

The Evolution of the Concept of 'Unfair Discrimination' in South African Labour Law (2006) 27 ILJ 1311

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Introduction

This article examines the meaning and scope of the prohibition of unfair discrimination against employees contained in s 6 of the Employment Equity Act ¹ in the light of the development of the concept of 'unfair discrimination' from the early 1980s onwards. In so doing, it ipso facto delineates the content and scope of the defences available to an employer faced with a claim of this nature. Though focusing on direct discrimination, ² it will suggest that the same fundamental principles are applicable to indirect discrimination. ³

Some conceptual points of departure should be noted. The prohibition of unfair discrimination by the EEA derives from the basic right to 'equal protection and benefit of the law' ⁴ contained in s 9 of the

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Constitution ⁵ and, more specifically, from the constitutional injunction that '[n]ational legislation must be enacted to prevent or prohibit unfair discrimination'. ⁶ The EEA, in other words, is the 'national legislation' giving effect to the fundamental constitutional right in the context of employment. ⁷ This raises an issue which has been subject to much uncertainty, or lack of clear definition, in our labour law: the relationship between a statutory provision and its underlying constitutional mandate. Two aspects, in particular, have been problematic: first, the interpretation of statutory limitations on basic constitutional rights and, second, the reliance to be placed on legislation giving effect to basic rights. Since these questions are integral to much of what follows, they will be considered by way of introduction.

The interpretation of limitations on basic constitutional rights

The Bill of Rights lays down a floor, not a ceiling, of rights. A statute giving effect to a basic right, in other words, is not limited to providing the minimum required by the Constitution; on the contrary, nothing prevents the legislature from giving more generous protection. ⁸ Any limitation of a basic right, on the other hand, must be interpreted restrictively. ⁹ The Constitution itself makes this clear by providing that basic rights may only be limited expressly - that is, by laws of general application - subject to the strict criteria laid down in s 36 of the Constitution. This principle, it should be noted, is not a product of constitutionalism; it is well-established in case law. In *R v Abdurahman* ¹⁰ Centlivres CJ held that 'it is the duty of the Courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community'. Similarly, in *S v De Wet* ¹¹ - an employment-related decision handed

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down at the zenith of apartheid - Boshoff AJP prefaced his reiteration of the above statement with the following observation:

'Racial discrimination of this kind [precluding blacks from being employed as barkeepers] is permitted only if the Act authorises such discrimination either by express words or by necessary implication. The Act does not authorise racial discrimination by merely giving the Minister wide powers. Unless the contrary appears it is to be presumed that the Legislature intended such powers to be exercised impartially and without racial discrimination.'

Applying this principle to the prohibition of discrimination against employees, it will be argued that differentiation among employees on any of the grounds listed in s 6 of the EEA is permissible only to the extent that (a) it does not amount to 'discrimination' in the legal sense, and hence falls beyond the scope of the prohibition, or (b) it is expressly allowed by the EEA or other statute, provided such provision meets the criteria laid down by s 36 and any applicable rules of international law.

The reliance to be placed on a statute giving effect to basic constitutional rights

A justiciable constitution, most fundamentally, 'binds a government or governments, limiting the contexts in which rules may be created, interpreted and force may be applied'; it lays down 'rules about making rules'.¹² While 'fundamental' in the sense of prevailing over all other laws, thus, a constitution at the same time represents 'second order rulemaking'¹³ from the standpoint of everyday life. Citizens are governed in their conduct primarily by the rules of common law and statutes interpreted or enacted in terms of the Constitution; only if these sources are silent, or in conflict with the Constitution, does it become appropriate to invoke the relevant constitutional provision itself.

Thus, in *Institute for Democracy in SA & others v African National Congress*¹⁴ it was held that the right of access to information contained in s 32 of the Constitution has been -

'subsumed by [the Promotion of Access to Information Act],¹⁵ which now regulates the right of access to information. . . . In my view, therefore, section 32 is not capable of serving as an independent legal basis or cause of action for enforcement of rights of access to information in circumstances such as the present where no challenge is directed at the validity or constitutionality of any of the provisions of PAIA'.

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This principle was endorsed by the Constitutional Court in *Minister of Health & another v New Clicks SA (Pty) Ltd & others*¹⁶ where the majority held as follows:

'Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.'¹⁷

It is for this reason that the article focuses primarily on the protection against unfair discrimination contained in s 6 of the EEA rather than on the underlying right in s 9 of the Constitution. In contrast, many judgments dealing with s 6 or its predecessor¹⁸ have relied heavily on interpretations of s 9 of the Constitution,¹⁹ on the apparent assumption that such decisions are equally, and directly, applicable in the employment context. In fact, the two provisions are not identical. Section 6 is premised on the realities of the world of work, especially in regulating the defences available to an employer more precisely and more strictly than would be possible or appropriate at the level of constitutional rule-making. In addition, as will be discussed below, the EEA must be interpreted in compliance with International Labour Organization (ILO) Convention 111 of 1958.²⁰ Viewing the prohibition contained in s 6 exclusively through the prism of s 9 would thus

obscure an important part of its meaning; it would (in the language of the Constitutional Court, cited above) 'bypass the legislation' by seeking to construe the statutory prohibition 'on the basis of the constitutional provision that is being given effect to by the legislation', and is to that extent 'impermissible'.

