

# EMPLOYMENT DISCRIMINATION LAW INTO THE FUTURE<sup>1</sup>

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## 1 Introduction

Since the middle of the last century the prohibition on discrimination in general, and in employment in particular, has gained prominence. The initial recognition of protection against discrimination at international level through the adoption of a number of important conventions<sup>2</sup> was followed by the irregular domestication of protection against discrimination across jurisdictions.

The development of employment discrimination law showed distinct phases and strands:<sup>3</sup> An initial focus on direct discrimination based on unequal treatment and motive; a move away from the confines of treatment and motive to a focus on effect; the recognition of indirect discrimination; an impetus to expand the grounds of discrimination; a continuous struggle to conceptualise and circumscribe the acceptable limits of discrimination; the recognition of certain non-obvious policies and practices – notably harassment – as discrimination; the recognition of the difficulties associated with proof of discrimination cases followed by measures to tinker with the onus of proof; the development of the idea of substantive equality and increased recognition and application of affirmative action as an integral part of the pursuit of equality; and, finally, where enforcement of the right not to be discriminated against either paved the way, or proved to be an insufficient foundation, for the recognition of certain marginalised groups in society and a proper understanding of the prejudice associated with membership of those groups, the inclusion of specific rights in legislation to address that prejudice.

Throughout this development, perhaps the central theme has been that discrimination as a legal concept is fraught and brings with it a number of

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<sup>2</sup> Noteworthy for present purposes are the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III) and, in the employment context, the International Labour Organisation's C111 Discrimination (Employment and Occupation) Convention of 1958.

<sup>3</sup> See, in general, C Garbers "The prohibition of discrimination in employment: Performance and prognosis in a transformative context" in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 18 ff.

challenges. These challenges include uncertainty about the meaning of the concept itself, uncertainty about the limits of protection against discrimination, the difficulties in bringing a successful discrimination case to court, and the continued search for a sensible conceptual and practical articulation between a prohibition on discrimination and the idea of special measures or affirmative action.

From the outset, these challenges were especially acute in the “new” South Africa. Prior to democracy, the organising principle of our society was discrimination, which excluded the majority of the population from effective and productive inclusion in the social, political and economic processes – including employment – that make up any individual and any society. After 1994, the immediate societal demand for transformation meant that South Africa jumped, and had to jump, straight into the deep end of equality law. Equality was enshrined as a foundational value,<sup>4</sup> an organising principle,<sup>5</sup> a substantive right,<sup>6</sup> and an interpretive tool<sup>7</sup> in the Constitution of the Republic of South Africa, 1996 (“Constitution”). This was followed by the Employment Equity Act 55 of 1998 (“EEA”) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”) which aim to regulate equality in some detail in, respectively, employment and broader society. As far as the EEA is concerned, a comparison of its content with other jurisdictions is startling: section 6(1) prohibits unfair discrimination, both direct and indirect, on no less than 20 listed grounds (and this list is not exhaustive).<sup>8</sup> From the outset the EEA declared that the onus to prove at least the fairness of discrimination rests on the employer.<sup>9</sup> While not the focus of this article, the EEA also places a detailed obligation on designated employers<sup>10</sup> to implement affirmative action and, in so doing, shows clear choices as to who the beneficiaries of affirmative action may be,<sup>11</sup> what measures need to be taken (inclusive of preferential promotion and appointment)<sup>12</sup> and what the proxy or yardstick for past disadvantage and present success in addressing past discrimination is (“equitable representation” of these beneficiaries).<sup>13</sup>

<sup>4</sup> Section 1(a) of the Constitution declares (among others) that

“[t]he Republic of South Africa is one, sovereign, democratic state founded on the .... values [of] ... [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.”

<sup>5</sup> Equality, dignity and freedom are the three overarching guiding principles in the Constitution – see, eg, sections 7, 36 and 39(1).

<sup>6</sup> S 9 of the Constitution. This section contains three substantive provisions – equality before the law (section 9(1)), affirmative action (section 9(2)) and protection against unfair discrimination (section 9(3)-(5)).

<sup>7</sup> Section 39(2) of the Constitution states that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights” of which, as illustrated above, equality is one of the core principles.

<sup>8</sup> The listed grounds are race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth. We count “social or ethnic origin” as two distinct grounds.

<sup>9</sup> Section 11 of the EEA provided (before the 2014 amendments) that “[w]henver unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.”

<sup>10</sup> As defined in section 1. Chapter III of the EEA regulates the implementation of affirmative action.

<sup>11</sup> “Suitably qualified persons” (as defined in section 20(3)) from the “designated groups” (as defined in section 1).

<sup>12</sup> S 15.

<sup>13</sup> S 2.

Thus, a pressing need to understand discrimination was immediately apparent; it continues to exist as a precondition for the concept to flourish in the South African context. And, it has to be said, this conceptual search was to some extent bedevilled by one simple reality: neither the Constitution nor the EEA tells us what “unfair discrimination” means. This raises a whole range of more specific issues that have been left to the courts. These are: The scope and meaning of the listed grounds of discrimination;<sup>14</sup> the appropriate test for the recognition of so-called unlisted grounds; the question whether an appropriate comparator is always necessary in discrimination cases; the question as to how strong the link between an employment policy or practice and the alleged ground of discrimination should be; the test for indirect discrimination; whether there is such a thing as “fair” discrimination (as opposed to the idea of non-discrimination); whether the two listed grounds of “justification” in the EEA – an inherent requirement of a job and affirmative action – are the only two arguments available to employers to defeat discrimination claims or whether it is open to employers to argue fairness or justification as general concepts; whether the presence of these “justification” grounds means that there is no discrimination, means that there is “fair discrimination”, or means that otherwise unfair discrimination is justifiable; and, lastly, who bears the onus of proving what?

With this in mind, 2014 was an important year for South African employment discrimination law. First, we saw amendments to the EEA – notably, for present purposes, the inclusion of the phrase “or on any other arbitrary ground” in section 6(1), explicit provision for “equal pay” in sections 6(4) and (5), a revamped onus provision in section 11 and changes to section 10 to provide for jurisdiction of the Commission for Conciliation, Mediation and Arbitration (“CCMA”) in most discrimination cases. Secondly, the introduction of sections 198B and 198C into the Labour Relations Act 66 of 1995 (“LRA”) may yet serve as a harbinger of things to come in the field of employment discrimination. These new sections (at least to the extent that they strive to provide for equality of treatment for fixed-term and part-time employees) raise questions about the continued role, and perhaps goal, of discrimination law. For example, comparative experience has shown that fixed-term and part-time employees are often predominantly female and the concept of indirect gender discrimination has been used to establish some parity with permanent employees.<sup>15</sup> Arguably, if specific rights exist which

<sup>14</sup> Of the twenty grounds listed, only “pregnancy”, “family responsibility” and “HIV” are defined in section 1. This section also contains a definition of “people with disabilities” which has been applied in the discrimination context, but arguably should only apply in the context of affirmative action (where this phrase is actually used). See Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future* 28 n 45.

<sup>15</sup> For example, in all of the following cases the practices were found to have a disproportionate impact on women: *Jenkins v Kingsgate Ltd* 2 CMLR 24 (paying part-time workers a lower hourly rate than full-time workers); *Clarke v Eley (IMI) Kynoch Ltd* [1982] IRLR 482 (retrenching part-time workers before considering full-time workers); *Bilka Kaufhaus v Weber von Harz* [1986] CMLR 701 (requiring full-time employment for occupational pension benefits); *Rinner Kuhn v FWW Spezial-Gebäudereinigung GmbH & Co KG* [1989] IRLR 493 (granting sick leave only to employees working more than 10 hours per week or 45 hours per month); *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910 (requiring part-time employees to work for three years longer than full-time employees to qualify

address prejudice associated with discrimination, there is no need for a general protection against discrimination, especially a concept as challenging as indirect discrimination.

For now, discrimination law remains important – not only as a general baseline mechanism for the recognition and protection of marginalised and potentially marginalised groups in society and in employment, but also as a transformative mechanism. Yet, even at this early stage, one may sound a note of caution: protection against unfair discrimination in employment is but one (limited) mechanism that may contribute to transformation. In our divided society – where the roots of the division between the “have’s” and the “have not’s” and between capital and labour are rooted in past discrimination, the temptation is to view anti-discrimination law as the solution to all (labour market) ills. However, in a world where different mechanisms (or institutions) are available to address past and current disadvantage, one should take care to ascribe responsibility for redress and change correctly. In a labour market where employees are also protected – among other things – by collective bargaining, affirmative action and against unfair labour practices (especially post – *Apollo Tyres*<sup>16</sup>), one should always be mindful of the true nature of anti-discrimination law, what its goals are and what its contribution to employee protection, workplace change and transformation is supposed to be.

Against the background of these remarks, the purpose of this article is to reflect on the challenges we have faced and continue to face in giving a sound and clear conceptual foundation to our employment discrimination law – a foundation which is a necessary precondition for its sensible, practical application and its proper impact. In doing so, a number of topics will be addressed. First, in part 2 below and in the absence of a definition of unfair discrimination in the EEA – we need, as point of departure, to (re)consider the ground rules for the interpretation of the EEA. Secondly – in part 3 – an overview of the judicial development and state of employment discrimination law at the time of the amendments will be provided. Part 4 is devoted to a reflection on the meaning and impact of the amendments. Part 5 will conclude.

## 2 Ground rules for interpreting the EEA

To state the obvious – ascertaining the meaning of the EEA is a question of interpretation of the Act itself. The EEA, however, does not exist in a vacuum: it functions against the background of our international obligations – notably the International Labour Organisation’s Convention on Discrimination (Employment and Occupation) (“ILO Convention 111”)<sup>17</sup> – as well as the Constitution. The EEA itself recognises as much in section 3(a), which requires interpretation of the Act “in compliance with the Constitution”, and section 3(d), which requires interpretation “in compliance with the international law

for statutory dismissal protection and for dismissal and redundancy payments).

<sup>16</sup> *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2013 34 ILJ 1120 (LAC).

<sup>17</sup> C 111 Discrimination (Employment and Occupation) Convention of 1958. South Africa ratified the Convention on 5 March 1997.

obligations of the Republic, in particular those contained in the International Labour Organisation Convention (C111) concerning Discrimination in Respect of Employment and Occupation”.<sup>18</sup> But while the EEA requires interpretation of the EEA in the light of both the Constitution and ILO Convention 111, one further important remark needs to be made: as far as the meaning and the structure of the concept of unfair discrimination are concerned, the EEA is virtually silent. From this it should be clear that we can expect the interpretive influence of the Constitution and the Convention to be the greatest in that area where it is needed most – the meaning of “unfair discrimination”.

