

# PROTECTION AGAINST UNFAIR DISCRIMINATION IN THE WORKPLACE: ARE THE COURTS GETTING IT RIGHT?\*

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## INTRODUCTION

No area of South African law is more critical than the prohibition of unfair discrimination, especially in the workplace. Under apartheid, discrimination against workers on grounds such as race and sex was not only permitted; it was legally enforced. In addition, employers had a relatively free hand to discriminate on grounds such as religion, disability or political opinion. No stable economy, let alone a democratic society, can be built on such foundations. The eradication of “unfair discrimination” in the workplace was essential to developing the new employment dispensation envisaged by the Constitution<sup>1</sup> and the Labour Relations Act of 1995 (‘LRA’). Section 6 of the Employment Equity Act 55 of 1998 (‘EEA’) now embodies this objective.

It is important to note the relationship between the Constitution and the EEA. Section 9 of the Constitution states that “[n]ational legislation must be enacted to prevent or prohibit unfair discrimination”. This is because the Constitution is primarily intended to regulate the exercise of State power, while statutes are enacted to give effect to basic constitutional rights. The role of the EEA is to implement the basic right contained in section 9 of the Constitution in the context of employment policies and practices. Thus the EEA, and not the Constitution, must be relied on by employees alleging unfair discrimination. Only if a statute (or the common law) fails to protect a basic right does it become permissible to rely directly on the Constitution.<sup>2</sup> In the case of unfair discrimination, however, the protection given to employees by the EEA is more extensive and more specific than the basic right entrenched in the Constitution. In the employment context, therefore, case law dealing with the broad constitutional meaning of “unfair discrimination” in other situations (for example, the imposition of different municipal tariffs in different parts of a city) may not always be relevant.

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\* The issues dealt with in the first part of this paper are discussed in more detail in Du Toit “The evolution of the concept of ‘unfair discrimination’ in South African labour law” (2006) 27 *Industrial Law Journal* 1311.

<sup>1</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>2</sup> See *Institute for Democracy in SA and Others v African National Congress* 2005 (10) BCLR 995 (C) at par 17; *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others* 2006 (1) BCLR 1 (CC) at par 437. This is so even though the courts have in a few cases (incorrectly) allowed an employee to rely directly on the Constitution: see, for example, *Stokwe v MEC, Department of Education, Eastern Cape Province* [2005] 8 BLLR 822 (LC).

This also means that employers are limited to the defences contained in the EEA and cannot rely on the broader defences that are available to the State – for example, when passing laws that differentiate between different groups of people (such as married and unmarried people).<sup>3</sup> This follows from the principle that any limitation of a basic right must be interpreted narrowly (i.e., to limit the basic right as little as possible).<sup>4</sup> In relation to the right to equality, this means that laws are presumed to treat people equally; unequal treatment is permissible only where it is expressly authorised by law<sup>5</sup> and such law does not violate any of the basic rights guaranteed by the Constitution, or by international law, to an impermissible degree. The EEA, as will be seen, authorises unequal treatment in only two instances.

To sum up: in practice, the prohibition of unfair discrimination in the workplace is regulated by the EEA and not by the Constitution. The concept of “unfair discrimination” contained in the EEA, in turn, has been interpreted by the courts in the light of the Constitution and international law. In the process, it will be seen, much difficulty has been experienced in clarifying the difference between affirmative action measures and unfair discrimination. These topics form the main focus of this paper.

## **THE DEVELOPMENT OF THE CONCEPT OF “UNFAIR” DISCRIMINATION**

In the first reported labour cases where the term “discrimination” was used, the Industrial Court was concerned with discrimination against trade unions or trade union members.<sup>6</sup> Two things are interesting about these early judgments. One is that the court made reference to the prohibition of “anti-union discrimination” contained in the relevant International Labour Organisation (ILO) Convention; even at that stage, in other words, it was accepted that labour rights in South Africa must be interpreted in the light of international law. Secondly, it was not found necessary to use the term “unfair”. Discrimination, in line with international law, was prohibited if it took place on an impermissible ground or for an impermissible reason.

For the next ten years it was left to the Industrial Court to strike down cases of impermissible discrimination as “unfair labour practices” – for example, on grounds of race,<sup>7</sup> sex,<sup>8</sup> and trade union membership.<sup>9</sup> Thus, dismissal of a female employee after having an affair with a senior male employee,<sup>10</sup> and the refusal by a white trade union to

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<sup>3</sup> Section 36 of the Constitution (the “limitation clause”) sets out the criteria for deciding whether a limitation of a basic right by statute or by common law is permissible.

