on a fixed-term contract can expect to be appointed permanently. The court held that, in the circumstances, the applicant’s expectation of renewal was indeed reasonable, notwithstanding the fact that she had applied for the position knowing that another candidate might be appointed. The applicant had accordingly been dismissed unfairly because affirmative action cannot constitute a fair basis for dismissing, as opposed to appointing, an employee.

As to the applicant’s alternative claim of unfair discrimination, the court noted that the successful candidate did not meet the requirements set out in the advertisement because he lacked extensive lecturing experience. The selection committee had decided that the applicant was the best candidate. However, the Vice-Chancellor had taken the view that in terms of the respondent’s affirmative action policy, if a black candidate was short-listed, he or she should be preferred to white candidates.

\textsuperscript{117} Dierks v University of South Africa (1999) 4 BLLR 304 (LC).
The committee had then rubber-stamped the Vice-Chancellor’s decision, in spite of the fact that it chose to reaffirm its belief that the applicant was the best candidate. Although the favoured candidate had been told that the advertised salary was not negotiable, the respondent had negotiated a salary with him that was far above that advertised.

It was clear that these actions were not countenanced by the respondent’s affirmative action policy, which did not require a selection committee to regard race as the sole criterion when a choice had to be made between two persons who were appointable. Still less did the policy sanction blatant race discrimination in favour of African against other race groups.

The respondent’s policy envisaged rather that during selection a balanced view would be taken of all relevant criteria, including the respective merits of the candidates. Neither the policy nor the law sanctioned offering members of a particular group higher salaries than those advertised. The appointment of the successful candidates was therefore not in accordance with the respondent’s affirmative action policy. This meant that the respondent had failed to justify discriminating against the applicant. The court noted that had it not found in favour of the applicant in respect of her main cause of action, it would have found for her in respect of the alternative cause of action. The applicant was reinstated without loss of benefits.

4.1.3 FAILURE TO PROMOTE A PERSON FROM A DESIGNATED GROUP

A person falling within a designated group who applies for but is refused employment may be able to argue that this refusal by the employer constitutes unfair discrimination. In this situation discrimination against such an employee is no different from discrimination on any other prohibited ground such as sexual orientation, pregnancy or marital status. But does the fact that the applicant falls within one of the designated groups give that applicant a right or preferential claim to such a job?
If the employer can establish that the white male appointed to the job was a better candidate than the black, female or disabled applicants who also applied for the job there will be no unfair discrimination on these grounds. It will not assist the applicants from the designated groups to argue that they can do the job and should be appointed because the employer’s workforce does not reflect an equitable representation of employees from the designated groups. The incentive for such an applicant lies in the fact that the employer will have to comply with the long and medium term commitments imposed by its employment equity plan drawn up in terms of Chapter 3.

_Eskom v Hiemstra NO_¹¹⁸ was an application for review of an award by an IMSSA arbitrator, Advocate J Hiemstra. The arbitrator heard that Eskom had invited applications from its employees for the post of vending controller. The advertisement indicated that Eskom was an affirmative action employer. Thirteen employees applied, including Ms Van Coller who scored 80 points and her closest rival, a Ms Samuels, who scored 64. Ms Van Coller was recommended for the position.

During the selection process, Ms Samuel’s union lodged a grievance against the composition of the list of candidates selected for interviews on the basis that whites were included. This grievance was investigated by a (black) manager who found that the selection process had been fairly conducted and had not prejudiced anybody. The union went over that manager’s head to a more senior (white) manager who, as head of the department concerned, decided to appoint Ms Samuels. The head of department told the arbitrator that Ms Samuel’s union had complained that his department had not made satisfactory progress with affirmative action. Since all the positions in the relevant grade were, in fact, held by whites, the department head was forced to agree. The manager said that he had decided to appoint Ms Samuels solely because the company had adopted an affirmative action “stance” (as opposed to a formal policy). Eskom had committed itself, in writing, only to introducing “a strategy, policy and practices aiming to alter the racial and gender profile of Eskom to be representative of the nation as a whole”. In terms of this “stance”, Eskom would ultimately reach a stage at which race, gender and creed would no longer affect

¹¹⁸ _Supra._
employment opportunities, and the sole criteria for appointment or promotion would be performance and ability. To this end, Eskom had adopted a “framework for action” in terms of which the company’s organisational groups were enjoined to “develop and implement their own programmes in line with Eskom’s objectives and desired state”. The document noted that each group had a unique working environment “that can not be impacted [sic] by a blanket programme”. At the time of the appointment of Ms Samuels, this was as far as Eskom had taken its affirmative action programme. However, the manager responsible for the appointment to the position of vending controller saw it as his duty to appoint a black person if there was a sufficiently qualified black candidate.