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The importance of the statutory prohibition of unfair discrimination is illustrated, in a different way, by its pre-constitutional antecedents. Originally, like much of our labour law, it was a product of the unfair labour practice jurisdiction of the Industrial Court, ²¹ evolved through case-by-case analysis whether alleged discriminatory conduct amounted to an 'unfair labour practice'. The prohibition contained in s 6 of the EEA, in contrast, derives from the constitutional right to equality. On the one hand, as Cooper points out, '[t]his difference is not insignificant in relation to the way in which the respective interests of employers and employees are weighed one against the other'. ²² The right to equality is one of the fundamental values informing the Bill of Rights. ²³ In *Fraser v Children's Court, Pretoria North & others* ²⁴ the Constitutional Court explained its importance as follows:

'There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '... need to create a new order ... in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'. ... Consistent with this ... commitment to equality are the conditions upon which there can be any justifiable limitation of fundamental rights in terms of s 33 of the Constitution. In order for such a limitation to be constitutionally legitimate it must be 'justifiable in an open and democratic society based on freedom and equality'.'

It is true that the right to fair labour practices, previously developed by the Industrial Court, has also been elevated to a basic constitutional right. Nevertheless it is, by its very nature, a broad and flexible concept, less directly premised on the intrinsic right to equal treatment and determined more by extraneous factors, ranging from commercial rationale to legal and constitutional rights. It is also bipolar in nature, being vested in employers and employees alike and will, in general, entail a weighing up of the employer's commercial interests against the employee's countervailing rights. ²⁵ Striking this balance is indeed a

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different exercise from deciding whether an employer's conduct has violated an employee's right to equal treatment.

And yet, at the same time, the right of an employee not to be discriminated against unfairly cannot but be part of the right to fair labour practices. Employees need protection against employer conduct that undermines their dignity as much as against conduct which unfairly threatens their economic interests. To this extent, there is no fundamental disparity between a concept of unfair discrimination rooted in the enforcement of fair labour practices and one premised on upholding the right to equality.

The prohibition of unfair discrimination in the workplace, it is suggested, embodies an intersection of these two fundamental objectives. This much is illustrated by the case law of the Industrial Court. In the often painstaking enquiry and incisive insights reflected in various judgments, many if not all of the elements of a concept of impermissible discrimination subsumed in the subsequent constitutional mandate were delineated. This process was continued by the Labour Court in its early jurisprudence. By the time the EEA was enacted, it will be argued, the meaning of the prohibition was no longer in any real doubt; there was fundamental continuity between the concept handed down from the earlier

case law and that embodied by the EEA via the Constitution. What remained (and remains) to be clarified was a proper and consistent formulation of what that concept embodied. As with the proverbial elephant, the courts in most cases had little difficulty in recognizing unfair discrimination when they saw it; defining it, however, has been a different matter (and it is arguable that inconsistent terminology may, in its own right, have contributed to inconsistent outcomes). Against this background, the article addresses the question by going back to the beginning.

1980-1994: From 'Discrimination' to 'Unfair Discrimination'

The first reported labour law case in which the notion of 'discrimination' surfaced was *Raad van Mynvakbonde v Minister van Mannekrag & 'n ander*, ²⁶ where it was claimed that less favourable conditions of service enjoyed by union members compared with officials amounted to 'discrimination' and constituted an unfair labour practice. The court was able to dispose of the issue without considering the meaning of 'discrimination'. Soon afterwards the issue arose again in *UAMAWU & others v Fodens (SA) (Pty) Ltd*. ²⁷ In deciding that it was an unfair labour practice for an employer to refuse to bargain with a representative trade union notwithstanding the absence of a pre-existing

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bargaining relationship, ²⁸ the court noted inter alia the prohibition of 'anti-union discrimination' ²⁹ contained in the International Labour Organization's Right to Organize and Collective Bargaining Convention. ³⁰

These brief references to the concept of 'discrimination' are interesting in that they foreshadowed the meaning that would be given to the term in numerous judgments in the years that followed: it was understood, essentially, as denoting adverse treatment of an individual or group of employees in comparison with others. Crucial, however, was the implication that 'discrimination' only attracts legal sanction if it takes place on a ground, or for a reason, that is considered impermissible. At least until the interim Constitution took effect in 1994, it was left to the Industrial Court to identify ad hoc the various grounds for discrimination which it found impermissible in the cases that came before it and, having done so, to stigmatize discrimination on any such ground as an 'unfair labour practice'. ³¹ Significantly, in this process the court was consistently guided by the meaning given to 'discrimination' in international and foreign law.