<sup>4</sup> For a leading European case on this point, see *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 (ECJ) where it was ruled that the employment of women in the police force could not be limited on grounds of “security” because the relevant European law made no provision for such a limitation.

<sup>5</sup> This was the case even before the enactment of our Bill of Rights: see *R v Abdurahman* 1950 (3) SA 136 (A) at 145; *S v De Wet* 1978 (2) SA 515 (T) at 517-518; cited in *Chamber of Mines v Mineworkers Union* (1989) 10 ILJ 133 (IC) at 157.

<sup>6</sup> See *Raad van Mynvakkonde v Minister van Mannekrag en 'n Ander* (1983) 4 ILJ 202 (T); *UAMAWU & Others v Fodens (SA) (Pty) Lt.* (1983) 4 ILJ 212 (IC).

<sup>7</sup> E.g., *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC).

<sup>8</sup> E.g., *J v M Ltd* (1989) 10 ILJ 755 (IC).

<sup>9</sup> *Mtshamba & others v Boland Houtnywerhede* (1986) 7 ILJ 563 (IC).

<sup>10</sup> *G v K* (1988) 9 ILJ 314 (IC).

allow its members to train coloured workers,<sup>11</sup> were held to be unfair labour practices. In the process the meaning of “discrimination” was considered in more detail. In particular, a distinction was drawn between “differentiation” (i.e., treating people differently on permissible grounds) and “discrimination” (i.e., treating people unequally on impermissible grounds).<sup>12</sup> Very importantly, ILO Convention 111 of 1958 on Discrimination in Employment and Occupation was recognised as a point of reference in defining “discrimination”. In *SACWU & Others v Sentrachem Ltd*<sup>13</sup> the Industrial Court, faced with a case of alleged wage discrimination based on race, quoted the Convention as follows:

“Discrimination is defined in the convention as including ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’. There are, however, limits, [with] art 1 s 1(2) stating: ‘Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.’”

This definition (reproduced in full at the end of the paper) will be referred to again, and should be kept in mind.

The concept of “unfair discrimination”, as opposed to “discrimination” on a prohibited ground, first made its appearance in the short-lived codification of “unfair labour practice” that was enacted in 1988 and repealed in 1991. Paragraph (i) of the definition stated that “unfair labour practice” would include “the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed”.

Did the introduction of the word “unfair” mean a narrowing down of the prohibition of discrimination? In other words, was discrimination on the grounds of race, sex or creed prohibited only if the court considered it “unfair”, thus leaving employers free to discriminate on these grounds if the court considered it “fair”? Even though the apartheid government might well have intended this, the courts did not interpret it in such a way. For example, in *Chamber of Mines v Council of Mining Unions*<sup>14</sup> it was found that the employer had discriminated unfairly against black workers by not affording them “exactly the same conditions of employment [as] their white counterparts solely on the grounds of race”. Discrimination based on race, in other words, was assumed to be unfair; it was not found necessary to inquire whether it was “fair” in the circumstances.

To sum up the position prior to 1993: distinctions (or “differentiation”) among employees were permissible provided they were based on valid or work-related grounds. “Unfair discrimination” meant unequal treatment based on impermissible grounds such as race, sex or creed, and was prohibited. The courts, in practice, treated the word “unfair” as an

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<sup>11</sup> *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC).

<sup>12</sup> See, for example, *Biyela & Others v Sneller Enterprises (Pty) Ltd* (1985) 6 ILJ 33 (IC) where the court found that it did not amount to “racial discrimination” to dismiss only African workers where, following a strike by African and Indian workers, the Indian workers had heeded the employers’ ultimatum to return to work.

<sup>13</sup> (1988) 9 ILJ 410 (IC) at 429; cited with approval in *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC) at 157.

<sup>14</sup> (1990) 11 ILJ 52 (IC) at 69.

open-ended term referring to discrimination on all grounds that were found to be impermissible even though they were not mentioned in the definition of “unfair labour practice”.<sup>15</sup>

### **1993–1999: FROM THE INTERIM CONSTITUTION TO THE EEA**

The interim Constitution<sup>16</sup>, which took effect in April 1994, contained the first blanket prohibition of “unfair discrimination” in all walks of life. Section 8 stated that “[n]o person shall be unfairly discriminated against” on any ground, including a number of listed grounds such as race, sex and religion. Importantly, it also stipulated that affirmative action measures were not prohibited. For the next two years, while the Industrial Court continued to exercise its unfair labour practice jurisdiction, the effect was that discrimination in the workplace on any of the grounds listed in section 8 had to be treated as an unfair labour practice.