The arbitrator was required to decide whether the failure to appoint Ms Van Coller amounted to an unfair labour practice within the meaning of the term in paragraph (a) or (b) of item (2)(1) of Schedule 7 to the Labour Relations Act. Eskom relied on item 2(2)(b) of the Schedule. This was all Eskom could rely on, as it had already conceded that Ms Van Coller had been denied the recommended appointment, for which she was objectively the best candidate, solely because she was white and Ms Samuel was “coloured”. Item 2(2)(b) provides that, in spite of the general prohibition against unfair discrimination contained in item 2(1)(a), an employer may adopt and implement employment policies and practices that are “designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms”.

The arbitrator turned for guidance to the first case in which a blow was struck for the rights of white workers, Public Servants’ Association of South Africa v Minister of Justice.119 From the case, and from the provisions of the EEA, Mr Hiemstra drew the following principles which, in his view, governed cases in which employers raise the defence of affirmative action against an allegation of race discrimination: that it is not enough for an employer to rely upon a “broad intention” (“breë bedoeling”) to advance or protect persons or groups or categories of persons; the employer must rely on standards that have been developed for that purpose; those standards must

119 (1997) 18 ILJ 241 (T). Also see 13(4) Employment Law.
not exceed the adequate protection and advancement of the designated groups or categories of persons; when affirmative action is applied, the rights of other members of the community must not be “undermined”; and efficiency must not be compromised.

After applying these principles to the facts at hand, Mr Hiemstra reached the following conclusion:

“Although it is clearly set out in the proposal, Eskom has not developed standards and procedures, and affirmative action is applied haphazardly without specific guidelines. In the absence of such standards, item 2(2)(b) is not available as a defence. The manner in which Mr Du Plessis applies affirmative action, namely only to require that black candidates possess the minimum qualification, may undermine efficiency and promote mediocrity. There is no doubt that Miss Van Coller was treated unfairly. The only question is whether the unfairness was justifiable under the circumstance. Eskom’s actions plainly amount to race discrimination and it can only be justified in terms of item 2(2)(b). The internal requirement of the sub-item and the applicable constitutional prescriptions must be complied with. Eskom has not complied with them”. (author’s translation)

Eskom requested the Labour Court to set aside this finding on the ground that the arbitrator had misdirected himself. What he should have done, argued Eskom, was first consider whether the appointment of “Ms Samuels per se was unfair” and only in the event of a finding that it was unfair, then consider the defence that the act of discrimination was to promote affirmative action as contemplated by item 2(2)(b). Eskom relied on this ground alone. What Eskom appears to have meant is that, when an appointment is attacked by a disappointed candidate, the first consideration is whether the employer acted unfairly towards the unsuccessful applicant by appointing the successful candidate. To answer this question, the appointment of the successful candidate must be examined to see whether it was justifiable in itself. Only if the successful candidate’s appointment is not justifiable can the conclusion be reached that the disappointed candidate was treated unfairly. If, then, the employer raises affirmative action as a defence, the next consideration is whether that unfairness was justifiable in terms of 2(2)(b). In other words, whether the discrimination was “fair” must be established in terms of the objective of affirmative action that it was meant to serve. Eskom’s complaint was that the arbitrator had never asked himself the crucial question: did the appointment of Ms Samuels involve
race discrimination? Only once that question had been answered, so Eskom argued, was the arbitrator entitled to consider whether the appointment was unfair.

The court (per Landman J) refused to allow itself to be persuaded by this reasoning. The judge observed:

“This issue can be answered in two ways with the same result … The arbitrator may well have asked the crucial question: was the discrimination, for it is common cause that there was discrimination in the sense of differentiation, between a black employee and a white employee *prima facie* unfair? If the arbitrator was of the opinion that it was, he would pass on to the next step and ask whether it was justified in terms of item 2(2)(b) …

If the ubiquitous bystander had asked the arbitrator as he was writing his award: ‘Was the discrimination on the grounds of race unfair?’ The arbitrator may well have responded: ‘Of course it is’ and have explained that the real issue in the matter was whether the discrimination was justified. I am unable to hold that the arbitrator did not ask himself the question. In my opinion he identified the issue and cut to the chase.”