An important step along the way was the identification of the notion of 'differentiation' in contrast to 'discrimination'. ³² In *SA Iron, Steel & Allied Industries Union v Chief Inspector, Department of Manpower* ³³ the Industrial Court was faced with an appeal by a white trade

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union against the decision of the chief inspector not to interfere with an employer's desegregation of sanitary facilities. Noting that the relevant legislation 'prohibit[ed] differentiation and not only discrimination', the court cited the following finding of the Appellate Division in *Minister of Posts & Telegraphs v Rasool*: ³⁴

'Now to 'differentiate', in its primary meaning, is to distinguish one thing from another; it does not connote attaching more, or less, importance, or more, or less, weight to the one thing than to the other. One may differentiate a red rose from a yellow by colour, but this does not mean that one rose is more beautiful or smells sweeter than the other. . . . Giving this meaning to the word 'differentially', it seems to me that administration affects Asiatics differentially when it places them in a position different from that of other inhabitants of the Union. It is differential if it puts the Asiatics in a worse position than that of the Europeans: it is differential if it puts them in a better position. It is differential also if it puts them in an equal position but yet not the same position.'

'Therefore', Ehlers P concluded, 'there need not necessarily be inequality, partiality or discrimination in order to constitute differentiation'. Conversely, it may be inferred, an element of inequality is required to establish the existence of 'discrimination' as opposed to 'mere differentiation'. ³⁵

Another important step was the identification of ILO Convention 111 of 1958 as a point of reference in defining discriminatory conduct amounting to an unfair labour practice. In *SACWU & others v Sentrachem Ltd* ³⁶ the Industrial Court, faced with a case of alleged wage discrimination based on race, held it to be an unfair labour practice. It is worth quoting the relevant passage in full:

"There is no doubt that wage discrimination based on race, or any other differences between the workers concerned other than their skills and experience, is an unfair labour practice. The applicants' counsel referred to ILO Convention 111 of 1958. Clause 2 states:

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"Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.'

'Discrimination is defined in the convention as including 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. There are, however, limits, [with] art 1 s 1(2) stating: 'Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.' As counsel pointed out, the Wiehahn Commission's view was that international standards as formulated in conventions and recommendations of the ILO constitute useful guide-lines in the development and updating of domestic labour and industrial relations legislation. . . . At 566 para 4.127.20 the commission states: 'As basic point of departure, the State, employers and employees, either individually or collectively, shall be committed to neither practising nor allowing discrimination or inequality in the field of labour based on the grounds of colour, race, sex, religious beliefs, national extraction, social standing, or origin.' The commission recommended that the principle of fair employment practices legislation based on the central themes of non-discrimination, equality and equitable and modern employment practices be accepted and implemented. This recommendation was accepted by the government (at 652 para 4.51).'

This, for the first time, gave the court a definition of 'discrimination' as well as a general framework for identifying prohibited grounds of discrimination. By and large, however, the development of protection against discrimination continued in an ad hoc manner. In the course of the 1980s various instances of what amounted to discrimination on grounds of race, ³⁷ sex, ³⁸ and trade union membership ³⁹ were found to constitute unfair labour practices. ⁴⁰ It is important to reiterate that the court was not concerned with discrimination as such but with various forms of employer conduct that were alleged to be unfair labour practices - for example, dismissal of a female employee after having an affair with a senior male employee, ⁴¹ or the refusal by a white trade union to allow its members to train coloured workers. ⁴² The point to note, however, is that the underlying reasons for the adverse treatment of the complainants in all these cases corresponded

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to grounds of discrimination that are now prohibited by s 6 of the EEA, and the nature of the conduct complained of in each case was such that in most if not all cases, arguably, the Labour Court would have had little hesitation in regarding it as unfair discrimination. ⁴³

The concept of 'unfair discrimination', as opposed to 'discrimination' on a ground found to be impermissible, made its appearance not in the jurisprudence of the Industrial Court but in the short-lived codification of 'unfair labour practice' introduced by the Labour Relations Amendment Act of 1988, ⁴⁴ para (i) of which read:

" '[U]nfair labour practice' means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include . . .