It is perhaps best to deal with ILO Convention 111 first. It has been relied on as ostensibly creating a prescriptive structure for South African employment equality law, specifically in that it does not create room for the notion of unfair or fair discrimination (only discrimination or non-discrimination) and also that it does not allow for any defences to discrimination claims other than the inherent requirement of a job or affirmative action as mentioned in ILO Convention 111.<sup>19</sup> However, as far as the interpretive role of the ILO Convention is concerned, a number of remarks may be made. First, the ILO Convention itself does not preclude the domestic implementation or operationalisation of the Convention by ratifying states in idiosyncratic fashion. While it is true that ILO Convention 111 gives us a definition of discrimination (for purposes of the Convention),<sup>20</sup> provides for so-called special measures<sup>21</sup> and – somewhat superficially – simply declares that “an inherent requirement of a job” and “special measures” shall “not be deemed to be discrimination”,<sup>22</sup> article 2 places an obligation on ratifying states “to declare and pursue a *national policy* designed to promote, *by methods appropriate to national conditions*, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof” (own emphasis). In addition, article 3(b) provides for the discretionary enactment of legislation to secure acceptance and observance of the national policy referred to in article 2. Furthermore, focusing on the detail mentioned in ILO Convention 111, the definition of discrimination in article 1(1) of the Convention reads as follows:

“(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;”

There are two ways to read this definition. One way – clearly incorrect, we submit – is to say that the mere existence of a distinction based on one of the grounds mentioned, is discrimination in a *final* pejorative sense (and that the second part of the definition is merely descriptive). If, however, one gives due regard to the literal meaning of the definition, it becomes clear that it is

<sup>18</sup> Subsections 3(b) and 3 (c) furthermore require interpretation “so as to give effect to [the] purpose of the EEA” and “taking into account any relevant code of good practice issued in terms of [the EEA] or any other employment law”.

<sup>19</sup> See D du Toit “Protection against Unfair Discrimination: Cleaning up the Act?” (2014) 35 *ILJ* 2623 and his own earlier work referenced at n 44.

<sup>20</sup> In article 1(1) of ILO Convention 111.

<sup>21</sup> In article 5.

<sup>22</sup> In articles 1(2) and 5.

not the mere existence of a distinction, exclusion or preference based on the grounds listed that constitutes discrimination in a *final* pejorative sense – it must also have the effect of nullifying or impairing equality of opportunity or treatment. This would mean that the final determination of the acceptability or otherwise of discrimination is more fluid from a South African perspective; it then becomes easy to argue that the definition in ILO Convention 111 leaves room for (and arguably requires) the introduction of a “fair” or “unfair” approach (or something similar) to discrimination in order to accommodate a consideration of the actual impact or effect of the distinction, exclusion or preference, even though it took place on one of the grounds listed (as is the case in both our Constitution and the EEA, which prohibit “unfair discrimination”). Furthermore, article 1(2) of ILO Convention 111 leaves it open to member states to identify other distinctions, exclusions or preferences which have the effect of nullifying or impairing equality of treatment or opportunity. At the very least, these arguments already mean that any suggestion that the definition of “discrimination” in ILO Convention 111 precludes consideration of some type of balancing act between the interests of employer and employee to determine the acceptability or otherwise of an employer’s discrimination, is suspect. The same may be said of the suggestion that our legislation (as interpreted) – which prohibits only “unfair” discrimination – is not in line with ILO Convention 111.

In fact, one cannot help but notice that ILO Convention 111, which comes to us from 1958, shows its age compared to the EEA. It mentions only seven grounds of discrimination (including race), does not speak of affirmative action (but instead “special measures”) and does not immediately identify “race” as a ground which is “generally recognised” to “require special protection or assistance” (it does, however, mention “sex” and “disablement”).<sup>23</sup> Furthermore, by their very nature conventions are generally formulated, constitute a “baseline” and, as illustrated above, are fluid. While ILO Convention 111 remains important and is a guiding light for domestic equality law, that law should ultimately be developed appropriate to our own national conditions. In any event, ILO Convention 111 can never be taken to mean that it prohibits something provided for in domestic law simply because it is not expressly provided for in the Convention. Domestic law might well be more effective and better suited to national conditions than ILO Convention 111 – especially where we prohibit discrimination on a large number of grounds in all employment policies and practices. In this regard, it may already be said that the word “unfair” in our legislation arguably has an important value. It forces us to always consider the impact of discrimination and what makes it unfair. The real danger of simply working with a deeming provision and the distinction between discrimination and non-discrimination (as the Convention does) is that the underlying unfairness of discrimination will never be unpacked and we will never truly appreciate the marginalisation of, and the effect of that marginalisation on, all the different groups in society

<sup>23</sup> In articles 1(a) and 5(2) respectively.



we seek to protect. Ultimately, only a true appreciation of marginalisation will lead to true transformation (especially in case of the lesser-known grounds). And, as will be argued below, the so-called dangers of “fairness” are more apparent than real – in the South African context it has developed into a clearly defined and quite stringent approach to the acceptability or otherwise of discrimination.<sup>24</sup> In any event, the formulation of idiosyncratic standards to balance competing interests in the area of employment discrimination law across different jurisdictions – standards that depart from the exact wording of ILO Convention 111 – is hardly contentious.<sup>25</sup> Put differently – if “fairness” in the discrimination context is given content in a sensible and responsible manner, it neither violates the ILO Convention, nor international best practice.

The interpretive influence of the Constitution on the EEA is, as point of departure, shaped by the principle of subsidiarity (or, as some would have it, constitutional avoidance): where legislation gives effect to a constitutional right (as the EEA does) any remedy for infringement of that right should be sought in the ordinary legislation itself.<sup>26</sup> At a first level, this simply means that the EEA is the primary source of employment equality law. By necessary implication it also means that, in the absence of constitutional challenge, the role of the Constitution becomes that of an interpretive guide to the EEA. It also means that the magnitude of this interpretive role will, and has to, vary according to the detail contained in legislation. In turn, this simply means that we can (rightly) expect a large measure of Constitutional influence where legislation itself is sparse (such as on the meaning of unfair discrimination in the EEA). Having said this, one should also be mindful of the dictate that even where legislation is clear, interpretation should be purposive and compliant with the Constitution, even more so where legislation relates to transformation and is “umbilically linked to the Constitution”.<sup>27</sup>

It must be mentioned that the Constitution – as an interpretive guide to the EEA – has muddied the waters in at least one important respect. Perhaps the biggest challenge to our equality law has been to find a sensible articulation between affirmative action and unfair discrimination. What we do know is that affirmative action that oversteps the boundaries of the law may constitute unfair discrimination while affirmative action that does not, is not unfair discrimination. This much is clear from at least two Constitutional Court judgments<sup>28</sup> and the EEA.<sup>29</sup> The challenge relates to how to get to this point. The Constitution declares discrimination on a listed ground to be

<sup>24</sup> It has been pointed out that instead of using “fairness”, one could interpret “the inherent requirement of a job” along the lines of “fairness” as developed in South Africa – see Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future* 33 ff.

<sup>25</sup> 33 ff.

<sup>26</sup> See, eg, *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) para 51:

“where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.”

<sup>27</sup> See *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) paras 51-53.

<sup>28</sup> *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 36; *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC).

<sup>29</sup> Section 6(2) of the EEA.

presumptively unfair – and this while all exclusionary decisions in the interest of affirmative action in the employment context are always based on listed grounds (race or sex). By definition, then, the Constitution seems to declare affirmative action to be presumptively unfair discrimination and, at best – and if lawful – fair discrimination. The idea that affirmative action is at best fair discrimination has been addressed and rejected decisively by our highest court.<sup>30</sup> Even so, the point for now is that one should not allow difficulties around the constitutional onus provision (or simply a firm belief in the need for redress) to unduly influence the development of our anti-discrimination law – especially in the form of strict adherence to the view that there can be no such thing as “fair” discrimination.

### **3 The judicial development of employment discrimination law and trends in litigation prior to the amendments**

#### **3 1 The structure and application of unfair discrimination**

##### *3 1 1 Discrimination, unfair discrimination, and the justification of unfair discrimination*

Bearing the dictates of interpretation in mind, the past two decades or so have undeniably shown that the structure of “unfair discrimination” established by the Constitutional Court in *Harksen v Lane NO and Others* (“*Harksen*”)<sup>31</sup> remains determinative in employment discrimination cases. In terms of this view – building on a clear distinction between differentiation, discrimination, and unfair discrimination – discrimination (not unfair discrimination) only exists when (in the employment context) a sufficient link is shown between the policy or practice in question and an identifiable and applicable ground of discrimination. This link, of course, may be direct or indirect. In subsequent decisions – of the Labour Courts, the Supreme Court of Appeal (“SCA”), as well as the Constitutional Court<sup>32</sup> – one recurring theme has been a clear measure of comfort with the basic distinction made in *Harksen* as well as with the idea of the “unfairness” or “fairness” of “discrimination”. Furthermore, this has been the approach not only in cases where the constitutionality of legislation has been attacked (as was the case in *Harksen*), but also where the alleged discriminatory conduct of both the state and private organisations was under scrutiny.<sup>33</sup> This experience clearly contradicts the view that the word “unfair” (especially in the employment context) is no more than a tautological adjective, a meaningless reminder of what “discrimination” in any event means. In fact, *Harksen* went further and gave us a baseline approach to unfairness:

<sup>30</sup> See *Van Heerden and Minister of Correctional Services* 2004 6 SA 121 (CC) para 36. See also *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC).

<sup>31</sup> 1998 1 SA 300 (CC).

<sup>32</sup> For the most recent judgments, see the text to part 3 1 4 below.

<sup>33</sup> See *Hoffman v SA Airways* 2000 21 ILJ 2357 (CC) and *Mbana v Shepstone & Wylie* 2015 36 ILJ 1805 (CC).



“In the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.

In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

...

- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving ‘precision and elaboration’ to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.”<sup>34</sup>

Put differently, *Harksen* made it clear that “fairness” primarily depends on the impact on the complainant, but also depends on the vulnerability of the group in question, the purpose of the measure in question and “any other relevant factors”. The court also clearly stated that fairness is determined by the cumulative effect of these factors.

Where things have become a bit muddled is that *Harksen* also tells us – at least in the constitutional context – that unfair discrimination may be justified in terms of section 36 of the Constitution.<sup>35</sup> This section, however, only applies to laws of general application, clearly not to individualised conduct. In at least one case, even though decided in the context of PEPUDA, the Constitutional Court seemed to express doubt about the application of section 36 justification factors in the context of individualised discriminatory conduct.<sup>36</sup> But at the same time, the meaning of “fairness” as developed by the Constitutional Court itself – already apparent from the *Harksen* formulation quoted above – and also applied in the context of discriminatory conduct, includes more objective, “justification” factors. In fact, it seems easy to argue that in *Harksen*, the

<sup>34</sup> *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) paras 51-52.

<sup>35</sup> Section 36(1) of the Constitution states that

“[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”

<sup>36</sup> *MEC For Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 70 where the court said, with reference to section 14 of PEPUDA (which provides a list of factors influencing the fairness or otherwise of discrimination):

“The list of factors in s 14(3) includes issues that traditionally fall under a fairness analysis ... and questions normally relevant to a limitation analysis under s 36(1) of the Constitution. Accordingly, the fairness test under the Equality Act as it stands may involve a wider range of factors than are relevant to the test of fairness in terms of s 9 of the Constitution. Whether that approach is consistent with the Constitution is not before us, and we address the question on the legislation as it stands”.