The “chase”, of course, was whether Ms Van Coller was treated unfairly. By Eskom’s own admission, had other things been equal, she deserved the job. However, according to Eskom, other things were not equal and had to be rendered equal by giving preference to its black employees. The arbitrator had to decide whether the fact that the person appointed was from a “disadvantaged” group neutralised the fact that Ms Van Coller was overlooked simply because she was white. In the arbitrator’s view, the mere fact that Ms Samuels was black was not, in itself, enough to render Eskom’s treatment of Ms Van Coller fair. Eskom had to show, in addition, that the appointment of Ms Samuels formed part of a rational plan that was aimed at achieving the objectives that the legislature had prescribed as minimum requirements for rendering defensible a decision to favour a person solely on the basis of race. These requirements are contained in item 2(2)(b). According to that provision, an applicant for employment or promotion can be favoured on the basis of race only if his or her appointment is designed to achieve the adequate protection or advancement of persons or groups of persons previously disadvantaged by unfair discrimination, for the purpose of enabling the favoured person to enjoy his or her full and equal rights and freedoms. Landman J interpreted the award in the same way:

“A reading of the award shows that the arbitrator paid considerable attention to Eskom’s affirmative action stance which was tendered at the arbitration proceedings.
The arbitrator examined this document and concluded that it was not an affirmative action policy as contemplated by item 2(2)(b). According to the arbitrator it expressly required further detailed and specific amplification and individualised plans for each operating division. This had not been done. It was left to the managers to decide what they believed was good policy. He found that this was not what item 2(2)(b) contemplated.”

In *Abbott v Bargaining Council for the Motor Industry (Western Cape)*, Mr Abott, who described himself as a “coloured man”, claimed that he was overlooked for employment as a designated agent of the respondent in favour of a “white” man and that this amounted to unfair discrimination. He said that, apart from his race, he was also overlooked because he was a union member. Mr Abott was 42 years old and came from a poor family. He had left school when he was in standard 8 to support his family, was currently a panel-beater and had obtained a university qualification in labour relations. Thus, said Mr Abbott, he possessed all the qualities of a disadvantaged person.

The court accepted as much. But that to succeed with a claim under item 2(1)(a) a person needs to be able to prove more than that he is disadvantaged becomes clear from the way the court approached the matter. Judge Landman began by observing that, although a literal reading of item 2(1)(a) appeared to suggest that a person might succeed in such a claim even if he could not show that the discrimination had had no effect on him, this could not be the case. By this, the court presumably meant that an applicant could be granted relief under the residual unfair labour practice if there was some adverse consequence to relieve. Noting that the Act permits discrimination when it is necessary because of the “inherent requirements of the job” and in order to implement affirmative action, the judge raised the question of whether, as he put it, “affirmative action is then merely a shield for an enlightened employer or … a sword for a disadvantaged person”. More technically, the question can be put thus: does affirmative action yield rights for the employer against claims of unfair discrimination?

The judge and Mr Abbott’s counsel agreed that affirmative action is only a defence. However, the latter contended that the affirmative action principles ought to be taken

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120 (1999) 2 BLLR 115 (LC).
into account when assessing whether an employer had acted fairly. With this, the judge did not agree. “Juridically”, he said, “this policy (ie, affirmative action) does not give a right to an applicant for employment, at least one who has no existing relationship with the employer. The policy stands on the same footing as the terms of the advertisement inviting applications for the job. The policy is, I think, a term of the invitation to treat and good labour relations binds the employer to follow it”.

On this view, then, affirmative action binds an employer only to the extent that it has been formally implemented as a policy. A claim in an advertisement that the employer is an “affirmative action employer”, or some similar expression, confers no grounds on which outside applicants can rely if the employer subsequently makes an appointment that is arguably inconsistent with that policy. Such a claim does not alter the status of the advertisement. It remains simply an invitation to enter into a contract. Before that happens, an employer cannot be held to its puffery by those who might have been seduced by it.

What the court is really saying is that an applicant for employment who happens to have come from a disadvantaged group cannot simply say: “I am black/female/disabled; ergo, I have been discriminated against.” Nor can such a disappointed applicant claim that, simply because the employer had professed to adhere to affirmative action, it had acted unfairly (in the sense contemplated by the residual unfair labour practice definition) merely because in a particular case the employer did not apply affirmative action.