- (i) the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed.' ⁴⁵

This definition (hereafter referred to as 'the statutory definition') raises at least two questions. In the first place, it confines the concept of 'unfair discrimination' to conduct by an employer vis-à-vis an employee and, on the face of it, excludes conduct by other parties (for example, a trade union or other employees) against employees in the employment context. This question was considered by Basson AM in *Chamber of Mines v Council of Mining Unions* ⁴⁶ where it was found that, despite the limitation, 'it is not a requirement that an unfair labour practice which is directed at an employee or employees must be committed by their employer but it can also be committed by a third party outside this relationship *provided* that the labour practice has the *effect* envisaged by the unfair labour practice definition'. ⁴⁷

Secondly and more speculatively, did the introduction of the word 'unfair' mark a narrowing down of the protection previously extended by the Industrial Court against discrimination on the stated grounds?

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In other words, was the legislature seeking to allow employers to discriminate on the grounds of race, sex or creed in circumstances where the court considered it 'fair' to do so, and prohibit it only in circumstances where it was considered 'unfair'? Although the then prevailing apartheid dispensation might have lent credence to such a construction, it is significant that no contemporary commentator or court appears to have interpreted it thus. This was certainly the case in the first matter where the Industrial Court had occasion to use the new term. In *FAWU v National Co-Operative Dairies Ltd (1)* ⁴⁸ the dispute concerned the existence of different disciplinary approaches at different workplaces belonging to the same employer. Having considered the facts, Van Niekerk AM rejected the contention that 'the mere fact' that different approaches were followed 'means that an unfair discrimination between employees has been shown to occur'. No reference was made to the amended definition, and no indication was given that 'unfair' was being used in any sense other than 'impermissible'.

In *Chamber of Mines v Council of Mining Unions* ⁴⁹ the court was faced for the first time with the task of applying the new concept of 'unfair discrimination'. Having considered the new definition (above), Basson AM found that the conduct of the employer itself fell within its scope in that the employer 'discriminate[d] unfairly against those . . . black, Asian and coloured employees who do not enjoy exactly the same conditions of employment that their white counterparts [enjoy] solely on the grounds of race'. Significantly, however, in the remainder of the judgment the conduct in question is referred to as 'racial discrimination' rather than 'unfair racial discrimination'. Again, it is submitted, the assumption is that racial

discrimination, once established, is ipso facto unfair. Had the prohibition been directed only at 'unfair racial discrimination', it is submitted, a two-stage enquiry would have been necessary: assuming 'discrimination' existed, it would have to be established (a) whether such discrimination was in fact based on race; and if so (b) whether it was fair or unfair. There is no suggestion of such an enquiry in the judgment. 'Unfair discrimination' for purposes of para (i) of the definition was found, in effect, to have consisted of black employees not being accorded 'the same conditions of employment that their white counterparts solely on the grounds of race'. Expressly rejecting the notion of 'separate but equal', Basson AM held that 'the doctrine of 'separate but equal' is inherently unequal' and that any labour practice resting on this doctrine 'amounts to racial discrimination and will, no doubt, be branded an unfair labour practice in terms of the definition contained in s 1 of the Act'. ⁵⁰ No scope is left for any notion of 'fair'

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racial discrimination; as before, racial discrimination is considered absolutely impermissible with or without the additional adjective 'unfair'.

Nor did Cameron et al, ⁵¹ in their meticulous commentary on the 1988 amendments, detect any special significance in the addition of the word 'unfair'. This is how they explained it:

'Discrimination has both a pejorative and a non-pejorative sense. The adjective 'unfair' settles the ambiguity. Not all forms of discrimination are prohibited. Employment is replete with distinctions made in the criteria for hiring, training, treatment, promotion and termination. Only the unacceptable face of discrimination is targeted by this unfair labour practice. The distinction between acceptable and unacceptable forms of discrimination is premised in comparative labour law on the 'inherent requirements of the particular job'. In other words distinctions based on qualifications, occupational status, skill, training, experience (in a word 'merit'), will not all things being equal constitute unfair discrimination. This was the basis of the decision in *SACWU v Sentrachelm*. There the court, basing its decision on the existence of discrimination 'in the sense of a difference in wages between people doing the same job', required the employer to remove these discriminatory practices within a period of time.'

This argument, on the face of it, misses one point: there is no visible 'ambiguity' about the statutory definition. It explicitly proscribes (in terms similar to those of international instruments and comparable foreign statutes) discrimination based 'solely' on 'race, sex or creed'. On the face of it, discrimination on any other grounds (for example, age), or 'partially' on one of the listed grounds, could only be declared an unfair labour practice in terms of some other part of the definition. ⁵² However, the learned authors take a different view. By implication, it is suggested, the word 'unfair' extends the definition to other 'unacceptable' grounds of discrimination not mentioned explicitly in the definition. Not only did the legislature refrain from narrowing down the existing protection against racial, sex or religious discrimination to its most heinous varieties only; ⁵³ it also refrained from narrowing down the prohibited grounds of discrimination to the listed grounds only but, in effect, preserved the open-ended protection against all forms of discrimination that might be considered unfair labour practices through the use of the term 'unfair'.