The interim Constitution further prohibited “indirect” as well as “direct” discrimination. By “direct” discrimination is meant discrimination based expressly on a particular ground; for example, refusing to employ a person *because* she is a woman. By “indirect” discrimination is meant a seemingly neutral measure which, however, has the effect of discriminating against a particular group of people *and* has no objective justification; for example, giving fewer leave days to employees on fixed-term contract where, in fact, most of them are women.

The judgments of the Industrial Court in this period, unfortunately, were not very clear and helped to lay the basis for subsequent confusion. Two cases may be noted. In *Collins v Volkskas Bank*<sup>17</sup> a pregnant employee was denied maternity leave in terms of a collective agreement and was thus forced to resign. Referring to ILO Convention 111, the court correctly found that inherent job requirements (or “business necessity”) was the only defence available to the employer, but went on to describe measures based on inherent job requirements as “acceptable” or “fair” discrimination. In fact, Convention 111 clearly states that such measures are “not deemed to be discrimination”. However, because the discrimination that Ms Collins suffered was “a result of her pregnancy”, it was by definition unfair. In effect, “unfair” was used as the equivalent of “impermissible” in describing the types of discrimination that were prohibited by the Constitution.

The same confusing notion of “fair” discrimination surfaced in *Association of Professional Teachers & Another v Minister of Education*,<sup>18</sup> where it was ruled that denying a home owner’s allowance to married women teachers amounted to sex discrimination and was therefore an unfair labour practice. Correctly, the court distinguished “discrimination” from “differentiation, stating that “where the effect of the differentiation is not based on an objective ground and such differentiation has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an

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<sup>15</sup> See, for example, *Mthembu & Others v Claude Neon Lights* (1992) 13 ILJ 422 (IC), dealing with alleged discrimination based on union membership. For a similar interpretation, see Cameron, Cheadle and Thompson *The New Labour Relations Act* (Juta, 1989) at 161–162.

<sup>16</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>17</sup> (1994) 15 ILJ 1398 (IC).

<sup>18</sup> [1995] 9 BLLR 29 (IC).

equal footing of all rights and freedoms, it would constitute discrimination”.<sup>19</sup> However, it then stated that the term “unfair” serves “to limit those distinctions or forms of discrimination which are outlawed in this section to those which are ‘unfair’”<sup>20</sup> – in other words, that discrimination based on listed grounds (such as sex) is prohibited only if it is found to be “unfair”. But, having said that, the court went on to suggest the opposite: the term “unfair”, it ruled, serves to distinguish measures that that merely “differentiate” from those that “discriminate”. “[U]nless the inherent requirements of the job require differentiation on the grounds of colour or sex,” it was held, “direct differentiation based on such inherent human characteristics should not be condoned.”<sup>21</sup> This, it is submitted, was more accurate, but left the notion of “fair discrimination” hanging in the air.

In 1997 the final Constitution took effect, containing a prohibition of “unfair discrimination” very similar to that in the interim Constitution (see section 9, annexed at the end of this paper). In *Hoffmann v South African Airways*<sup>22</sup> the Constitutional Court set out to interpret the meaning of unfair discrimination in terms of section 9.<sup>23</sup> As is well known, the case was about the refusal of SAA to employ Mr Hoffmann as a cabin attendant because he was HIV-positive. Since HIV status was not a listed ground of discrimination, it was necessary to establish whether it was prohibited by section 9. The employer’s original defence, based on the inherent requirements of the job, had by this stage been abandoned. Using the impact of the employer’s conduct on the applicant as its criterion, the court concluded that “the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination”.<sup>24</sup>

In the meantime the LRA had been enacted, abolishing the Industrial Court and laying down a prohibition of unfair discrimination on listed or unlisted grounds similar to that in the Constitution, but applicable exclusively in the employment context (Schedule 7, item 2(1)(a)). In addition to affirmative action measures (as provided for in both the Constitution and ILO Convention 111), it included “inherent requirements of a particular job” as a defence available to employers. Then, in 1997, South Africa ratified Convention 111, and in 1998 the EEA was enacted, replacing item 2(1)(a) with a similar prohibition of unfair discrimination plus the same two defences (see section 6, annexed at the end of this paper). One purpose of the EEA, as noted already, was to implement the constitutional prohibition of unfair discrimination in the workplace; another was to give effect to the requirements of Convention 111. As will be noted below, this made it necessary to interpret the EEA in line with the Convention – in particular, to give “unfair discrimination” in terms of section 6 the same meaning as that of “discrimination” in terms of the Convention.