The Labour Court adopted a similar approach in *TGWU v Bayete Security Holdings*. This involved an application in terms of item 2(1)(a) of Schedule 7 to the Act. The individual applicant in that matter alleged that he was being unfairly discriminated against because he was paid less than a colleague who had been introduced as an experienced person who would teach the other workers (including the applicant) “to perform”. The applicant claimed that the new appointee had no experience in the industry. The court held that the applicant was obliged to prove in the first instance that the discrimination was not unfair. The court found, however,
that payment of different wages to employees did not in itself amount to
discrimination, unless it was based on some arbitrary ground. The applicant
admitted that he had no idea what work the more highly paid employee performed,
what his educational qualifications were, for whom he had previously worked and for
how long. That the higher paid employee was white and the applicant was black was
not enough to assume that the differentiation was based on race alone.

It is interesting to note that, in this respect, the Labour Court’s approach is much the
same as that adopted by the High Court under the common law. *Swanepoel v
Western Region District Council* 122 provides an example of the latter court’s attitude
to applicants for employment who seek to justify claims that they have been
discriminated against solely on the inference that arises from the facts that the other
party is arguably less qualified and of a formerly favoured race group. The one
additional factor that Miss Swanepoel threw onto the scale was that the
advertisement for the position in question had stated that possession of a particular
academic qualification (which she had and the person appointed did not) was a
prerequisite for appointment.

The court was unimpressed by the fact that the person who had been appointed had
professional experience (he had been an artillery officer) that, on the face of it,
seemed of questionable relevance to his new position (an environmental education
officer). The court found that there was not a shred of evidence on the papers to
substantiate Miss Swanepoel’s claims that the person appointed had been preferred
because of his past political connections or to promote affirmative action. And even if
he had been, the judge concluded, there was no basis for complaint if one was not
selected for a position unless the employer had acted *mala fide*.

In *Stulweni v SA Police Service (Western Cape Province)* 123 the applicant, a Muslim,
applied for one of three advertised posts of chaplain to the SAPS. He was
unsuccessful and all three chaplain appointed were of the Christian faith. In
proceedings before the CCMA he claimed that he had been discriminated against on
the ground of his religion, contrary to section 6 of the Employment Equity Act. The

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respondent denied that the decision not to appoint the applicant had been based on his religion and pointed out that other successful candidates achieved higher scores in their interviews. The Commissioner found that the applicant had misinterpreted the provisions of the Employment Equity Act. His claim was not given special consideration because of his religion. The applicant was not looking for non-discrimination against him but for positive discrimination or preferential treatment on the grounds of being a Muslim. Section 15 of the Employment Equity Act provides that affirmative action may be taken in respect of three designated groups which are defined as black people, women and people with disabilities. The respondent had therefore no grounds to apply positive discrimination or affirmative action to the applicant on the basis of his religion.

The Commissioner did not accept the applicant’s claim that he had been given the impression that he would be appointed to the post, finding his claim to be inconsistent with his assertion that the questions asked of him made it clear that he would not be appointed because of his religious convictions. It was found that the respondent had acted objectively and properly in assessing the candidates on the basis of their answers to the questions and in awarding a score to cash. There had been no unfair discrimination.

4.2 INHERENT REQUIREMENTS OF THE JOB

Section 6(2)(b) provides that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of inherent requirement of the job.

This is consistent with the general rule that incapacity on the part of an employee, which may take the form of inability to meet the required performance standards can constitute a fair reason for dismissal. By the same token, the refusal to appoint or promote a person who does not measure up to the inherent requirements of the job in question is justifiable. If such a combination of factors can be shown, it is a complete defence to a claim of unfair discrimination.

However the harm which is caused to those who are disqualified must be proportionate or fair. This means that the nature and degree of discrimination must
be weighed up against intended purpose. The EEA does not indicate which test should be used to determine whether inherent requirements exist. In *Griggs v Duke Power Company*\(^{124}\) the standard of business necessity was used. This decision was followed by the decision of *Wards Core Packing Company v Anton*\(^{125}\) where it was held that as long as the discriminatory criteria served a legitimate employment goal of the employer, they would survive challenge even though the adverse impact was considerable and the business interest could probably have been achieved in other, less harmful ways.