Whether such an interpretation is permissible on the strict wording of the definition might have been debatable; there is, however, no indication that the labour courts ⁵⁴ at any stage interpreted it in any other sense. While disputes based on alleged discrimination continued to arise at an increasing tempo, the term 'unfair discrimination' did not feature in any

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further case that was decided in terms of the amended definition; and neither did the courts consider their jurisdiction to be limited to the three listed grounds only. As De Kock M put it in *Mthembu & others v Claude Neon Lights*: ⁵⁵ 'It is not necessary to confine oneself to the provisions of the Act. One can also look to discrimination in a wider sense.' And in *Council of Mining Unions v Chamber of Mines* ⁵⁶ the Labour Appeal Court, upholding the judgment of the Industrial Court (above), interpreted para (i) of the new definition as 'classif[ying] as unfair any discrimination by an employer against an employee solely on the grounds of race, sex or creed'. The list could be extended, ⁵⁷ but the inference seems clear: the word 'unfair' was generally regarded as an adjective describing the prohibited grounds of discrimination, listed or unlisted, rather than a qualifier describing the degree to which discrimination on a listed ground was permissible. There was, it followed, no scope for the defence that discrimination, albeit on a listed ground, was nevertheless 'fair'.

There was, however, little opportunity to develop the analysis of 'unfair discrimination' beyond the comments listed above since, in 1991, the controversial codification of 'unfair labour practice' was repealed ⁵⁸ and the pre-1988 status quo entailing the prohibition of forms of discrimination deemed to be unfair labour practices was incontrovertibly restored; and there matters rested until the coming into effect of the interim Constitution in 1994.

1994-1999: The Advent of the Constitutional Era

The first five years of South Africa's constitutional democracy, from the standpoint of protection against discrimination in the workplace, can be divided into several parts. From April 1994 until November 1996 the Industrial Court continued to exercise its unfair labour practice jurisdiction, subject, however, to the prohibition of 'unfair discrimination' contained in of s 8 of the interim Constitution (the 'equality clause'). The relevant parts read as follows:

- (1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
- (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons

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- disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. . . .
- (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.'

As argued above, a Bill of Rights establishes a floor of rights. The interim Constitution thus left the Industrial Court free to continue combating discrimination in the workplace by means of its unfair labour practice jurisdiction, as before, but added a number of prohibited grounds of discrimination which the court would henceforth be obliged to treat as unfair labour practices. At the same time, the form of words used and the novel concepts introduced by s 8 clearly presented the court with some difficulties, which are reflected in a number of judgments during the last two years of its existence. Despite this, it is submitted, the fundamental nature of the protection crafted during the previous decade remained essentially unchanged.

Three judgments in particular stand out. In *Collins v Volkscas Bank*⁵⁹ the court was faced with the constructive dismissal of a pregnant employee who was denied maternity leave in terms of a collective agreement and was consequently forced to resign. This, Marcus AM found, amounted to (indirect) discrimination within the meaning of s 8(2) of the interim Constitution. The judgment continues:

'[I]t is only unfair discrimination that is proscribed in s 8(2) and, indeed, by chapter 7 of the American Civil Rights Act. ILO Convention 111 distinguishes acceptable from unacceptable discrimination in terms of the 'inherent requirements of the particular job'. Business necessity, it would seem, is the touchstone as to what constitutes acceptable discrimination in international codes and practice. Put in another way, I would submit that the question whether the dismissal of a female employee in a particular case arising from her having to take maternity leave amounts to unfair discrimination within the meaning of s 8(2) revolves around considerations of business necessity or the operational requirements of the business. If her dismissal is justified by her employer's operational requirements, in the sense that he cannot do without her during the period of her maternity leave, then although her dismissal would be discriminatory, at least indirectly, it would not amount to unfair discrimination within the meaning of s 8.'

Given that the employer's operational requirements did not justify the applicant's dismissal, it followed that her dismissal amounted to indirect discrimination on grounds of sex and, hence, an unfair labour practice.

While it is respectfully suggested that the ultimate outcome (leaving aside the finding that the discrimination was indirect rather than direct) was sound, the reasoning of the court does muddy the waters around some of the central concepts involved in the analysis of 'unfair discrimination'. The basic problem, it is submitted, lies in the meaning given to 'discrimination'. While it is true to say that s 8(2) only prohibited 'unfair' discrimination, it does not follow that 'business necessity' (or 'inherent

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requirements of the particular job') is what separates 'fair' from 'unfair' discrimination. The appeal to ILO Convention 111, in particular, is misplaced: as had been noted by the Industrial Court in *SACWU v Sentrachem*,⁶⁰ article 1 of the convention states that '[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination'. The presence of inherent job requirements, in other words, does not establish the 'fairness' of discrimination; it establishes the *absence* of 'discrimination' and, therefore, the question of 'fairness' does not arise. In casu, however, this defence did not apply and therefore, it was assumed, the applicant's dismissal amounted to 'discrimination'. But what made it 'unfair'? It would seem that the court further assumed (correctly, it is submitted) that the fact that the dismissal was a result of the applicant's pregnancy was enough to render it 'unfair' in terms of s 8(2).