## **THE IMPORTANCE OF CONVENTION 111**

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<sup>19</sup> At 59.

<sup>20</sup> At 61.

<sup>21</sup> At 64.

<sup>22</sup> [2000] 12 BLLR 1365 (CC).

<sup>23</sup> The LRA had not yet taken effect when the dispute arose.

<sup>24</sup> At par 40.

The first case dealing a claim of unfair discrimination in terms of the LRA, *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd*,<sup>25</sup> created some confusion. The case arose from the unequal treatment of monthly-paid and weekly-paid employees for purposes of pension fund membership in a workplace where all weekly-paid employees were black and most monthly-paid employees were white. This, the court found, amounted to indirect discrimination based on race. It went on, however, to suggest that “discrimination” may be justified if “the object [is] legitimate and the means proportional and rational”<sup>26</sup> – in other words, that employers can plead “fairness” in general, in addition to the two defences mentioned in the Act, to justify alleged discrimination even on listed grounds.

If this was so, it would be in direct conflict with ILO Convention 111 and, therefore, with the Constitution, the LRA and the EEA (which must all be interpreted in accordance with international law). In fact, the court did not disagree with Convention 111; it used the term “discrimination” as not implying “actual prejudice” but, rather, distinctions based on “characteristics which are generalised assumptions about groups of people.”<sup>27</sup> In other words, the court was speaking not of “discrimination” as defined in the Convention but of “generalised assumptions”, which might potentially be justified on grounds of “fairness”. Unfortunately the judgment has been used to suggest that discrimination on prohibited grounds may also be justified on grounds of “fairness”, thus greatly reducing the protection available to employees.

Some of the confusion was removed by later judgments. The Constitutional Court re-emphasised the distinction between “differentiation” and “discrimination”,<sup>28</sup> as did the labour courts. The approach to be followed in establishing whether an employer has committed unfair discrimination was summarised by the Labour Appeal Court in *Mias v Minister of Justice & Others*<sup>29</sup> as follows:

“In short: Is there a differentiation? If so, is it discriminatory? If so, is it unfair either directly, on one or more of the specified grounds, or indirectly?”

This, it is submitted, is broadly the sense in which section 6 of the EEA should be understood. Section 3(d) of the EEA states expressly that the Act must be interpreted “in compliance with” Convention 111. This means that “discrimination” (as defined by Convention 111) is “unfair” (prohibited) if it takes place on any of the grounds listed in section 6 or on an unlisted ground which “has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation of employees in an equivalent manner” (for example, nationality). Unequal treatment of employees on listed or unlisted grounds, however, will not constitute “unfair discrimination” if it is justified in terms of (a) an affirmative action measure or (b) an inherent requirement of the job. Both these defences are expressly allowed by Convention 111. Failing this, an employer would have to show that its conduct (i) did not amount to “discrimination” but was merely “differentiation” (for example, providing separate toilet facilities for men and

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<sup>25</sup> [1997] 11 BLLR 1438 (LC).

<sup>26</sup> At 1448.

<sup>27</sup> At 1448.

<sup>28</sup> See especially *Harksen v Lane NO 1997 (11) BCLR 1489 (CC)*.

<sup>29</sup> [2002] 1 BLLR 1 (LAC) at par 21.

women) or (ii) was based on a legitimate or permissible ground (for example, a disciplinary code).

Unfortunately, with few exceptions, the courts have not adhered to the approach outlined in the *Mias* case (above). While little fault can be found with the remedies ordered in most cases, the reasoning of the court was often unclear and key concepts were blurred – in particular, the meaning of “discrimination”. The problem is not only technical; it potentially undermines the protection available to workers. In the absence of clear legal rules, or where existing legal rules (such as the definition of “discrimination”) are not applied, it is left to judges to seek the law where they can find it. In the case of section 6 of the EEA, the relatively broad and sophisticated interpretation given to “unfair discrimination” in terms of the constitutional test has become a popular and seemingly authoritative criterion. The effect, it is suggested, is to obscure the clear meaning of “discrimination” as targeted by Convention 111 and make room for a subjective element to enter the exercise, with unpredictable results.