Constitutional Court already made the idea of proportionality (in the sense of the importance of the goal, the extent of the infringement and the relationship between means and ends), which is the cornerstone of justification (in the constitutional sense), an integral part of “fairness” – as it arguably should be.

What is also true is that the EEA continues to specifically mention only two defences to unfair discrimination claims – an inherent requirement of a job and affirmative action consistent with the purpose of the EEA.<sup>37</sup> Mention of these defences is paired with the statement that should these defences apply, the employer’s conduct “is not unfair discrimination”. This gave rise to the question whether these are the only defences available to discrimination claims and also whether the presence of these defences means there is no discrimination to begin with, whether it makes the discrimination fair, or whether it justifies unfair discrimination. By the time the amendments to the EEA came into force, the prevailing judicial view was that the two defences mentioned in the EEA are not the only available defences (but that employers may argue “fairness” grounds in addition to these defences); that it is not necessary to enquire whether these defences make otherwise unfair discrimination fair; that the two defences mentioned rather should simply be seen as complete defences which defeat the case; and, based on the express wording of the old section 11 of the EEA, it was not possible for discrimination in the employment context to be “justified”.<sup>38</sup>

These developments also address three arguments raised over the years. First, there is the argument that in the context of South African employment discrimination law, there is no such thing as fair discrimination,<sup>39</sup> an argument clearly not supported by case law. Secondly, a more refined version of this argument held that the acceptability of “discrimination” is and should be determined not by “fairness”, but by legitimacy and proportionality.<sup>40</sup> This argument is addressed by the reality that proportionality – as already evidenced by *Harksen* – is part and parcel of our view of “fairness”. Thirdly, the flip-side of the second argument mentioned is that, given the importance of equality, we need a more exacting standard than fairness in our search for the limits of discrimination.<sup>41</sup> As the further discussion will show, this argument loses sight of one simple reality: the idea of “fair” discrimination – started in *Harksen* and developed over the years – is, in fact, subject to a clear and stringent standard which rests on four pillars – dignity (as the prime determinant), rationality, proportionality and individual accommodation.

### 3 1 2 *The test for recognition of unlisted grounds of discrimination*

*Harksen* (with reference to *Prinsloo v Van der Linde* (“*Prinsloo*”)<sup>42</sup>) also gave us a test for the recognition of so-called unlisted grounds of discrimination:

<sup>37</sup> S 6(2) of the EEA.

<sup>38</sup> See the text to part 3 1 4 below.

<sup>39</sup> This is the view of Du Toit (2014) *ILJ* 2623.

<sup>40</sup> See B Hepple “Can discrimination ever be fair?” in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D’Arcy du Toit* Juta (2012) 1 ff.

<sup>41</sup> See 1 ff.

<sup>42</sup> 1997 3 SA 1012 (CC).

“There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.”<sup>43</sup>

This test was subsequently expanded on by the Constitutional Court,<sup>44</sup> but it has never strayed from its early direction: discrimination is about an impact on dignity – it is about attributes or characteristics that make us who we are. It is not about mere difference – in the words of the Constitutional Court:

“[t]he Constitution ... prohibits the breach of equality not by mere fact of difference but rather by that of discrimination. This nuance is of importance so that the concept of equality is not trivialised or reduced to a simple matter of difference.”<sup>45</sup>

This test for unlisted grounds was also accepted in the Labour Courts.<sup>46</sup> What is also true is that for a brief period of transition, the general prohibition on discrimination in employment was contained as an unfair labour practice in Schedule 7 to the LRA. During this time, unfair discrimination was prohibited on “any arbitrary ground, including” the listed grounds. This resulted in at least one decision – *Kadiaka v Amalgamated Beverage Industries* (“*Kadiaka*”)<sup>47</sup> – where the court took the word arbitrary at face value and

<sup>43</sup> 1998 1 SA 300 (CC) para 49.

<sup>44</sup> Already in *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) para 53 the court elaborated as follows:

“I would caution against any narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. *In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features ...* Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in society.”

In accepting citizenship as an unlisted ground of discrimination the Constitutional Court in *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC) (“*Larbi-Odam*”) quoted with approval from *Andrews v Law Society of British Columbia* 1989 56 DLR (4th) 1 (at 32):

“Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending”.”

The court in *Larbi-Odam* went on to state that

“citizenship is a personal attribute which is difficult to change. In that regard, I would like to note the following views of La Forest J, from [*Andrews* par 39]: “The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.”

What all of this seems to say is that the test for recognition of unlisted grounds is quite strict and includes the identification of a distinct group, sharing commonality and worthy of protection; the ground has to be related to the listed grounds in that it impacts, or has the potential to impact dignity; this required relationship with the listed grounds also requires immutability; immutability means that a person cannot control the attribute or characteristic in that it cannot be changed (albeit temporarily) by conscious action and, to the extent that the attribute or characteristic may be changed, this can only be done at unacceptable cost. See also the remarks focusing on the impact of the vulnerability and dignity of HIV – positive persons the court made in *Hoffman v SA Airways* 2000 21 ILJ 2357 (CC) 2370-2371 in the course of recognising HIV status to be an unlisted ground (for purposes of the Constitution).

<sup>45</sup> *Hassam v Jacobs NO and Others* 2009 5 SA 572 (CC) para 30 (per Nkabinde J).

<sup>46</sup> See *Middleton v Industrial Chemical Carriers (Pty) Ltd* 2001 22 ILJ 472 (LC); *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC); *IMATU v City of Cape Town* 2005 11 BLLR 1084 (LC).

<sup>47</sup> *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC).

sought discrimination in the lack of purpose or capriciousness of employer conduct, rather than in an identifiable ground based on the dignity inherent in the concept of discrimination. This decision – in our view incorrectly decided – is dealt with below.<sup>48</sup> Perhaps significant for purposes of the discussion to follow, is that the Labour Appeal Court (“LAC”) went as far as equating the word “arbitrary” in section 187(1)(f) of the LRA (which follows the same wording as the old Schedule 7 prohibition on discrimination) with the meaning of “unlisted” grounds as established in *Harksen*. In dealing with a dismissal based on depression in the context of section 187(1)(f) of the LRA, the court in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*<sup>49</sup> had this to say:

“It is not strictly necessary to decide whether the concept of ‘disability’ as set out as a ground in section 187 (1) (f) describes the condition suffered by respondent ... even were [the] condition not to be considered a form of disability as set out in section 187 (1) (f), unquestionably the discrimination suffered by respondent as a result of his ‘mental health problem’ had, in the words of Stein AJ, ‘the potential to impair the fundamental dignity of that person as a human being or to affect him in a comparably serious manner’. Expressed differently, the question can be posed thus: did the conduct of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent? See for the source of this approach, *Harksen v Lane* NO [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC). In my view, the question must be answered affirmatively. The conduct of appellant clearly constituted an egregious attack on the dignity of respondent and accordingly falls within the grounds set out in section 187 (1) (f) of the Act”.

Further guidance from the LAC comes from an unlikely context. As we know, section 5 of the LRA curiously makes use of the word discrimination in the context of protection of freedom of association. In *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight and Dock Workers Union*<sup>50</sup> the court stated with reference to section 9(3) of the Constitution and union membership:

“[A]s far as the anti-discrimination clause (section 9(3)) is concerned, it prohibits discrimination on the grounds listed therein or on analogous grounds. Union membership is not a listed ground and it is unlikely to be considered an analogous ground because such discrimination does not involve the requisite level of injury to human dignity.”<sup>51</sup>

### 3 1 3 *The test for causation and the onus of proof*

The courts also determined that the onus to establish discrimination in both the constitutional and employment contexts remained on the applicant (with the employer called on to show it was fair, if on a listed ground). The pre-amendment wording of section 11 of the EEA facilitated this approach.<sup>52</sup> What was also evident (and this will be discussed in more detail below) is that the sting in the onus tail was not so much in what it clearly meant, but what it was seen to say about the structure of “unfair discrimination”. As far as the test for causation was concerned, the courts were not particularly consistent. The

<sup>48</sup> See the text to part 4 3 below.

<sup>49</sup> *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* 2009 30 ILJ 2875 (LAC) paras 24-26.

<sup>50</sup> 2013 34 ILJ 335 (LAC).

<sup>51</sup> Para 18.

<sup>52</sup> See the text to n 9 above.

early decision of *Louw v Golden Arrow Bus Services (Pty) Ltd*<sup>53</sup> raised three possibilities – any contamination by a ground of discrimination is enough, an immaterial contamination is not sufficient, or discrimination exists to the extent of the contamination. In general, one could say that the courts mostly applied a “but for” test (and sometimes a more standard approach to causation, largely flip sides of the same coin).<sup>54</sup> For example, in *Department of Correctional Services v Police and Prisons Civil Rights Union (“POPCRU”)*<sup>55</sup> we find the following remarks:

“The appellants’ counsel conceded most of the issues previously raised by his predecessor. These included a concession that the dress code operated disparately among correctional officers and was directly discriminatory on all three proscribed grounds, namely religion, culture and gender. The concession was well made. Indeed, but for their religious and cultural beliefs, the respondents would not have worn dreadlocks. And but for that fact and their male gender, they would not have been dismissed. The disparate treatment constituted discrimination and the appellants’ motives and objectives of the dress code are entirely irrelevant for this finding.”<sup>56</sup>

It has to be said that the “but for” test of causation fits easily with the differential treatment inherent in direct discrimination. In indirect discrimination cases, the link is established through proof of a disproportionate impact of a policy or practice on a protected group coupled with proof of membership of the prejudiced group. This requires an often statistically complex comparison of compliance rates between different groups (where those groups are distinguished based on a ground of discrimination).

### 3 1 4 *The last words of the Constitutional Court, the SCA, the LAC and the Labour Court on the meaning of “unfair discrimination” prior to the amendments*

In case of any uncertainty about the state of our employment discrimination law by the time the amendments came into force, it is perhaps worthwhile to mention a number of decisions on employment discrimination handed down by different courts immediately prior to the amendments.

In *Mbana v Shepstone & Wylie*<sup>57</sup> the Constitutional Court considered an application for leave to appeal where the complainant alleged discrimination based on her “race and social origin or an arbitrary ground”. Her complaint was based on the refusal by a firm of attorneys to allow her to commence employment without having finished her LLB degree (the allegation was made that the firm had allowed other candidates – one black and two white – to commence employment without LLB degrees). In considering her prospects of success, a unanimous court stated, as point of departure and with reference to *Harksen*, that:

“The EEA proscribes unfair discrimination in a manner akin to section 9 of the Constitution. Apart from permitting differentiation on the basis of the internal (sic) requirements of a job in section 6(2)(b),

<sup>53</sup> 2000 21 ILJ 188 (LC) 197-198.

<sup>54</sup> See, eg, *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC).

<sup>55</sup> 2013 34 ILJ 1375 (SCA). See also *Hoffman v SA Airways* 2000 21 ILJ 2357 (CC).

<sup>56</sup> 2013 34 ILJ 1375 (SCA) para 18.