The answer to the question which the court posed (the distinction between 'fair' and 'unfair' discrimination) thus remains implicit rather than explicit and lies, it is submitted, precisely in that which the court took for granted: it is the existence of a causal link between discriminatory conduct and a prohibited ground of discrimination that renders the discrimination 'unfair'. Because the discrimination that Ms Collins suffered was 'a result of her pregnancy', it was by definition unfair. 'Unfair', thus, emerges as the equivalent of 'impermissible' or 'prohibited' in characterizing the types of discrimination that would previously have been struck down as unfair labour practices, the difference being that the basis for identifying those forms of discrimination was now laid down by the Bill of Rights. The logic of such a construction can be explained by the open-ended nature of the prohibition of discrimination contained in s 8(2) (and its successors): the term 'unfair' serves to identify all the impermissible grounds of discrimination, listed and unlisted, contemplated by the section. Had it been intended to prohibit only certain grounds of discrimination,⁶¹ the term 'discrimination' would have required no additional adjective to

indicate its reach. ILO Convention 111, in contrast, achieves the same objective by a different route. While setting out to prohibit discrimination on multiple and potentially open-ended grounds, it incorporates the prohibited grounds within the definition of 'discrimination'.⁶² The

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definition, in other words, does away with the distinction between 'acceptable' (or 'fair') and 'unacceptable' (or 'unfair') discrimination that has so bemused South African courts by expressly confining itself to that category of conduct which our courts have so laboriously defined, and redefined, as 'unfair discrimination'.⁶³ Had our legislature followed a similar approach, it is submitted, a great deal of judicial and scholarly energy might have been saved and diverted to better purposes.

These difficulties, foreshadowed by *Collins v Volkskas*, resurfaced even more pointedly in the landmark judgment in *Association of Professional Teachers & another v Minister of Education*⁶⁴ where Landman P and Basson AM ruled that the denial of a home owner's allowance to married female teachers amounted to sex discrimination and, hence, an unfair labour practice. On the one hand the court provided an illuminating analysis of the concept of unfair discrimination, recognizing that it was premised on the grounds set out in s 8(2), noting that 'sex' and 'gender' were listed grounds and suggesting that 'marital status' might be considered an unlisted ground of prohibited discrimination.⁶⁵ It then distinguished 'discrimination' from 'differentiation', stating that 'where the effect of the differentiation is not based on an objective ground and such differentiation has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms, it would constitute discrimination'.⁶⁶ Noting that 'direct differentiation . . . based on one of the immutable personal characteristics of a person' may be legitimate if it is based on the inherent requirements of a job, the court concluded that 'sex discrimination may be described as the less favourable or differential treatment of a woman solely on the basis of her sex'.⁶⁷ Having thus to all intents and purposes settled the question before it, the court reverted to the distinction between 'fair' and 'unfair' discrimination and, in a perplexing departure from its earlier reasoning, revisited it as follows:

'The strategical placing of the word 'unfair' in conjunction with the word 'discrimination' leads to the conclusion that more is required than a mere finding of a distinction between the treatment of individuals or groups. By inserting the word 'unfair', a type of qualifier is built into s 8(2) to limit those distinctions or forms of discrimination which are outlawed in this section to those which are 'unfair'.⁶⁸

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Having said that, the court went on to conclude that 'unfair' discrimination 'should accordingly be read to imply prejudicial differentiation'.⁶⁹

This, it is submitted, is both contradictory and confusing. On the one hand 'discrimination' is understood (consistently with ILO Convention 111⁷⁰ and previous decisions of the Industrial Court) as 'less favourable' treatment - in a word, 'prejudicial' - which, unless based on an 'objective ground', is prohibited. On the other hand it is stated that discrimination on a listed ground is only 'unfair' if it is - 'prejudicial'. This would seem to allow for the possibility of discrimination (prejudicial differentiation) not based on 'objective grounds' but on 'immutable personal characteristics' - in contrast to differentiation based on inherent requirements of a job - nevertheless being 'fair'. And yet, when dealing in

conclusion with the notion of 'discrimination as an unfair labour practice', the court reverted to its earlier reasoning:

'Not all forms of differentiation or classification would constitute an unfair labour practice. The word 'unfair' suggests that more than a mere differentiation or classification is required. . . . In differential treatment, the deciding factor should therefore not be a person's colour or sex, but a person's ability to do the job. Put differently, unless the inherent requirements of the job require differentiation on the grounds of colour or sex, direct differentiation based on such inherent human characteristics should not be condoned.' ⁷¹

This, it is submitted, is correct. It may be noted in passing that the concept of 'fair discrimination' as canvassed in this judgment is not particularly helpful, nor is it clear what purpose it might have in practice other than serving as a laborious and legally incorrect ⁷² reconceptualization of existing forms of prejudicial treatment on permissible grounds (for example, dismissal for misconduct), it is difficult to see the purpose of such a distinction.

Finally, in *Hoffmann v SA Airways* ⁷³ the Constitutional Court was called upon to interpret the meaning of unfair discrimination in terms of s 9 of the Constitution, ⁷⁴ which reads as follows:

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

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- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.
- (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

As is well-known, the case concerned the refusal of the respondent to employ the applicant because he was HIV-positive. Mindful of the fact that it was not dealing with the constitutionality of a law of general application, the Constitutional Court regarded the enquiry 'whether the differentiation amounts to unfair discrimination' ⁷⁵ as a single step. Since HIV status was not a listed ground of prohibited discrimination, however, it was necessary to establish whether it fell within the reach of s 9(3). The court approached this question as follows:

'At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.' ⁷⁶

Having regard to these criteria, the court had no difficulty in finding that 'the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination'. ⁷⁷

It is submitted that this approach is a model of clarity which avoids the complexities encountered in the two judgments considered above. While too much should not be made of it, the court did not find it necessary to consider the meaning of 'discrimination' separately from that of 'unfairness' but treated 'unfair discrimination' as a single concept. This, it is respectfully submitted, is in principle correct. International law, and ILO Convention 111 in

particular, takes no cognizance of 'fair discrimination' and is concerned only with discrimination that

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is impermissible, demeaning or subversive of human dignity. It is true that, even so, the definition contains different elements; in particular, the conduct complained of must be prejudicial *and* linked to a prohibited ground to constitute 'discrimination' (in the language of Convention 111) or 'unfair discrimination' (in the language of s 9 of the Constitution and, later, the EEA). In casu, however, it may be assumed that the prejudicial nature of the respondent's refusal to employ the applicant was not in dispute; what remained to be established was whether such refusal was 'unfair' in the sense contemplated by s 9.

What would have been the position if the case had involved discrimination on a listed ground? Given that it was based on s 9 of the Constitution, the unfairness of such discrimination would have been presumed, subject to the right of the respondent to establish (in terms of s 9(5)) 'that the discrimination is fair'. To do so, presumably, the respondent would need to satisfy rigorous criteria of legitimacy and proportionality akin to that laid down in s 36(1) of the Constitution.⁷⁸ It is difficult to see, however, which factors other than those subsumed under the generally accepted rubrics 'inherent requirements of a job' or affirmative action.⁷⁹ In *Hoffmann v SA Airways* the respondent, in effect, pleaded a defence based on inherent requirements of the job, which it subsequently abandoned. It is even possible that a court, faced with the application of s 9(5) in an employment context, might have looked to Convention 111 for guidance in establishing the meaning of 'fairness'. This question has become largely⁸⁰ academic since, as will be seen, the position was changed decisively by the ratification of Convention 111 and the enactment of the EEA.

Convention 111 and the Employment Equity Act

The period 1996 to 1999 saw a series of rapid shifts and changes in South Africa's anti-discrimination legislation. The LRA, enacted inter alia to bring our labour law into line with the interim Constitution and the country's international law obligations, came into force in November 1996. Abolishing the Industrial Court and its open-ended unfair labour practice jurisdiction, it redefined 'unfair labour practice' to confine it to a number of specific issues in the area of individual labour law, including -

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'the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.⁸¹

Three months later, in February 1997, the present Constitution took effect, substituting the equality clause of the interim Constitution with one very similar, but placing more emphasis on substantive equality and requiring the enactment of national legislation regulating the prohibition of unfair discrimination.⁸² The following month South Africa ratified ILO Convention 111, committing the country inter alia to enacting legislation to promote equality of opportunity in employment and eliminating any discrimination in respect thereof.