## RECENT CASE LAW

On the positive side, the recent decision in *HOSPERSA obo Venter v SA Nursing Council*<sup>30</sup> promised to bring much-needed clarity to the meaning of “discrimination”. In this matter the applicant had been employed subject to a retirement age of 70 with the option of retiring at 65. Subsequently all employees of the SA Nursing Council were transferred to a new interim council which, after unilaterally laying down a new retirement age of 60, refused to allow Ms Venter to work beyond the age of 61. Ms Venter then brought a claim of unfair discrimination on the ground of age. In deciding whether such discrimination had taken place, Acting Judge Steenkamp found that the test was whether the applicant’s treatment had been based on her age, not whether she had been treated differently from other employees of the same age. Having referred to ILO Convention 111 to establish the meaning of “discrimination”, the court then concluded that age discrimination is “absolutely prohibited” in terms of the Convention as well as the EEA. It was noted that the Nursing Council did not try to justify its decision in terms of the inherent requirements of the job. Interestingly, the court accepted that the defence to a claim of automatically unfair dismissal based on age in terms of the LRA – i.e., that the employee had reached an agreed or normal retiring age – could also be used as a defence to a claim of age discrimination. The employer, however, was unable to establish this defence. The court accordingly found that Ms Venter’s dismissal amounted to age discrimination and ordered compensation equal to the difference between the salary she would have earned until the age of 65 (when she intended to retire) and her pension for that period. The judgment is now on appeal.

Other judgments, unfortunately, were less helpful. A scenario similar to that in *Venter* arose in *Evans v Japanese School of Johannesburg*.<sup>31</sup> Again the applicant was forced to retire at an age unilaterally determined by the employer. In this case, however, the applicant claimed automatically unfair dismissal as well as unfair discrimination based on age and, having succeeded on both counts, was awarded compensation equal to 24

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<sup>30</sup> [2006] 6 BLLR 558 (LC).

<sup>31</sup> [2006] 12 BLLR 1146 (LC).

months' remuneration, plus R200 000 damages in terms of the EEA, plus R29 524 notice pay. The judgment, however, followed a less clear route. Unlike in the *Venter* case, the court made no attempt to define the meaning of "discrimination", and found that the unfairness suffered by Ms Evans consisted of being treated differently from other employees who had been allowed to continue working after the age of 60. This is problematic; for example, what if – as in the case of Ms Venter – there had been no other employees in a similar position to compare her treatment with? It is submitted that, as in the *Venter* case, it should be enough to prove that the disadvantage suffered by the employee was based on a prohibited ground, even if there are no other employees in a similar position who were treated differently.

A case that attracted considerable attention was *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another*.<sup>32</sup> The dispute in this matter was sparked by racist comments made by a white employee, Ms Burger, about two black fellow-employees. Although the comments had been made behind the victims' backs, word got out and action was demanded of the employer. However, little happened: Burger's supervisor allegedly issued her with a verbal warning and Burger apologised to the black employees concerned. Despite ongoing complaints from the applicant union about the lack of action, nothing further was done until the matter was presented to its Employment Equity Manager. A fact-finding inquiry and a disciplinary hearing then took place, resulting in Burger's dismissal. This, however, was reversed on appeal on the grounds that Burger had suffered "double jeopardy" (a warning followed by a disciplinary hearing for the same offence) and that the employer had stated that no further action would be taken. The union then referred a claim of unfair discrimination to the Labour Court on behalf of one of the victims.

The judgment of the court is noteworthy for several reasons. On the negative side, the claim was heard with reference to the Constitution as well as the EEA when, for reasons already mentioned, it should have been dealt with in terms of the EEA. The court also did not make clear the criteria it used in deciding whether the racial abuse suffered by the applicant amounted to "discrimination", and went on to find that Burger's conduct amounted to direct discrimination in terms of the Constitution rather than the EEA. However, there can be little question that racial abuse has the effect of "nullifying or impairing equality of opportunity or treatment" in terms of Convention 111 and, therefore, amounts to unfair discrimination also in terms of the EEA.<sup>33</sup> At the same time, Judge Revelas broke new ground by ruling that the EEA applies to unfair discrimination not only by an employer against an employee but also by one employee against another. The employer, however, was held liable on the ground that its "failure to take proper steps to prevent racism being perpetrated at the workplace by certain of its employees" constituted unfair discrimination against the complainant. Although the judge declined to interfere with the reversal of Burger's dismissal (on the grounds that the fairness of a

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<sup>32</sup> [2006] 8 BLLR 737 (LC).