<sup>57</sup> 2015 36 ILJ 1805 (CC). See also the remarks of Jafta J in *Sali v National Commissioner of the SA Police Service* 2014 35 ILJ 2727 (CC) paras 7-16.

the test for unfair discrimination in the context of labour law is comparable to that laid down by this court in *Harksen*.

The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair<sup>58</sup> (footnotes omitted).

This statement clearly shows that *Harksen* remains determinative of discriminatory conduct in the employment context and that "fairness" is the ultimate determinant of the acceptability or otherwise of discrimination (despite the specific mention of "an inherent requirement of a job" in section 6(2) of the EEA).<sup>59</sup> Particularly interesting in this regard was the acceptance by the court that "business needs of the respondent dictated that these [other] candidate attorneys be retained under these circumstances", followed later by the statement that:

"[I]t must be stressed that an employer's business and operational needs will not simply be accepted on the employer's own say-so. It must be shown, objectively, that there are genuine and legitimate business and operational needs that justify the differential treatment of employees. We believe that, in this case, the respondent has adequately done so."<sup>60</sup>

Clearly – and in line with the approach to fairness laid down in *Harksen* – the court was willing to consider (and this may be seen both as part of rationality and as part of proportionality as an aspect of fairness) the "genuine and legitimate business and operational needs" as an important factor influencing the fairness of discriminatory conduct in employment. The SCA also adopted the *Harksen* approach in *POPCRU*<sup>61</sup> and was quite comfortable seeing the "inherent requirement of a job" as justification for otherwise unfair discrimination (despite upholding the claim).<sup>62</sup>

In a comprehensive judgment handed down barely two months before the amendments to the EEA were promulgated, the LAC was called on to consider – in *SA Airways v Jansen van Vuuren*<sup>63</sup> – a claim of unfair discrimination on the basis of age. The claim arose from a collective agreement which provided for the lower payment of pilots over the age of 60 compared to pilots under the age of 60. The employer sought to justify the discrimination on the basis that this differentiation was the product of collective bargaining and contained in a collective agreement. In rejecting this argument and upholding the claim, and in line with what was said above, the LAC accepted the following principles:

- (i) Despite the court being fully aware of ILO Convention 111 and its role in the interpretation of the EEA, it accepted that "material guidance is to be derived from the equality analyses that were conducted under the Constitution and the interim Constitution",<sup>64</sup>

<sup>58</sup> Paras 25-26.

<sup>59</sup> While the court used the word "justified" in the course of its judgment, it is clear that it was considering the "fairness" of the employer's conduct.

<sup>60</sup> Para 38.

<sup>61</sup> See the text to n 55 above.

<sup>62</sup> Paras 21, 23 and 25.

<sup>63</sup> 2014 35 ILJ 2774 (LAC).

<sup>64</sup> Para 29.



- (ii) With reference to *Harksen* and *Prinsloo*, the court adopted a two-stage analysis: “the first stage would be to determine whether the conduct or measure of the employer, which the employee is complaining about, constitutes “discrimination”. The second stage is to consider whether it is “unfair”,<sup>65</sup>
- (iii) As far as the onus is concerned, and despite the absence of an express deeming provision in (the old) section 11 of the EEA, the effect of (the old) section 11 of the EEA is the same as the onus provision in the Constitution – “unless the employer establishes that the discrimination is fair, it would be unfair”,<sup>66</sup>
- (iv) Section 11 of the EEA (as it was worded prior to the amendments) does not allow for justification of otherwise unfair discrimination;<sup>67</sup>
- (v) With reference to *President of the Republic of South Africa v Hugo*,<sup>68</sup> *City Council of Pretoria v Walker*,<sup>69</sup> *Hoffmann v South African Airways*,<sup>70</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (“*Leonard Dingler*”),<sup>71</sup> *National Union of Metalworkers of SA v Vetsak Co-operative Ltd*<sup>72</sup> as well as the wording of (the old) section 11 of the EEA, the court formulated the following principles relating to the fairness of discrimination:
- “no clear distinction can be drawn between the considerations involved in determining fairness and those involved when determining justification”,<sup>73</sup>
  - “ideally in determining fairness, moral considerations and the impact of the measure complained of ... should be assessed”,<sup>74</sup>
  - section 11 of “the EEA recognises that there may be considerations other than those specifically referred to in section 6(2) which may render the discrimination fair”,<sup>75</sup>
  - an inherent requirement of a job and affirmative action specifically mentioned in section 6(2) of the EEA “are complete defences to an allegation of unfair discrimination”,<sup>76</sup>
  - in determining fairness in the general sense, the court will have to exercise a value judgement based on consideration of all relevant factors. The determining factor remains the impact of the discrimination on the victim,<sup>77</sup> but relevant factors may include economic arguments, commercial requirements, the approach of

<sup>65</sup> Para 35.

<sup>66</sup> Para 36.

<sup>67</sup> Para 38. The new section 11 now expressly allows for justification – see the text to part 4 4 below.

<sup>68</sup> *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

<sup>69</sup> *City Council of Pretoria v Walker* 1998 2 SA 363 (CC).

<sup>70</sup> *Hoffman v SA Airways* 2000 21 ILJ 2357 (CC).

<sup>71</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1998 19 ILJ 285 (LC).

<sup>72</sup> *NUMSA v Vetsak Co-operative Ltd* 1996 17 ILJ 455 (A).

<sup>73</sup> *SA Airways v Jansen van Vuuren* 2014 35 ILJ 2774 (LAC) para 39.

<sup>74</sup> Para 39.

<sup>75</sup> Para 45.

<sup>76</sup> Para 45.

<sup>77</sup> This comes from *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC), *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) and *Hoffman v SA Airways* 2000 21 ILJ 2357 (CC).

competitors,<sup>78</sup> the legitimacy of the goal of the discrimination, as well as the proportionality and rationality of the mode of discrimination relative to its goal.<sup>79</sup> This, in essence, calls for a balancing of the interests of the employer with that of employees.<sup>80</sup>

Further down the ladder, the Labour Court continued to apply the *Harksen* approach to discrimination and unfair discrimination in respect of the pre-amendment EEA – in cases such as *Bandat v De Kock*<sup>81</sup> and *Brink v Legal Aid South Africa*.<sup>82</sup>

### 3.2 Trends and patterns in discrimination litigation prior to the amendments<sup>83</sup>

Despite growing certainty about the meaning and structure of “unfair discrimination” as described above, litigation of the right not to be unfairly discriminated against showed certain trends prior to 2014, trends worthy of consideration as we look to the future. First, there were relatively few discrimination cases, in all probability caused by a combination of jurisdiction vesting in the Labour Court only, uncertainty about and the challenges inherent in the concept of discrimination, as well as the fundamental reality that litigation and protection against unfair discrimination are not a good mix to begin with. Secondly, by far the majority were direct discrimination cases, with indirect discrimination finding little application in practice (due to a combination of factors – indirect discrimination is a difficult and poorly understood concept, affirmative action largely eliminates the need for indirect discrimination claims – at least on the basis of race or sex – while resort to direct discrimination claims based on unlisted grounds may eliminate the need for indirect claims based on listed grounds). Thirdly, the majority of these cases were unsuccessful. Fourthly, the unsuccessful cases were unsuccessful because they were defeated at the “discrimination” stage (and not the “fairness” stage). This was usually the result of one of three reasons: The inability of applicants to show differentiation to begin with; the development of a curious culture of unsupported reliance on unlisted grounds of discrimination evidenced by the inability of applicants to identify a ground or to show that the unlisted ground meets the test for recognition as an unlisted ground; or the inability of applicants to establish a sufficient “but for” link between the policy and the ground in question. Fifthly, in many cases reliance was placed on unfair discrimination where there was no more than a vague

<sup>78</sup> These three factors come from *Hoffman*.

<sup>79</sup> This comes primarily from *Dingler* where the court stated that “[d]iscrimination is unfair if it is reprehensible in terms of society’s prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational” (at 295 H).

<sup>80</sup> *SA Airways v Jansen van Vuuren* 2014 35 ILJ 2774 (LAC) paras 39-45. The idea that fairness is not one-sided but remains a double-edged sword and always calls for a balancing act comes from *Vetsak*.

<sup>81</sup> 2015 36 ILJ 979 (LC) para 16 ff.

<sup>82</sup> 2015 36 ILJ 1020 (LC) para 64 ff.

<sup>83</sup> This is a restatement of the review included in Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future*.

notion of unfairness, but little appreciation that a link with an identifiable and applicable ground in a discrimination case is necessary. Rather than being a frontline mechanism for the recognition of dignity, the elimination of marginalisation and transformation in workplaces, unfair discrimination was often reduced to a vague and opportunistic (if unsuccessful) avenue triggered not by insult to dignity. Sixthly, the discrimination cases that were successful were the so-called affirmative action cases (where the employer in effect conceded the merits of “discrimination” and bore the onus of proving that the affirmative action was consistent with the purpose of the EEA). Lastly, because most discrimination cases were defeated at the discrimination stage, the courts never really grappled with the available defences against discrimination claims – either “fairness” generally or in the sense of an “inherent requirement of a job”.

## 4 The 2014 amendments to the EEA<sup>84</sup>

### 4.1 Introduction

For present purposes, and in line with the theme of the earlier discussion, the important amendments were those with the potential to impact on both the structure and our understanding of unfair discrimination law. With this in mind, the focus necessarily is on:

- the expansion of the CCMA’s jurisdiction to include sexual harassment cases (harassment as unfair discrimination) and all unfair discrimination cases where applicants earn below the threshold;<sup>85</sup>
- the insertion of the words “any other arbitrary ground” into section 6(1) of the EEA after the list of grounds expressly mentioned in that section (ostensibly for “clarification” and to bring section 6(1) of the EEA in line with section 187(1)(f) of the LRA),<sup>86</sup>
- the inclusion of a completely overhauled section 11, dealing with the onus of proof in discrimination cases;<sup>87</sup> and
- the express prohibition of “equal pay” discrimination<sup>88</sup> and the refinement of the regulation of equal pay discrimination in the regulations published in terms of the EEA.<sup>89</sup> Note, however, that the remarks below will not focus on equal pay as such, but rather on what these provisions contribute to our understanding of unfair discrimination.

<sup>84</sup> See the Employment Equity Amendment Act 47 of 2013 which came into operation on 1 August 2014.

<sup>85</sup> Section 10(6)(aA) now allows for employees referring discrimination disputes to the CCMA for arbitration (even in the absence of consent by the employer) “if (i) the employee alleges unfair discrimination on the grounds of sexual harassment; or (b) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.”

<sup>86</sup> According to the Explanatory Memorandum to the 2012 Employment Equity Amendment Bill published in GG 35799 of 19 October 2012.

<sup>87</sup> This section is discussed in the text to part 4.4 below.

<sup>88</sup> Section 6(4) of the EEA now reads as follows:

“A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.”

<sup>89</sup> Regulations 2-7 of the Employment Equity Regulations, 2014 GN R595 in GG 37873 of 1 August 2014.