In a South African decision, *Whitehead v Woolworths (Pty) Ltd*\(^{126}\) the inherent requirement was defined as an indispensable attribute which must relate in an inescapable way to the performing of the job. The implication is that any applicant who fails to meet the requirement of the post, should not be appointed. However in this matter the employer’s contention that the applicant should be able to perform for a minimum of twelve months was rejected because the applicant was offered a five-month contract. In *NUTESA v Technikon Northern Transvaal*\(^{127}\) it was found that the requirement of three years experience at the technikon was not essential to the post of Dean and that the advertisement containing this requirement was therefore unfair in that it may have discouraged eligible candidates from applying.

If one were to have regard only to section 6 of the Act, then one might be drawn to the conclusion that affirmative action is no more than a defence to claims of unfair discrimination. The Act obliges the employer to ensure equitable representation of suitably qualified persons to further diversity in the workplace.

Section 20(3) of the Act provides that:

“(3) For the purposes of this Act a person may be suitably qualified for a job as a result of any one or any combination of that person’s:

(a) formal qualifications,

(b) prior learning.

\(^{124}\) 401 US 424 1978.

\(^{125}\) 490 SC 642 1989.


\(^{127}\) (1997) 4 BLLR 467 (CCMA).
(c) relevant experience, and/or

(d) capacity to acquire within a reasonable time, the ability to do the job.

4. When determining whether a person is suitably qualified for the job the employer must:

(a) review all factors listed in subsection (3) and

(b) determine whether that person has the ability to do the job in terms of any one or any combination of those factors.

5. In making a determination under subsection (4) a employer may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience.”

Subsection 20(3)(d) is wide and permits employers to appoint employees from designated groups who do not have the necessary ability to do the job at the time of appointment but who can acquire the ability within a reasonable time. It is unlikely that the aggrieved applicant will be able to successfully challenge an employer’s judgement as to whether an employee will be able to acquire the necessary ability to do the job within a reasonable time. Section 20(5) singles out relevant experience for special attention. It appears from the wording of section 20 that an employer may fairly discriminate on the grounds of the person’s lack of relevant experience. The factual circumstances in which a person’s lack of relevant experience may on its own form the basis of rendering him/her unqualified or not suitably qualified are however limited as section 20(5) provides that the employer may fairly discriminate on the combined grounds of lack of relevant experience and

(a) formal qualification,
(b) prior learning, or
(c) formal qualifications and prior learning.

In Fesel v Masonic Home of Delaware Inc128 it was held that male nurses could justifiably be excluded from a maternity hospital despite the presence of male gynaecologists. Reliance on privacy or physical intimacy, however, may be a mask for unfair discrimination or the perpetuation of stereotyping and therefore

128 447 F Supp 1346 (D Del) 1978.
“[d]iscrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively”.

In *Diaz v Pan American World Airways Inc*¹²⁹ where an airline employed only female flight attendants, an attempt was made to justify this on the grounds that men lacked the compassion necessary to calm nervous or timid passengers. Compassion was held not to be a peculiarly female quality.

In *Lagadien v University of Cape Town*¹³⁰ the applicant, a black disabled woman, was employed on contract by the respondent as acting coordinator of the respondent’s Disability Unit. It had been agreed that her responsibilities would be renegotiated if a new head of the unit were appointed prior to the termination of her contract. When the position was advertised, the applicant applied. Four candidates were interviewed. A black disabled female Zimbabwean citizen was appointed. However, the successful candidate was unable to accept the position as her application for a permit, to which the applicant had objected, was turned down by the Department of Home Affairs.

The position was re-advertised. The applicant applied again, but was not interviewed by the selection committee. This time, the successful candidate was a white male who had been acting in the position after the resignation of the earlier incumbent. The applicant initially contended that she was unfairly discriminated against on the basis of race and gender, but finally contended that the discrimination was based on qualifications.

The applicant contended further that the discrimination was directed, not only at her in an individual capacity, but at her as a member of a class or group who, for reasons beyond their control, were disadvantaged by not having obtained tertiary qualifications. The respondent denied that the sole reason why the successful candidates had been preferred was the fact that they possessed tertiary qualifications.