<sup>33</sup> Section 6(3) of the EEA further states that "harassment" on a listed ground amounts to unfair discrimination. As in the case of sexual harassment, it can be argued that a single serious incident of racial abuse can be regarded as racial harassment, and thus falls within the scope of section 6.

dismissal should be decided in terms of the LRA, not the EEA) she ordered compensation to be paid to the complainant in terms of an agreement between the parties.

Less problematic was the judgment in *Wallace v Du Toit*.<sup>34</sup> In this matter an *au pair*, who had been dismissed by her employer (an attorney) after falling pregnant, claimed (i) compensation for automatically unfair dismissal in terms of the LRA and (ii) damages for unfair discrimination in terms of the EEA. The employer's defence was that it had been agreed that the applicant's employment would end if she fell pregnant. Even if this were true, it was found, such a provision would have been unconstitutional. The court then dealt with the substance of the claim. Again the existence of "discrimination" was assumed, again with reference to the Constitution rather than the EEA. Reverting to the EEA, Acting Judge Pillemer then found that not having children could not be regarded as an inherent requirement of the applicant's job. Her dismissal because of pregnancy, therefore, was not only automatically unfair but also amounted to unfair discrimination. Though mindful of possible unfairness to a respondent where claims are duplicated, the court noted that compensation for unfair dismissal is in addition to any other remedy to which an applicant may be entitled (section 195, LRA). Damages of R25 000 were awarded for the unfair discrimination which the applicant had suffered plus R46 500 as compensation for unfair dismissal, calculated with reference to her loss of earnings.

By contrast, major uncertainty arises from *Dlamini & others v Green Four Security*.<sup>35</sup> The applicants in this matter were security guards belonging to a religious group which, they claimed, did not allow them to trim their beards. Since the company's rules required its employees to be clean-shaven, the applicants were in due course given disciplinary hearings and dismissed. This, they alleged, amounted to discrimination on the grounds of their religion and was therefore automatically unfair dismissal in terms of section 187(1)(f) of the LRA. The claim failed because the applicants could not show that their religion, in fact, prohibited them from trimming their beards. Unfortunately, in reaching this conclusion the court made a number of problematic findings. First, it ruled that the issue had to be decided in terms of the Constitution (because the "source" of section 187(1)(f) is in the Constitution) and not in terms of the LRA. For reasons noted already, this is questionable; if it were so, all labour disputes would need to be decided in terms of the Constitution because the major "source" of labour rights is the constitutional right to fair labour practices. In fact, the criteria used in determining the limits of basic rights in terms of the Constitution are very different from those used in deciding whether an employer has breached an employee's basic rights. But, having taken this step, the court went on to rule that a three-stage inquiry was necessary:

*"Stage one:* Are the facts relied upon to substantiate the complaint of discrimination proved?

*"Stage two:* If discrimination is proved, is it justified? At this stage the court must establish whether the workplace rule can be justified as an IROJ [inherent requirement of the job].

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<sup>34</sup> [2006] 8 BLLR 757 (LC).

<sup>35</sup> (2006) 27 ILJ 2098 (LC).

“*Stage three*: If it is an IROJ, it may still be discriminatory, if the impact is not ameliorated by a reasonable accommodation or modification of the rule, or an exemption from it.”<sup>36</sup>

In fact, in terms of the EEA “discrimination” and an “inherent requirement of a job” are mutually exclusive. Convention 111 states that a measure based on an inherent requirement of a job is “not discrimination”; or, to put it differently, “discrimination” can only be proved if the employer’s conduct is *not* based on an inherent requirement of the job. In the same vein, section 187(2)(a) states that a dismissal based on an inherent requirement of a job “may be fair”. In practice, this means that such a dismissal *will* be fair (and therefore not “discriminatory”) provided it is also procedurally fair. If this is correct, stages one and two above are incorrect: if discrimination *is* proved, it means that the defence of “IROJ” has failed whereas, if the rule *does* amount to an “IROJ”, it means that the complaint of discrimination must fail.