## 4.2 The jurisdiction of the CCMA

Given the reservations expressed earlier about the relative paucity of discrimination cases leading up to 2014, the broadening of the CCMA's jurisdiction already has led to a significant increase in discrimination litigation.<sup>90</sup> In principle, this development holds true potential for the contribution of discrimination law to baseline protection as well as transformation. Added to this, the powers given to commissioners in discrimination cases include not only the awarding of compensation and damages, but the making of “an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice from occurring in the future in respect of similar employees”.<sup>91</sup> At the same time, however, there are two areas of concern. First, it raises serious challenges around the capacity of the CCMA to deal with this new flood of cases. Secondly, heed should be taken of some of the trends identified in discrimination litigation mentioned earlier<sup>92</sup> – notably what we referred to as the curious culture of reliance on unlisted grounds and the fact that discrimination cases more often than not originate in a vague notion of unfairness (rather than actual impairment of dignity). The experience thus far has shown that the majority of cases referred to the CCMA are so-called “arbitrary ground” cases (of which a large number have been equal pay cases).<sup>93</sup> Put differently, the initial experience after the amendments has been one of an increase in the CCMA caseload, fuelled by a large number of “unlisted” or “arbitrary” ground cases.

It is submitted that there are a number of ways the CCMA may, as a point of departure, address this challenge. This, of course, also depends on how we view the meaning of “arbitrary ground” in section 6(1)<sup>94</sup> and how we view the new onus provision in section 11.<sup>95</sup>

- In all discrimination cases, the CCMA may insist on compliance with section 10(4)(b) of the EEA prior to conciliation. This section requires evidence to the satisfaction of the CCMA at the time of referral that the “referring party has made a reasonable attempt to resolve the dispute”. This could be interpreted to mean that the allegation of discrimination was properly raised with the employer (along the lines explained below), that the employer was given the opportunity to respond to these allegations and that this response was considered and rejected by the referring party. This information may already assist in reaching sensible solutions at conciliation.

<sup>90</sup> Information provided to the authors by the CCMA shows that in the immediate period after the amendments – until 31 March 2016 – 3 943 discrimination cases were referred to the CCMA. The communication with the CCMA is on file with the authors.

<sup>91</sup> Section 50(2)(c) read with section 48 of the EEA.

<sup>92</sup> See the discussion in the text to part 3.2 above.

<sup>93</sup> Of the referrals to discrimination in the period up to 31 March 2016, 2516 referrals were based on an “arbitrary ground” (64% of the total). There were 1085 referrals concerning equal pay, of which 881 were based on an “arbitrary ground”. The communication with the CCMA is on file with the authors.

<sup>94</sup> Discussed in the text to part 4.3 below.

<sup>95</sup> Discussed in the text to part 4.4 below.

- Furthermore, it is a fundamental principle of our law that every litigant is at least entitled to know what the case against him or her is. To the extent that the word “allege” in the amended section 11 really means “allege”, one could at least expect employees to refer their cases properly (that is, to “allege” properly) – in the sense that the referral identifies the policy or practice concerned, the ground or grounds allegedly applicable (especially in case of an unlisted ground) and the reason why the applicant says it constitutes discrimination (that is, causation). If not, any employer faced with a mere allegation of discrimination has to consider at least 12 broad possible employment practices<sup>96</sup> and 20 possible listed grounds – let alone possible unlisted grounds. Put differently, a bland allegation of discrimination could be any one of 240 different discrimination scenarios (taking only listed grounds into consideration). In this regard, there are two rules<sup>97</sup> the CCMA may fruitfully use prior to arbitration – rule 19, which empowers the CCMA or an arbitrating commissioner to direct the referring party to deliver a statement of case containing the material facts on which reliance is placed and the legal issues arising from those facts, and rule 20, which empowers the CCMA to direct the parties to hold a pre-arbitration meeting. Even in the absence of such a statement or meeting (and despite the onus being on the employer), there is also nothing wrong with presiding commissioners using their powers of “narrowing the issues” at the outset of proceedings to tease out this information. Furthermore, it is submitted that commissioners may also use their discretion to expect the applicant to testify first and to produce “some credible evidence” that unfair discrimination might be involved at which point the onus proper passes to the employer to prove the absence of discrimination, fairness or justification. This evidence should primarily be about the existence of discrimination<sup>98</sup> (that is, whether there is differentiation, a valid comparison, an identified and applicable ground of discrimination, and a sufficient link between the differentiation and the ground in question). Our experience in the area of automatically unfair dismissals makes it clear that such an approach – of placing an initial evidential burden on the employee – does not violate a provision that the substantive burden remains on the employer.<sup>99</sup> To some extent, these remarks have found judicial support in the Labour Court: in *Pioneer Foods (Pty) Ltd v Workers Against Regression*<sup>100</sup> where it was held that a discrimination award resulting from proceedings where there

<sup>96</sup> In section 1 of the EEA there is a definition of “employment policy or practice” which includes (in a non-exhaustive list) 13 broad policies and practices, inclusive of dismissal. Discriminatory dismissal is still dealt with in terms of sections 187(1)(f) and 191(5)(b) of the LRA (which assigns jurisdiction to the Labour Court) and is left aside for the present discussion.

<sup>97</sup> See the Rules for the Conduct of Proceedings before the CCMA GN 223 in GG 38572 of 17 March 2015.

<sup>98</sup> Not unfair discrimination – the presumption of unfairness follows if a link is established with a listed ground (ie if discrimination is established).

<sup>99</sup> See, eg, *Mashava v Cuzen & Woods Attorneys* 2000 21 ILJ 402 (LC) 407 and *Kroukam v SA Airlink (Pty) Ltd* 2005 26 ILJ 2153 (LAC) paras 28 and 88.

<sup>100</sup> 2016 37 ILJ 2872 (LC).

was an absence of identification of the (unlisted) ground in question is both reviewable and appealable.<sup>101</sup>

- Commissioners will do well to constantly bear in mind that there are many ways to defeat allegations of discrimination: for example, the absence of a valid comparison (where appropriate and needed); the inapplicability of the alleged listed ground of discrimination; the inability to identify an unlisted ground of discrimination, or the inability to show that an (identified) unlisted ground meets the required test for recognition; the absence of a “but for” link<sup>102</sup> (in direct discrimination cases) or a disproportionate impact (in indirect discrimination cases); and only then, consideration whether the discrimination was rational and not unfair, or otherwise justifiable (as to this, see the remarks below).
- If discrimination is alleged on an arbitrary ground, the full onus, of course, remains on the employee. Most of the remarks made above are also applicable here, but there is one important further consideration. Section 6(1) prohibits discrimination not on “arbitrariness” (that is, a vague feeling that there is differentiation and no good reason), but on an “arbitrary ground”.<sup>103</sup> There is a difference between the two – discrimination requires identification of a ground. To the extent that “arbitrary ground” means the same as the established meaning of “unlisted grounds” (as discussed above, and it will be submitted below that it does), many spurious discrimination cases should already be dismissed on this basis.<sup>104</sup>

In summary, given the ease of access to the CCMA, it has been called on to deal with a large number of discrimination cases. But the proper application of the law, the onus and its own procedures may serve to ferret out the good from the bad, often at a stage early enough or quickly enough to not create an undue burden. This will enable the CCMA to focus on “real discrimination” and, in so doing, give discrimination law a better chance to flourish, not only as baseline protection, but also as a force for transformation.

#### 4 3 The structure of unfair discrimination – the meaning of “or any other arbitrary ground”

An “arbitrary ground” as a prohibited ground for differentiation was initially included in the repealed Schedule 7 to the LRA. As originally enacted, the EEA itself did not contain a similar phrase although it did find a place in section 187(1)(f) of the LRA which characterised discriminatory dismissals as automatically unfair dismissals. The 2014 amendments introduced the concept of an “arbitrary ground” into the EEA. The explanatory memorandum to the amending statute stated that this amendment was introduced in order to bring the EEA in line with section 187(1)(f) of the LRA.<sup>105</sup>

<sup>101</sup> Para 33.

<sup>102</sup> See the discussion in the text to part 3 1 3 above.

<sup>103</sup> See the discussion in the text to part 4 4 below.

<sup>104</sup> See the reference to the *Pioneer Foods* case in the text to n 100 above.

<sup>105</sup> See the text to n 86 above.



As to the meaning of “or any other arbitrary ground”, we have also had the benefit of at least one academic view – that of D’Arcy du Toit.<sup>106</sup> According to Du Toit, relying on *Kadiaka*,<sup>107</sup> arbitrary means “capricious”; its introduction broadens “the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational” and, in so doing, “places an additional remedy at workers’ disposal which may further encourage employers to pay serious attention to workplace practices and procedures”. In coming to this conclusion, Du Toit relies heavily on the view that the re-introduction of the word “arbitrary” signifies a decisive break from especially Constitutional Court jurisprudence which expressly ties discrimination to dignity and grounds impacting on dignity.<sup>108</sup>

There is no doubt that Du Toit is correct in his assessment that should section 6(1) be interpreted to in effect include a general right to rational differentiation, it would have a sweeping effect on the employment landscape. But, it is submitted that this view is wrong, for a number of reasons. *First*, to state the obvious, the EEA does not prohibit “differentiation”, it prohibits “discrimination”. Equality jurisprudence has consistently made it clear that, while there is a right to equality before the law in section 9(1) of the Constitution, which is taken to mean protection against irrational differentiation, *this right is distinct from protection against discrimination* (or, for that matter, unfair discrimination in sections 9(3) to 9(5) of the Constitution). The same jurisprudence has made it clear that differentiation in the section 9(1) sense can only ever be discrimination if the differentiation is based on a ground contemplated in section 9(3) to 9(5) – listed or unlisted (in the sense of an impact on dignity). *Secondly*, section 6(1) of the EEA does not prohibit “differentiation”, “arbitrariness” or “arbitrary discrimination”, it prohibits unfair discrimination on an “arbitrary ground”. It was mentioned earlier that the Constitutional Court has held that:

“[t]he Constitution ... prohibits the breach of equality not by mere fact of difference but rather by that of discrimination. This nuance is of importance so that the concept of equality is not trivialised or reduced to a simple matter of difference.”<sup>109</sup>

The Constitutional Court has also stated that:

“Discrimination is a particular form of differentiation. Unlike ‘mere differentiation’, discrimination is differentiation on illegitimate grounds or on grounds that have historically been associated with patterns of disadvantage.”<sup>110</sup>

In other words, the differentiation tail should not wag the discrimination dog. Both discrimination as a concept and the wording of section 6(1) of the EEA beg identification of a ground. In this regard, the muddle created by *Kadiaka* is best illustrated by exactly the quotation from that case Du Toit relies on:

<sup>106</sup> Du Toit (2014) *ILJ* 2623.

<sup>107</sup> See the text to n 47 above.

<sup>108</sup> Du Toit (2014) *ILJ* 2624 – 2628. The two quotations are at 2627 and 2628.

<sup>109</sup> *Hassam v Jacobs NO and others* 2009 5 SA 572 (CC) para 30 (per Nkabinde J).

<sup>110</sup> *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 43.