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¹²⁹ 442F2d (9th Circular) 1981.
¹³⁰ Supra.
The court held that an allegation of discrimination raises a presumption of unfairness which the respondent is obliged to rebut. The advertisements for the posts had not indicated that possession of tertiary qualifications was an inherent requirement of the position. On the contrary, the immutable requirements were “proven skills, experience and knowledge” in specified areas. The applicant was judged weaker than the successful candidates in one critical area - namely assisting disabled students to cope with their lecture material. There was no doubt that possession of academic qualifications would enhance the incumbent’s ability to perform this function. There was accordingly no basis for concluding that the respondent had been arbitrary or capricious in attaching some weight to that factor when evaluating the applicants. The application was dismissed with costs.

In *Harmse v City of Cape Town*\(^\text{131}\) the applicant’s claim was simply that, having regard to section 20(3)-(5) of the Act, he was suitably qualified for the posts for which he applied. The respondent failed to comply with its obligations to review all factors when determining whether or not he was suitably qualified.\(^\text{132}\)

He claimed that the respondent, in contravention of section 20(5), unfairly discriminated against him on the ground of his lack of relevant experience.\(^\text{133}\) In terms of section 20(5) of the Act an employer may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience. The applicant’s claim was that he was unfairly discriminated against on the grounds of lack of relevant experience. In this regard the applicant\(^\text{134}\) specifically pleaded that the respondent informed him that the reasons he was not short-listed were:

1. the (sole) eligibility criterion was “past accomplishments in similar circumstances”, with more recent and more long-standing accomplishments carrying greater weight;

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\(^{131}\) *Supra.*

\(^{132}\) Para 30.1 of the statement of claim.

\(^{133}\) Para 30.2 of the statement of claim.

\(^{134}\) At para17.2-17.4.
2. the panel was of the opinion that the applicant’s exposure at strategic management level with policy and strategy as a portfolio, was lacking; and

3. the applicant’s broad based management of diverse functions was somewhat limited, both in terms of time and scope of complexity.

The point should be made that the stated purpose of an affirmative action measure is no longer to protect and advance the interests of previously disadvantaged groups within the workforce. An enquiry into whether the person who was appointed in terms of such a measure was actually disadvantaged appears to be unnecessary. The view expressed in the Liberty Life decision will therefore probably not be followed under the Employment Equity Act.

It does not appear necessary that the decision to employ somebody as an affirmative action measure needs to be taken in accordance with a formal policy adopted by an employer. All that is required is that it complies with the requirements set out above.

However, where such a decision is taken in accordance with such a policy the decision will be more easily justified. Where such a policy does exist and a decision to appoint somebody is taken contrary to its provisions this could be an indication that it was not a genuine affirmative action measure.

Individuals who allege that they have been discriminated against by virtue of an affirmative action appointment may derive rights to seek redress from a collective agreement. In this case, however, the remedy is not based on an allegation of discrimination but on the breach of a collective agreement. This dispute could be referred to arbitration.

With regard to inherent requirements of the job, as long as a suitably qualified candidate who can learn the job within a reasonable time is appointed, the employer cannot be challenged for unfair discrimination.

It is submitted that, where there are individual interests, there will always be clashes concerning these issues and the courts or the CCMA will have to come to the rescue.
4.3 GENERAL FAIRNESS DEFENCE

It has been suggested that a wider, residual defence based on fairness principles remains available to an employer when faced with an unfair discrimination claim.

There is support for this view in the Labour Appeal Court case of Woolworths. In that case the majority judgment condoned unfair discrimination on the basis of the operational reasons of the employer. The case has been criticised and it is submitted that this further defence is untenable and should be jettisoned from our law.
CHAPTER 5
CONCLUSION

In the previous chapters the procedure to be used by the aggrieved applicant when he/she lodges a claim of unfair discrimination was not explained. This chapter will concern itself with the procedure to be followed, the institutions to be approached and comments by various authors on the subject.

5.1 DISPUTES OVER UNFAIR DISCRIMINATION

Any party to a dispute about alleged unfair discrimination in an employment policy or practice, other than a dismissal, may in terms of section 10(2)\textsuperscript{135} register the dispute in writing within six months after the act or omission that allegedly constitutes unfair discrimination. Subsection (3) provides that the CCMA may permit a party who shows good cause to refer a dispute after the relevant time limit set out in subsection (2). It must be noted that a dispute of this nature cannot be referred to a bargaining council. In the reference to the CCMA the referring party must indicate that it has made a “reasonable attempt” to resolve the dispute.\textsuperscript{136} “Reasonable attempt” would depend on the circumstances and may include getting help from a fellow employee or a union or utilising internal grievance procedures, up to a point where it is clear that the employer does not intend to provide relief. Proof of service of the copy of the referral to the other party must also be shown to the CCMA.\textsuperscript{137}

Section 10(5) provides that the CCMA must attempt to resolve the dispute through conciliation. If the conciliation fails the dispute may be referred to the Labour Court unless the parties consent to the jurisdiction of the CCMA for arbitration. The Labour Court can make any appropriate order that is just and equitable under the circumstances including compensation, damages and orders directing the employer to take protective steps.