“Stage three” is equally problematic. The question of “accommodating” the employee will only arise in judging the substantive fairness of the dismissal, not in deciding whether it is discriminatory.

The court, unfortunately, went even further. Being clean-shaven, it found, was an inherent requirement of the applicants’ jobs because “neatness” is generally enforced in the military, police and security industries. It is submitted that this is also incorrect. Previous cases had made it clear that this defence must be narrowly interpreted; an “inherent” requirement of a job means a requirement without which the job cannot be performed. Having an untrimmed beard, however, does not prevent a person from performing the job of a security guard. The court, it would seem, was confusing the concept of a “reasonable workplace rule” with that of “an inherent requirement of a job”. Refusing to trim their beards may well have amounted to breach of a workplace rule and justified disciplinary proceedings; this, indeed, was the basis for the applicants’ dismissal. Treating it as an inherent requirement of the job, however, means that it could have served as a defence even if having an untrimmed beard had indeed been a requirement of the applicants’ religion. The very purpose of section 6 is to strike down employment practices, no matter how widespread they may be, that discriminate unfairly against employees. Giving them the status of “inherent requirements of a job” allows them to continue.

The courts also continued to have difficulty in distinguishing affirmative action measures from discrimination based on race or gender. In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (‘PEPUDA’), this confusion to some extent arises from the wording of the statute (see sections 1 and 13). Defining “discrimination” as any act “including a policy or practice which directly or indirectly imposes a disadvantage or withholds a benefit from any person on one or more of the prohibited grounds” (such as race or gender), the Act then states that, if “discrimination” is established, the burden is on the respondent to show that it is fair. The consequences were shown in *Du Preez v Minister of Justice and Constitutional Development & others*,<sup>37</sup> where a highly experienced (white) magistrate claimed that he had been unfairly

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<sup>36</sup> At 2104.

<sup>37</sup> [2006] 8 BLLR 767 (SE).

discriminated against by selection criteria which excluded him from being considered for appointment to the Port Elizabeth Regional Court. Since magistrates are not “employees”, the case was decided in terms of PEPUDA. The Department’s defence was that the selection criteria were justified by its affirmative action policy. On the one hand the court recognised that affirmative action measures “must be seen as essential and integral to the goal of equality; and not as limitations of or exceptions to the equality rights”. In terms of the definition of “discrimination” in PEPUDA, however, it found that the applicant’s exclusion from the selection process amounted to “discrimination” and, therefore, it was necessary to consider whether it was “fair”. Although the Constitution requires that “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed” (section 174(2)), the court noted that this is not the only criterion; other criteria such as experience, legal knowledge, leadership and management skills must also be taken into account. But this had not been done; black women with minimum qualifications automatically prevailed over all other applicants. The Department’s actions were therefore held to be unfair and it was ordered to readvertise the posts.

Under the EEA, it is submitted, a similar “two-stage” approach would be unnecessary since the EEA expressly excludes affirmative action measures from the scope of “unfair discrimination”. The remainder of the judgment, however, confirms earlier rulings in terms of the Constitution, the LRA and the EEA that the promotion of employment equity is by no means the only duty of the State. For example, all spheres of government are required to provide “effective” government and must take this into account when making appointments. Also in the private sector, employers are expected to strike a proper balance between the requirements of affirmative action and any other legal duties they are under.<sup>38</sup>

In *Baxter v National Commissioner, Correctional Services & another*<sup>39</sup> the affirmative action policy of a public sector employer again came under scrutiny. In this matter the appointment of Mr Baxter, a “Coloured” male, to a senior position in the Free State was vetoed on the ground that “[t]he issue of equity should first be addressed properly”. When the post was re-advertised, Mr Baxter was not shortlisted. In examining the procedure that was followed, Judge Cele noted that the National Commissioner had neither approved nor rejected the decision not to appoint Mr Baxter, which amounted to a gross irregularity. Moreover, the Department’s employment equity plan for the Free State called for the appointment of a Coloured person rather than an African. Due to these errors the Department’s defence of affirmative action failed and its exclusion of Mr Baxter was held to be “discrimination based on race and gender”. The Department was accordingly ordered to pay him the salary and benefits to which he would have been entitled had he been appointed, backdated to January 2002, plus interest.