“In my view ... unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. But even if there is a reason, the discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job-seeker ...”.<sup>111</sup>

*Kadiaka* shows a clear confusion in thinking between “arbitrariness” (in the sense of irrational differentiation) and an “arbitrary ground” (in the sense of a reason for, or identifiable ground that must exist, before discrimination can be said to exist). For discrimination you always need a ground, for arbitrariness (or irrationality) you do not. In fact, if one does view the meaning of “arbitrary” in section 6(1) as “arbitrariness”, the phrase “arbitrary ground” becomes a nonsensical oxymoron. After all, the apotheosis of arbitrariness is complete randomness – there cannot be any ground. It is then that one will find statements emanating from the CCMA as curious as the following:

“It is not possible to state the ground on which they were discriminated against, save to say it appears to have been entirely arbitrary.”<sup>112</sup>

*Thirdly*, section 6(1) prohibits discrimination through the phrase “or on any other arbitrary ground” (not, it should be emphasised, “any arbitrary ground”). This phrase follows the listed grounds, which also means that the wording of section 6(1) is different to that in section 187(1)(f) of the LRA and to that of the repealed Schedule 7. It is easy to make the argument that the meaning of “arbitrary ground” is, in the first instance, to be determined by reference to the preceding listed grounds. They are, as we know, all about dignity (not arbitrariness). This already means that the established test for unlisted grounds should remain controlling. *Fourthly*, and in any event, even in the context of section 187(1)(f) – where the word “arbitrary” *precedes* the listed grounds (as was the case with the old Item 2(1)(a) of Schedule 7) – the LAC adopted the established test for unlisted grounds to give meaning to the word “arbitrary”<sup>113</sup> (and here we have to bear in mind that section 6(1) was amended to bring it in line with section 187(1)(f) of the LRA). *Fifthly*, if one reads “arbitrary ground” in conjunction with the new section 11(2),<sup>114</sup> it is clear that the irrationality of differentiation itself (as the flip-side of “arbitrary”) will not win a discrimination case based on an arbitrary ground. The complainant also has to show discrimination (which needs an identifiable ground) and unfairness.<sup>115</sup> In this sense, arbitrariness/irrationality is clearly subjected to the established notions of discrimination and unfair discrimination, as it should be. While it is true that the provisions of section 11(1), which deals with discrimination on listed grounds, makes it clear that irrationality might “win” a discrimination claim, the section also makes it clear that discrimination (in the sense of direct or indirect differentiation on a listed ground) has to exist to begin with (before rationality is considered). Put differently, irrationality itself does not win cases for complainants, the *irrationality of unfair discrimination*

<sup>111</sup> *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) para 43.

<sup>112</sup> *SAMWU obo Nhlanhla / Hibiscus Coast Municipality* 2016 7 BALR 751 (CCMA).

<sup>113</sup> See *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* 2009 30 ILJ 2875 (LAC).

<sup>114</sup> Section 11 is quoted in the text to part 4.4 below.

<sup>115</sup> See, *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) para 53.

(in its established meaning) does. *Sixthly*, constitutional jurisprudence has told us that the defence against a section 9(1) “differentiation” allegation is “rationality”. Rationality is a fairly easy argument to make and is about the link between means and ends – about whether conduct (the differentiation) furthers a legitimate purpose. Rationality is not the same as proportionality, which also looks at how important the goal is, its impact and whether there are better (or less invasive) ways to achieve that goal.<sup>116</sup> Rationality does not mean what the court implied in *Kadiaka*. While the absence of a purpose would indeed constitute irrationality, rationality is not about the quality of a goal measured against the impact on the complainant as *Kadiaka* suggests. The Constitutional Court said the following about this in the context of section 9(1) of the Constitution:

“Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The test for determining whether section 9(1) is violated was set out by the court in *Prinsloo v Van der Linde* and *Harksen v Lane*. A law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose. The question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious”<sup>117</sup> (footnotes omitted).

Rationality and proportionality (which includes the importance of the goal measured against the impact on the complainant, as well as the question whether there were other less invasive ways to achieve the goal) are not the same. The irony, for those who want to elevate irrational differentiation in general (even without an accepted or acceptable ground) to discrimination, is the inherent danger of the argument. In those cases the allegation of discrimination is defeated simply by commercial reasons – all you need is a legitimate goal (which in the employment context would always be no more than a genuine, legitimate operational requirement or business need) and a showing that the differentiation furthers (is rationally linked to) this goal – much like substantive fairness in case of operational reasons dismissals, and much as happened in *Mbana*.<sup>118</sup> There is no requirement of proportionality (and accommodation). And the further irony, of course, is that proportionality (which requires a goal to begin with and by necessary implication requires a link between the measure and the goal) embraces rationality. This means, to the extent that proportionality already is part and parcel of our “fairness” or “unfairness” of discrimination as illustrated above,<sup>119</sup> there is no need to introduce rationality into the EEA, other than to expressly state what we already know (or to detract from the real protection of employees). *Seventh*,

<sup>116</sup> See, for a general discussion on rationality in the context of section 9(1) of the Constitution, I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 219 ff. Also note the distinction the authors make between section 9(1) rationality (based on differentiation between groups) and what they call general “rule of law” rationality (last-mentioned being premised on the general notion of arbitrariness, but limited to the exercise of public power). The EEA, of course, was expressly enacted in the context of, and to give effect to, section 9 of the Constitution.

<sup>117</sup> *Weare v Ndebele NO and Others* 2009 1 SA 600 (CC) para 46.

<sup>118</sup> *Hoffman v SA Airways* 2000 21 ILJ 2357 (CC).

<sup>119</sup> As discussed above in part 3.

and by way of illustration, we can mention that a variety of potential unlisted or arbitrary “grounds” have come before the courts and the CCMA over the last few years – including “union membership”,<sup>120</sup> “previous employer”,<sup>121</sup> “length of service”,<sup>122</sup> “geographical location”,<sup>123</sup> “successfully completing a test”,<sup>124</sup> “being too professional”<sup>125</sup> and “personal hygiene”.<sup>126</sup> And it is easy to imagine others – for instance “precarious employment”, “criminal record”, “obesity”, “experience”, “height” or “weight”, “physical endurance”, “academic qualification” (or absence thereof), “where a qualification is obtained”, or “which sports team you support”. The question simply is this – how do we decide which of these grounds should be recognised as unlisted or “arbitrary grounds”? It is submitted that the only way to do so is to resort to the *Harksen* test. Not only for the reasons already mentioned, but for two further reasons illustrating the absurdity of a contrary view. *Eighth*, then, is the reality that many persons justifiably will feel that employees or prospective employees may well be prejudiced by, for example, decisions based on geographical location, experience, criminal record, or academic qualification. The fact remains that these grounds have a decided racial dimension in our country (and in many other countries, where they have formed the bases of *indirect discrimination* claims). Put differently, these grounds look neutral, but may well have a disproportionate racial effect. Similarly, a ground like physical endurance may seem sensible and neutral in certain contexts, but may have a decided gender effect. The point is this – section 6(1) of the EEA prohibits not only direct discrimination, but also indirect discrimination (that is, where a requirement looks neutral, but has a disproportionate effect). If we simply allow recognition of every ground not listed as “arbitrary”, the express prohibition of indirect discrimination in section 6(1) of the EEA becomes a dead letter (in its stead there will always be a case of direct discrimination on an unlisted or arbitrary ground). *Lastly*, as is evident from *Kadiaka* and the list of potential arbitrary grounds given above, the view that “arbitrary ground” means arbitrariness results in a curious conflation of the existence of discrimination and its fairness. To decide whether the employer acted arbitrarily (and discriminated) means we have to consider whether the employer acted fairly (with good reason). That simply is putting the cart before the horse.

In short, the argument that arbitrary differentiation constitutes discrimination shows a clear disregard for Constitutional Court jurisprudence, the nature of discrimination, the wording of the EEA itself, LAC authority,

<sup>120</sup> *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight and Dock Workers Union* 2013 34 ILJ 335 (LAC).

<sup>121</sup> *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC).

<sup>122</sup> See *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) and *Ndlela / Philani Mega Spar* 2016 37 ILJ 277 (CCMA).

<sup>123</sup> *Duma v Minister of Correctional Services* 2016 37 ILJ 1135 (LC).

<sup>124</sup> *NEHAWU obo members / SARS* 2015 9 BALR 966 (CCMA).

<sup>125</sup> *Smith / Gauteng Provincial Legislature* 2015 6 BALR 679 (CCMA).

<sup>126</sup> *Gumede / Crimson Clover 17 (Pty) Ltd t/a Island Hotel* 2016 7 BALR 676 (CCMA).

Labour Court precedent,<sup>127</sup> the rules of statutory interpretation, not to mention (semantic) common sense. Discrimination is about infringement of dignity (or a comparably serious harm), about an identifiable and unacceptable ground and about the link (directly or indirectly) between that ground and the differentiation. Should a ground not be listed, it should meet the well-established test for unlisted grounds: it must have the potential to impair the fundamental human dignity of a person (or have a comparably serious effect) and has to show a relationship with the listed grounds.<sup>128</sup>

Following on the decision in *Pioneer Foods*<sup>129</sup> (where the court accepted that “arbitrary” means “unlisted” in its established sense), the Labour Court in *Ndudula v Metrorail – PRASA (Western Cape)*<sup>130</sup> again considered this issue. With reference to *Numsa v Gabriels (Pty) Ltd*,<sup>131</sup> constitutional developments and their legitimate impact on the interpretation of the EEA (as discussed above), the interpretation of section 187(1)(f) of the LRA in *Marsland* and its impact on interpretation of the EEA,<sup>132</sup> the clear message sent by section 11 of the EEA and also by placing *Kadiaka*<sup>133</sup> in context, the court came to the conclusion (correctly, it is submitted) that:

“The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparably similar manner, not the classification of the ground as listed or unlisted as is evident from the quotation from *Harksen*. ... Differentiation on both a listed and analogous ground amounts to unfair discrimination only if the differentiation has indeed affected human dignity or has had an adverse effect in a similar serious consequence ... the purpose of adding “*or any other arbitrary ground*” to section 6 was not to create a third category of unfair discrimination as contended for by the applicants in this matter .... The purpose of the legislator by inserting “*or any other arbitrary ground*” serves no other purpose than being synonymous with “*one or more ground*” or being synonymous with “*unlisted grounds*”.”<sup>134</sup>

Recently, in *Chitsinde v Sol Plaatje University (“Sol Plaatje”)*,<sup>135</sup> the Labour Court was once again called on to consider discrimination on an alleged arbitrary ground (a so-called “aptitude test” or written submission not required from the applicant’s competitors for employment). In a curious judgment (handed down by the same judge who decided *Pioneer Foods*, but in apparent contradiction to that earlier judgment), the court expressed

<sup>127</sup> In *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 37 ILJ 2872 (LC) the Labour Court accepted the *Harksen* test for unlisted or “arbitrary” grounds. See paras 22, 32, 55, 56 of the judgment.

<sup>128</sup> See the discussion in the text to part 3 1 2 above.

<sup>129</sup> See the text to n 101 above.