\textsuperscript{135} Act 55 of 1998.
\textsuperscript{136} S 10(4)(b) of Act 55 of 1998.
\textsuperscript{137} S 10(4)(a).
The court may also direct an employer who is not a designated employer to comply with Chapter III of the EEA. The employer’s name may be removed from the register of employers eligible for State contracts in terms of section 4150(2)(7). If the parties consent to arbitration by the CCMA, a commissioner may make any appropriate arbitration award that gives effect to a provision of the Act.¹³⁸

In *Whitehead v Woolworths Pty Ltd*¹³⁹ the court considered in some detail the amount of compensation payable by an employer who had committed an act of unfair discrimination. The applicant had claimed a year’s income in the sum of R300 000. The court held that the compensation should not be limited to patrimonial loss.

Taking into account income earned subsequently by the applicant as well as the unsatisfactory nature of the respondent’s evidence, the court considered two-thirds of a year’s earnings to be a fair and reasonable amount of compensation.

### 5.2 THE BURDEN OF PROOF

Section 11 of the EEA reverses the burden of proof. The effect is that once the fact of discrimination has been established, the onus shifts to the employer to establish on a balance of probabilities that such discrimination was fair. It has been stressed by the courts that mere allegation by the employee in respect of discrimination would not be sufficient. In *Transport & General Worker’s Union v Bayete Security Holdings*¹⁴⁰ it was held that an employee will have to show all the elements of discrimination and that he/she falls within the scope of “employee” as defined.

Section 10(7) provides that the relevant provisions of parts C and D of Chapter VII of the Labour Relations Act, with changes required by context, apply in respect of disputes in terms of this chapter.

5.3 FINAL COMMENTS

Rautenbach\textsuperscript{141} is of the opinion that the Employment Equity Act does not prohibit discrimination but prohibits treating people differently in a manner which is unfair. It therefore follows that it is possible to discriminate fairly, \textit{ie} affirmative action and inherent requirements of the job. On \textit{affirmative action} he feels that a perception exists that the Act calls for quotas to be set and filled and each employer has to attempt to have a workforce which is representative of the demographic constitution of the population of South Africa. He is of the view that firstly the demographic representativeness of the company/employer need not necessarily exactly resemble that of the Republic because the party assessing compliance must consider the regional demography of the business as well as the availability of suitably qualified people from the designated groups.

Garbers \textit{et al}\textsuperscript{142} are of the opinion that affirmative action is a temporary measure and once the goal of equality in the workplace has been achieved, the reason for it would fall away. In other words, there is a turning point whereafter further efforts would probably constitute unfair discrimination.

The Employment Equity Act is driving strategic diversity and transformation legislation designed to address past imbalances. It places a duty on all employers to achieve employment equity goals and to maximise the benefits of diversity, equal opportunity and fair treatment of employees.

Every employer is required to achieve reasonable progress in closing the excessive gaps identified and reaching numerical goals. The organisation/employer has to align its employment practices and policies with the requirements of the EEA, the Labour Relations Act and the Basic Conditions of Employment Act.

The cases of all the previous chapters demonstrate that where there are individual interests there will always be clashes between the employer and employees. It is then up to the courts and the CCMA to interpret the legislation, policies and

\textsuperscript{141} Business Blue Book of South Africa (1999).
\textsuperscript{142} Essential Labour Law (2002) 3\textsuperscript{rd} edition.
practices, and adjudicate on their fairness. It is also expected of the courts to give clear guidelines.
BIBLIOGRAPHY

ARTICLES

Hunter, R “Indirect Discrimination in Workplace” (1992)

Landman, A “The Code of Practice on Sexual Harassment” (1998) Vol 8.3 Contemporary Labour Law

Le Roux, PAK “More Unequal Than Others – Affirmative Action Under the Spotlight” Employment Law

Le Roux, PAK “Shield, Not Sword – Discrimination in Appointments” (1999) Vol 8 Employment Law