Again, unfortunately, the reasoning of the court was ambiguous. Although it was not in dispute that the Department was seeking to implement an employment equity plan, the court appeared to accept that affirmative action measures amount to “*prima facie* unfair

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<sup>38</sup> See, e.g., *McInnes v Technikon Natal* [2000] 6 BLLR 701 (LC), where the Technikon’s duty to “provide the highest standard of tertiary service to its students” was balanced against its duty to implement affirmative action measures when appointing lecturers.

<sup>39</sup> [2006] 9 BLLR 844 (LC).

discrimination” which the employer must show to be “fair”. This perpetuates the notion of affirmative action as a form of “fair discrimination” and, therefore, a limitation of the right to equal treatment which must be interpreted narrowly (see above).<sup>40</sup> In fact, the Constitution, Convention 111 and the EEA all treat affirmative action as a category in its own right which is excluded from the ambit of “discrimination” and should be interpreted as broadly as is necessary to promote the objective of substantive equality. In this regard the approach adopted in earlier decisions such as *Stoman v Minister of Safety & Security & Others*<sup>41</sup> is more consistent and is to be preferred.

## CONCLUSION

What is the importance of these issues from a trade union perspective?

There is a perception that trade unions give priority to collective bargaining issues and to rights issues that are directly relevant to collective bargaining (for example, organisational rights). In fact, individual disputes, many of them referred by trade unions, form the bulk of the CCMA’s workload. Most of these, however, are dismissal disputes. Unfair discrimination disputes are few and far between. From April 2003 to March 2004, for example, a total of 1 053 unfair discrimination disputes were referred to the CCMA – less than one per cent of the total number of disputes. Also, many of these disputes involved relatively senior employees. Why are so few discrimination disputes referred by or on behalf of workers in less senior positions, who form the overwhelming majority of the workforce?

The question must be answered with caution. There is little factual information available; the experience of trade unions themselves will shed more light on the issue. Subject to this proviso, the following propositions are suggested for discussion:

1. The small number of unfair discrimination disputes does not mean that unfair discrimination has ceased to be a problem in South African workplaces. Discriminatory practices remain deeply ingrained in many workplaces, large as well as small, so much so that many workers may regard them as the norm.
2. While direct racial discrimination may be less frequent, being highly visible and explosive, other forms of discrimination – for example, based on sex, disability or religion – remain rife. In particular, indirect discrimination may be widespread but is less easy to bring to light.
3. It is easier for more skilled, educated and better-paid employees to raise complaints of unfair discrimination than for the majority of workers. The latter, in particular, will need union assistance in exposing the discriminatory practices to which they may be subject.

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<sup>40</sup> See also *Henn v SA Technical (Pty) Ltd* (2006) 27 ILJ 2617 (LC) where the employer purported to concede that an affirmative action measure amounted to “discrimination” on the ground of race. The court, instead of questioning this concession, held that the employer bore the burden of proving that its “discrimination” was “fair”.

<sup>41</sup> (2002) 23 ILJ 1010 (T). See also the judgment of the Constitutional Court in *Minister of Finance & another v Van Heerden* [2004] 12 BLLR 1181 (CC).

4. Unions need to make special efforts to communicate with their members about these issues, encourage them to speak out about discriminatory practices and support them in pursuing disputes. This will be an important way of empowering members by affirming their dignity and adding to their confidence.

The role that unions can play, however, does not end here. The main problem noted in this paper is the degree of uncertainty that has been introduced into the law of unfair discrimination by lack of clarity in various court judgments. It is not an exaggeration to say that this presents a danger for employees. The prohibition of unfair discrimination in ILO Convention 111 and the EEA was formulated to provide employees with the greatest possible protection against discrimination. By not interpreting the provisions strictly, judges may to a greater or lesser extent substitute their own opinions for the protection intended by the law. Unions can help to address the problem by ensuring that cases brought on behalf of their members are clearly argued and by pointing courts towards a proper interpretation of the relevant provisions – in particular, the meaning of “discrimination”. It may only need one or two well-reasoned judgments to ensure that the ambiguity noted in the decisions discussed above will become a thing of the past.

## ANNEXURE

The relevant parts of ILO Convention 111 of 1958 read as follows:

### Article 1

1. For the purpose of this Convention the term *discrimination* includes--

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms *employment* and *occupation* include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

### Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

Section 9 of the Constitution reads as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

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

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) 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 of the EEA reads as follows:

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

(2) It is not unfair discrimination to—

- (a) take affirmative action measures consistent with the purpose of this Act; or
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) 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 (1)