<sup>130</sup> 2017 38 ILJ 2565 (LC)

<sup>131</sup> 2002 23 ILJ 2088 (LC).

<sup>132</sup> See the text to part 3 1 2 above.

<sup>133</sup> See the text to part 3 1 2 above.

<sup>134</sup> *Kadiaka v Amalgamated Beverage Industries* 1999 20 ILJ 373 (LC) paras 73, 101, 102 (footnotes omitted).

<sup>135</sup> Case No 482/15 of 29-06-2018.

its agreement with the contradictory<sup>136</sup> views of Du Toit et al,<sup>137</sup> which we submit, for all of the reasons mentioned above, are wrong and nonsensical in light of the express wording of section 11(2) of the EEA. One interesting aspect of this judgment was the argument raised by the applicant that his non-appointment infringed his dignity. The court in *Sol Plaatje* dealt with this by first accepting the link between productive work and dignity, but then rejecting the argument by distinguishing the authority relied on by the applicant and stating that there is no right to be appointed. What makes this argument interesting is that it perhaps gives us a clue as to the fundamental motivation of proponents of the view that “arbitrary” in section 6(1) of the EEA should mean “arbitrariness” independent of dignity: employment simply is so important (especially in South Africa) that there should be a general right to rationality in the employment sphere. That arguably may be so – but that is an argument for a different time and a different place. Our argument simply is that in the broader context of all the protection available to employees in terms of carefully tailored labour legislation, the EEA is not the place for this to happen. That Act – the way it is written and the way in which it has been interpreted and applied – is aimed at the specific mischief of unfair discrimination which has been ascribed a specific meaning. What *Sol Plaatje* does clearly show is, firstly, that there is no escaping the wording of the new onus provision (discussed below) in section 11(2) of the EEA where applicants rely on so-called “arbitrary grounds: the applicant has to prove irrationality (arbitrariness) and discrimination and unfairness. Secondly, these types of discrimination cases may (and often will) fail at the first of these three hurdles (the employer only has to show commercial rationality). Again, according to the clear wording of section 11(2), the rationality of an employer’s conduct defeats a discrimination case based on an arbitrary ground, but irrationality on its own does not win such a case. Our argument simply is that, while the applicant in *Sol Plaatje* did identify a ground (the aptitude test), discrimination cases such as these should be dismissed unless the applicant, as a threshold requirement, can also show that the ground is worthy of recognition in terms

<sup>136</sup> The apparent contradiction of the view of Du Toit et al on which the court relied – quoted in n 137 below – is reliance on dignity as a fundamental principle of discrimination law to eliminate the possibility of commercial reasons trumping protection against discrimination, but then rejecting dignity to cast the net of “arbitrary grounds” as wide as possible. Also see the remarks further in the text.

<sup>137</sup> The passage relied on is the following from D du Toit *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 683: “Other” may be read as suggesting that the defining characteristic of all prohibited grounds, including listed grounds, is henceforth to be characterised as “arbitrary”. Such a reversion to the framework of Schedule 7 to the LRA, however, is excluded by the fundamental principle that it is not “lack of reason” but violation of human dignity that forms the essence of “unfairness” in all forms of discrimination proscribed by the Constitution and, hence, by the EEA. Thus, in terms of Schedule 7, demonstrating that an employer’s conduct was not “purposeless” but was motivated by commercial rationale was potentially a good defence against a claim of unfair discrimination. In the context of the EEA it is evident that a “commercial reason” in itself, of whatever magnitude, can never outweigh the fundamental right to dignity. By the same token, the reintroduction of the prohibition of discrimination on “arbitrary” grounds cannot be understood as merely reiterating the existence of unlisted grounds, which would render it redundant. To avoid redundancy, “arbitrary” must add something to the meaning of “unfair discrimination”. Giving it the meaning ascribed to it by Landman J in *Kadiaka* – that is, “capricious” or for no good reason – would broaden the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational without confining it to the latter.”



of the *Harksen* test (which was not the case in *Sol Plaatje*, nor in *Pioneer Foods* in respect of length of service).

#### 4 4 The structure of unfair discrimination – the new onus provision

Proper appreciation of the amended onus provision has at least two dimensions: First, its potential contribution in a transformative context; secondly, what it actually means, and what it tells us, if anything, about the structure and our understanding of “unfair discrimination”. The essence of the new section 11 is that the full onus of persuasion – in respect of both the presence or otherwise of discrimination as well as rationality and fairness or justification (if discrimination exists) – now rests on the employer where a case is based on a listed ground. In contrast, the full onus of persuasion remains on the employee in case of an arbitrary (unlisted) ground.

As mentioned earlier, experience has shown that most discrimination cases are lost at the discrimination stage (not on fairness or justification) for two reasons. First, “discrimination” already requires a valid comparison (in most cases), the identification of a ground of discrimination and the applicability of that ground to the facts at hand, as well as a sufficient link (causation) between the ground and the conduct complained of. In addition, in a case of discrimination on an unlisted or arbitrary ground, the case has to be made that the ground is worthy of recognition in terms of the applicable test. Put differently, there are a whole host of potential hurdles in getting from the conduct complained of to the point where we can say discrimination (in the legal sense) exists. If any one of these elements is missing, the claim fails. Secondly, closely related, there are the evidentiary problems associated with proof of discrimination claims. In cases of direct discrimination, the fundamental difficulty has always been that evidence to bolster comparison with other employees, as well as the reasons for the employer’s conduct, remain in the domain of the employer and is not readily available to complainants. This in turn means that complainants often have to rely on evidence which by its very nature is circumstantial and weak. Not surprisingly, many direct discrimination claims in the past – with the onus being on the employee to prove “discrimination” – never progressed beyond a mere allegation of discrimination. In case of indirect discrimination claims, evidentiary problems also exist. Sometimes (the easy indirect discrimination cases), the disproportionate impact on a protected group of a seemingly neutral requirement or condition is readily evident and a matter of common sense.<sup>138</sup> But often the evidence (or the raw statistics) about the impact of workplace policies or practices will fall in the domain of the employer, or will only be available through statistical impact analyses requiring varying degrees of sophistication. For indirect discrimination cases, data, which is not always available or reliable, is needed. The bold step to place an onus of persuasion on the employer – also in relation to the presence or absence of discrimination – should go a long way to ensure that evidentiary

<sup>138</sup> See, eg, *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1998 19 ILJ 285 (LC).

issues are canvassed fully and properly. At the same time, there is the danger that the floodgates of discriminatory allegations based on vague notions of unfairness, or poorly identified or merely incidental grounds will require a disproportionate allocation of CCMA resources. Earlier, suggestions were made as to how the CCMA may sensibly cope with this; the most important of which, perhaps, is a sound knowledge of discrimination law and the concomitant capacity to identify and weed out weak cases at an early stage.

The second issue that arises around the onus provision concerns the meaning of section 11 and what it tells us about the structure of our discrimination law. It is worthwhile to quote the provision in full:

**“11. Burden of proof**

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

An initial reading of section 11(1) as it relates to cases based on listed grounds already raises a number of issues. First, section 11(1) makes a clear distinction between the idea of discrimination, the idea of unfair discrimination and the idea of the justification of unfair discrimination. As such, the provision seemingly (and closely) follows the Constitution and the structure of unfair discrimination established by the Constitutional Court in *Harksen*. Secondly, in case of listed grounds, the full onus of persuasion (also about the absence of discrimination) is now on the employer which, it is submitted, is not problematic, even in light of section 9(5) of the Constitution. On a first reading then, but also considering the case law discussed earlier, it seems easy to give the following (sequential) construction to section 11 where discrimination is based on a listed ground:

- a proper allegation of unfair discrimination by the complainant;<sup>139</sup>
- followed by the opportunity of the employer to show the absence of discrimination (which could be any one or more of an invalid comparison, the inapplicability of the ground of discrimination, or the absence of the required link between the differentiation and the alleged ground);
- if the employer cannot disprove the allegation of the existence of discrimination, there is the opportunity to show – as a general and in principle unlimited opportunity – that the discrimination is “rational and not unfair, or is otherwise justifiable”;
- if the employer chooses to rely on affirmative action consistent with the purpose of the EEA, or an inherent requirement of a job and is successful, it would constitute a complete defence against the allegation of unfair discrimination.

<sup>139</sup> As to what this means, see the discussion in the text to part 4 2 above.

Having said this, Du Toit<sup>140</sup> has endeavoured to ascribe a different meaning to section 11. His view, if we understand it correctly, is that the words “such discrimination” in section 11(1) refer only to the “alleged discrimination” mentioned in the introduction to that section, that section 11 deals with proof after the allegation and, presumably, that this then means that paragraphs (a) and (b) (especially (b) which allows for fair or justifiable discrimination) relates only to the “allegation”, and not the “actual discrimination”. This, in turn, creates room for the argument that there is no question about fairness or justifiability of discrimination on a listed ground, rather a question only about the presence or absence of discrimination. In support of this construction, Du Toit relies on the much maligned judgment of Willis JA in *Woolworths (Pty) Ltd v Whitehead* (“*Whitehead*”)<sup>141</sup> to illustrate the dangers of an open-ended defence of fairness, the argument that *Harksen* is about the constitutionality of legislation (and inapplicable in the employment context), constitutional avoidance, as well as the dictates of ILO Convention 111 and the role it should play in the South African context.<sup>142</sup>

Most of these arguments have already been addressed in the course of this article. At the risk of repetition, the following may be said: First, Du Toit’s proposed interpretation of section 11 seems inconsistent with its clear wording. Secondly, it is clear that the Constitutional Court and all other courts have applied *Harksen* – and continue to do so – also in the context of employer conduct and have shown themselves to be quite comfortable with the idea of fair discrimination.<sup>143</sup> Thirdly, the principle of constitutional avoidance does not mean the Constitution plays no role in the interpretation of legislation giving effect to the Constitution (as the EEA does). On the contrary – the less legislation says (and the EEA did not and does not say much about “unfair discrimination”), the greater the role of the Constitution.<sup>144</sup> And, with the amendment of section 11, the EEA has arguably expressly been brought in line with the Constitution and the past two decades of jurisprudence. ILO Convention 111 was also dealt with earlier. The EEA prohibits unfair discrimination and allows for “special measures” (affirmative action) and an inherent requirement of a job as complete defences to discrimination claims. In this sense, the EEA is compliant with ILO Convention 111. The only complaint could be that the EEA – by consistently using the word “unfair” and calling for the word to be taken seriously – allows for more than the Convention. But it was shown earlier that the definition of discrimination in the Convention itself arguably allows for a nuanced approach to acceptable and unacceptable discrimination<sup>145</sup> and that our chosen route – that of fairness or unfairness – actually adds value to discrimination law. The so-called dangers of “general fairness” are also more apparent than real. One arguably aberrant judgment (*Whitehead*) does not detract from the validity of the broader

<sup>140</sup> Du Toit (2014) *ILJ* 2623.

<sup>141</sup> *Woolworths (Pty) Ltd v Whitehead* 2000 21 *ILJ* 571 (LAC) paras 129-149.