BOOKS

Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Rossouw, J; Christie, S; Cooper, C; Giles, G and Bosch, C Labour Relations Law (2000) 4th edition LexisNexis Butterworths


LIST OF CASES

Abbott v Bargaining Council for the Motor Industry (Western Cape) (1999) 20 ILJ 30 (LC)

Association of Professional Teachers v Minister of Education (1995) 16 ILJ 1048 (IC)


Claasen v Department of Labour (1998) 10 BALR 1261 (CCMA)

Coetzer v Minister of Safety and Security (2003) 24 ILJ 163 (LC)

Crotz v Worcester Transitional Local Council (2001) 22 ILJ 750 (CCMA)

Department of Correctional Services v Van Vuuren (1999) 1 BLLR 1132 (LAC)

Diaz v Pan American World Airways Inc 442 F2d (9th LCR) 1981
Dierks v University of South Africa (1999) 4 BLLR 304 (LC)

Dothard v Rowlinson 433 US 321 1971

Eskom v Hiemstra NO (1999) 20 ILJ 2362 (LC)

Fesel v Masonic Home of Delaware Inc 447 F Supp 1346 (D Del) 1978

Gaylard v Telkom SA (1998) 9 BLLR 942 (LC)

George v Liberty Life Association of Africa Ltd (1996) 17 ILJ 571 (LC)

Germishuys v Upington Municipality (2001) 3 BLLR 345 (CC)

Govender v Department of Health KZN (2001) BALT 21 (CCMA)


Harksen v Lane 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)

J v M Ltd (1989) 10 ILJ 755 (LC)

Kadiaka v Amalgamated Beverage Industries (1999) 8 LC 6.12.1


Lagadien v University of Cape Town (2001) 1 BLLR 76 (LC)

Larbi-Orbidam v MEC for Education (North West Province) 1998 (1) SA 745 (CC)

Leonard Dingler Employee Representative Council v Leonard Dingler Pty Ltd (1997) 11 BLLR 1438 (LC)

McInnes v Technikon Natal (2000) 6 BLLR 101 (LC)

Middleton & Others v Industrial Chemical Carriers Pty Ltd (2001) 22 ILJ 472 (LC)

MWU obo Van Coller v Eskom (1999) 9 BALR 1089 (IMSSA)

Nawa v Department of Trade & Industry (1998) 7 BLLR 701 (LC)

NEHAWU obo Thomas v Department of Justice (2001) 22 ILJ 306 (BCA)

NUMSA obo Cook v Delta Motor Corporation (2000) 12 BALR 1411 (CCMA)

Nutesa v Technikon Transvaal (1997) 4 BLLR 467 (CCMA)
President of the Republic of South Africa v Hugo (1997) 6 BCLR 708 (CC)

Prinsloo v Van der Linde (1997) 6 BLLR 759 (CC)

Public Servants Association obo Dalton v Department of Public Works (1998) 9 BALR 1177 (CCMA)

Public Servants Association of SA v Minister of Justice (1997) 18 ILJ 241 (W)

R v Secretary of States for Employment Ex Parte Equal Opportunities Commission (1993) IRLR 10 HL

Rafferty v Department of the Premier (1998) 8 BALR 1077 (CCMA)

Reddy v University of Natal (1997) 2 LAC

Roinner-Kuhn v Fuhr Spezial Gebaudereinigung (1993) CMR 932, 19954 LCD 378

Schoeman v Samsung Electronics (1997) 10 BLLR 1346 (LC)

Sehlolo v Department of Education (2000) 12 BALR 1430 (CCMA)

South Africa, Adriaanse v Swartklip Products (1999) BALR 649 (CCMA)

Stulweni v SAPS (2003) 24 ILJ 883 (CCMA)

Swanepoel v Western Region District Council (1998) 9 BLLR 987 (SE)

Swart v Mr Video (Pty) Ltd (1997) CCMA 10.8.20

TGWU v Bayete Security Holdings (1999) 4 BLLR 401 (LC)

Van Rensburg v Northern Cape Provincial Administration (1997) 18 ILJ 1421 (CCMA)

Van Zyl v Department of Labour (1998) 4 BALR 438 (CCMA)

Walters v Transitional Local Council of Port Elizabeth (2001) 1 BLLR 981 (C)

Wards Core Packing Company v Anton 490 SC 642 1989

Whitehead v Woolworths (Pty) Ltd (1999) LC 6.12.4