<sup>142</sup> Du Toit (2014) *ILJ* 2632-2636.

<sup>143</sup> See the discussion in the text to part 3 above and the cases referred to there.

<sup>144</sup> See the discussion in the text to part 2 above.

<sup>145</sup> See the discussion in the text to part 2 above.

argument. Further, if we take rationality and fairness together (in the sense of section 11) and read it against the backdrop of our jurisprudence, there are clear and strict guiding principles for the application of this general defence. We know fairness primarily is about the impact on the complainant (dignity) and that the legitimacy of the goal and the relationship between the measure and the goal are important (through rationality). It was also illustrated that proportionality is included in the way our courts approach the “fairness” of discrimination and that this includes a consideration of how important the goal is, measuring the goal against its impact, as well as a consideration of less invasive ways to achieve the goal. Under “less invasive ways” we can include the idea of reasonable accommodation, a principle clearly accepted by our Constitutional Court in the context of discrimination.<sup>146</sup> Put differently – before an employer will be successful in showing rationality and fairness (in the general section 11(1) sense of the phrase) – the employer will have to clear the hurdles of dignity, rationality and proportionality (inclusive of reasonable accommodation). Clearly this will be difficult, and it should be. But the fact that more often than not employers will fail, does not mean that the possibility does not or should not exist – especially if we take the Constitution, constitutional jurisprudence, other precedent and the clear wording of the EEA seriously.<sup>147</sup> As mentioned – if one simply combines the different policies and practices envisaged by the EEA (let alone the myriad more specific requirements and conditions in any workplace underlying those policies and practices) with the 20 listed grounds, we start off with the possibility of 240 different types of discrimination claims. Can we really say, in advance, that a proper application of dignity, rationality, proportionality and individual accommodation might not show a defence for an employer or might lead to an irresponsible dilution of protection against discrimination?

One example of how this defence – which will typically only be available where the employer seeks to promote diversity – could work is to be found in *Davids/ Peninsula Beverage Co (Pty) Ltd*.<sup>148</sup> In this case, the employer had a long standing practice that allowed its Muslim (17% of the workforce) and Hindu (1% of the workforce) employees to apply for special leave for Eid and Diwali (only these days), which do not always fall on workdays. The employer was approached by one of its shop stewards, self-styled as a devout Christian, who applied for special leave on the Day of Ascension in 2015. The application was denied, and the shop steward was told to use annual leave (which he did). After this, an internal decision involving employee representatives was taken to keep the policy in place. The shop steward referred a case of religious discrimination to the CCMA. The employer’s stated goal was to accommodate religious diversity, based on the fact that the Christian faith was already “catered” for through two public holidays – Good Friday and Christmas day. This argument by the employer clearly had nothing to do with the inherent

<sup>146</sup> See *MEC For Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 71 ff.

<sup>147</sup> To this may be added the persuasive influence of comparative law and analogous legislation – notably section 14 of PEPUDA. See the discussion in Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future* 33 ff.

<sup>148</sup> CCMA case WECT 9800-2015 of 1 October 2015.

requirement of a job, nor affirmative action. The commissioner – in applying *Leonard Dingler*<sup>149</sup> – found that the employer did discriminate, but that it was rational and not unfair: according to the commissioner the employer had a legitimate goal and acted rationally and proportionally.<sup>150</sup>

As mentioned, this approach addresses the criticism that discrimination – as a matter of South African law – can never be “fair”. It also addresses any attempted construction of section 11 of the EEA (and, by implication, the structure of unfair discrimination) based on this view. But, as pointed out earlier, it also addresses the related argument that fairness is too amorphous a concept to use as a yardstick to limit discrimination. In South Africa, the possibility of fair discrimination is not amorphous – it is founded on well-established and recognised concepts, which include proportionality. In any event, it has to be said that the idea that labour lawyers (or any lawyer, for that matter) should express unease with fairness as a legal concept or yardstick is rather strange. Fairness may always start life as an indeterminate concept, but is always given or acquires a specific meaning in a specific context – it is either predetermined in legislation, or acquires meaning through litigation and precedent. This is exactly what has happened over the last two decades – fairness in the discrimination context is, and should be, determined with reference to dignity, rationality, proportionality and individual accommodation. The mere fact that all these considerations serve to define “fairness” in the sphere of discrimination shows a clearly circumscribed and very stringent test for the fairness of discrimination.

It is submitted that section 11 means exactly what it says – and that is the meaning we ascribe to it above. First, employers may defeat discrimination claims by showing the absence of discrimination. If this is not possible, employers may attempt to show the discrimination is rational and not unfair, or otherwise justifiable, taking into consideration the four guiding principles mentioned above.

What the phrase “otherwise justifiable” in section 11(1) means is not entirely clear. It may mean justification in the section 36 Constitutional sense,<sup>151</sup> but then, as discussed above, “justification” (that is, proportionality) is already part of fairness. It may be a deliberate effort to split fairness and justification (proportionality), or to create room for proportionality to be a self-standing test (apart from fairness). It may also mean justification in the section 6(2) EEA sense – that is, where the employer relies on affirmative action or the inherent requirement of a job and these are seen as complete defences to allegations of unfair discrimination. As far as the inherent requirement of a job is concerned, the SCA recently was quite comfortable to view this defence as justification for unfair discrimination.<sup>152</sup>

<sup>149</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1998 19 ILJ 285 (LC).

<sup>150</sup> It should perhaps be mentioned that even though public holidays may be exchanged, it could never work if the remaining 82% of employees do not come to work.

<sup>151</sup> This section is quoted in the text to n 35 above.

<sup>152</sup> *Department of Correctional Services v Police and Prisons Civil Rights Union* 2013 34 ILJ 1375 (SCA). The contrary view that discrimination may not be justified expressed by the LAC in *Jansen van Vuuren* was based on the previous wording of section 11 of the EEA which did not mention justification.

But, as far as affirmative action is concerned, there is a strong argument that affirmative action should not be seen as discrimination to begin with. That argument is, in effect, based on the constitutional presumption of unfairness of discrimination on listed grounds. In other words, the stronger argument is not that affirmative action is not discrimination (in the sense of an exclusion or preference based on race or gender), but that it is not presumptively unfair discrimination. This argument has, in any event, now been overtaken in the employment context by the full onus being on employers – to show the absence of discrimination or its fairness or justification. Presumption or no presumption – the employer must show (in the face of an allegation of unfair discrimination arising from affirmative action) that its conduct “was consistent with the purpose of the Act”. “Otherwise justifiable” may also mean something else – for example, justification in the section 7 EEA<sup>153</sup> sense of the word or as provided for by Regulation 7 in respect of “equal pay” (that is, something other than proportionality or the section 6(2) EEA defences). It may also mean more or all of the above. The courts will have to provide clarity on this. In doing so, it is as well to remind ourselves that the word “justification” in its ordinary sense means “vindication” or “exculpation” – in other words, while it may have seemed as if there was something wrong, there is nothing wrong with what you did to begin with.

As a last thought, note should be taken of one curiosity arising from the equal pay regulations. Regulation 7 – headed “Factors justifying differentiation in terms and conditions of employment” – provides that a difference in terms and conditions of employment is not unfair discrimination if it is “fair and rational and is based on” one or more of seven reasons mentioned in the regulation. The first problem with this regulation is that it is seemingly not in line with section 11 of the EEA (which only requires rationality and fairness, not something more, to defeat discrimination claims). Furthermore, regulation 7(2) tells us what is “rational and not unfair” in the area of equal pay: the differentiation must not be biased against a group on any listed ground and it must be applied in a proportionate manner.

Above all, what we have to bear in mind is that the controlling equal pay provision in section 6(4) of the EEA does not prohibit a differentiation in pay. It declares differentiation *on the grounds listed in section 6(1)* of the EEA to be *unfair discrimination*. The rules and principles arising from this reality and discussed throughout this article apply with equal force. And, if anything, the principles relating to equal pay cases (as recognised in the Regulations) serve as a constant reminder of two things: first, that discrimination may be shown to be fair or justified for reasons other than the two defences expressly mentioned in the EEA – an inherent requirement of a job or affirmative action; and that the cornerstone of fairness is an absence of bias and proportionality (as discussed throughout this article). And, at the same time, the wording of the regulations shows that we should not be too pedantic about the distinction between fairness and justification.

<sup>153</sup> Section 7(1)(b) of the EEA provides for “justification” of medical testing.



## 5 Conclusion

The purpose of this article was to investigate the conceptual foundation of our employment discrimination law, how the amendments to the EEA affected it and how we can expect our law to develop into the future, especially considering the increased role of the CCMA. What is clear from this review is that at the heart of the conceptual challenge is the meaning of “unfair discrimination” (inclusive of the meaning of the grounds of discrimination). What the review also shows is that focus is often lost in semantics. Words like arbitrary, fairness, justification, rationality, proportionality and the like are used too often and too loose and fast. A careful analysis, however, shows that this is all much ado about a few basic and clear principles. First, the idea of the “fairness” or otherwise of discrimination does not violate ILO Convention 111 and is in line with the Constitution and constitutional jurisprudence, as it should be. Secondly, the “fairness” of discrimination is not completely open-ended – in essence it consists of dignity, rationality, proportionality and accommodation (which is actually part and parcel of proportionality), principles we all accept as precondition for the limitation of protection against discrimination. Thirdly, the EEA is about discrimination, not about differentiation. Discrimination always requires an identifiable and unacceptable ground. And if the ground is not specifically listed, we should recognise and respect the nature of discrimination by insisting that that ground has the potential – as do the listed grounds – to impact on the dignity of the complainant. Fourthly, despite capacity challenges (and some proposals to address this were made in this article), the increased jurisdiction of the CCMA has given discrimination litigation (as the basis for promotion of equality and transformation) a decided impetus.

In final conclusion it may well be said that there exists greater clarity about our employment discrimination law than many would think, that the amendments to a large extent confirm this clarity and, to the extent that some still maintain otherwise, we are probably talking semantics, not substance.

## SUMMARY

Important amendments to the Employment Equity Act 55 of 1998 (“EEA”) were introduced in 2014, notably conferring jurisdiction on the Commission for Conciliation, Mediation and Arbitration in employment discrimination cases, inserting the phrase ‘arbitrary ground’ in section 6(1) of the EEA, explicitly providing for (and proscribing) unfair discrimination in terms and conditions of employment and also including a brand new onus provision in section 11. In this contribution, the impact of these amendments on our conceptual understanding of employment discrimination law is considered in the context of: First, world-wide trends in the development of employment discrimination law and the South African adoption of employment discrimination law in line with those trends; secondly, the correct approach to interpretation of the EEA in light of ILO Convention 111 and the Constitution, 1996; thirdly, the judicial development of principles applicable to employment discrimination over the past 25 years, which precedent provides a lot of certainty about the conceptual foundations of our employment discrimination law; and, fourthly, the initial academic views, experiences and judicial approaches after the amendments came into effect. Ultimately, the authors argue that these amendments do not signify, nor do they require, any significant departure from the pre-amendment conceptual approach to employment discrimination established through precedent over the past 25 years.