⁸³ The result was the EEA, enacted in 1998 and promulgated in August 1999, containing the following prohibition of unfair discrimination to supersede that in the LRA:

- (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
- (2) It is not unfair discrimination to -
 - (a) take affirmative action measures consistent with the purpose of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).⁸⁴

Although relatively shortlived, item 2(1)(a) of schedule 7⁸⁵ gave rise to a significant body of judgments in which the meaning 'unfair discrimination' in the new dispensation was considered.⁸⁶ On the one hand it is true that the LRA did not intend to 'change the basic fabric

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of the concept of an unfair labour practice' in relation to unfair discrimination;⁸⁷ to this extent the jurisprudence of the Industrial Court remained (and remains) pertinent. Unfortunately, it must also be said that no great consistency emerged from these early judgments and that, in the absence of a truly definitive decision, the meaning of the prohibition contained in item 2(1)(a) needs to be distilled from an overall conspectus of the case law. Given the demise of that item in 1999, the question might seem of historical interest only. To the extent that this case law has continued to influence the Labour Court in its interpretation of s 6 of the EEA, however, its influence cannot be ignored.

In particular, it is instructive to consider the decision in *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd*,⁸⁸ the first - and, arguably, the most closely reasoned - judgment to be handed down in terms of item 2(1)(a). As is well-known, the case involved the unequal treatment of monthly paid and weekly paid employees for purposes of pension fund membership in a workplace where all weekly paid employees were black and the overwhelming majority of monthly paid employees were white. In finding that the distinction was essentially based on race, the judgment became the leading authority on concept of indirect discrimination in our labour law. More controversially, however, it has also been cited as authority for the proposition⁸⁹ that an employer's defences to a claim of unfair discrimination are not limited to the two grounds permitted by ILO Convention 111 that are stated in item 2(1)(b) and (c) of schedule 7.⁹⁰ In addition, it has been suggested, an employer may justify discrimination on a listed ground on

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the basis that it is not 'unfair'.⁹¹ This interpretation is based to a large extent on the following pronouncements:

"The Act provides two complete defences to unfair discrimination on any of the prohibited grounds. By virtue of item 2(2)(b), if the inherent requirements of a job justify an act of discrimination, this is a complete defence to an unfair discrimination claim in terms of item 2(1)(a). Affirmative action measures that satisfy the requirements of item 2(2)(c) also provide a complete defence to unfair discrimination. Neither of these defences is raised by the facts of this case so needs no further consideration in this judgment. . . .

'Discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.'⁹²

Taken together, these two passages might be read as inferring that discrimination on a 'prohibited ground', even if it does not fall within the scope of the statutory defences, may be 'fair' provided it is not 'reprehensible in terms of the society's prevailing norms'. The effect, in other words, would be to offer employers a defence of 'general' or 'residual' fairness in addition to the two defences mentioned in the Act with which to justify discrimination on listed grounds.

If this was in fact the meaning of the judgment, it would be startling indeed. ⁹³ Given the enormous importance attached in post-apartheid South Africa to eradicating the heinous effects of past and present discrimination, it would appear not only incongruous but glaringly at odds with the objectives of the Constitution, ⁹⁴ the LRA and the EEA ⁹⁵ to allow employers greater scope for continued discrimination ⁹⁶ than that permitted by ILO Convention 111 and much of the

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foreign law to which the drafters of our legislation referred. ⁹⁷ If this were indeed the case, the judgment might simply have been dismissed as clearly wrong. One of the purposes of the LRA was 'to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'. ⁹⁸ It is true that some debate could be raised as to whether, in strictly legal terms, Convention 111 was applicable in South Africa at the time the dispute arose. ⁹⁹ It is arguable, however, that Convention 111 should be regarded as part of customary international law and, as such, was binding in South Africa irrespective of formal ratification and statutory application. ¹⁰⁰ But, as seen above, the applicability of Convention 111 as a statement of the norms which our courts considered themselves bound to apply was never in any real question. ¹⁰¹ In the *Dingler* judgment itself the court, having noted that the prohibited grounds of discrimination in item 2(1)(a) cover the grounds listed in Convention 111, did not in any way suggest that it was distancing itself from the protection offered by the convention. On these grounds alone, it is submitted that the notion of a 'general fairness' defence in conflict with Convention 111 (had it been expressly asserted) would not have withstood scrutiny at any point after the enactment of the interim Constitution.

In defence of the judgment in *Dingler*, however, it must be noted that the above interpretation of the judgment is by no means clear-cut. At no point does the court in so many words assert the existence of an open-ended 'general' defence over and above the two statutory defences, as might have been expected if, indeed, such a far-reaching purpose had been entertained. In fact, the possibility of such a defence is raised earlier in the judgment where the following question is posed with regard to the issues to be decided:

'If there is discrimination, either directly or indirectly, on grounds of race or any other arbitrary ground, is the discrimination unfair?' ¹⁰²

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The court, however, immediately went on to explain its understanding of direct discrimination as follows:

'Direct race discrimination occurs where a person is treated differently because of their race or on the basis of some characteristic specific to members of that race. *It is incorrect to equate discrimination with actual prejudice.* Discrimination occurs when people are not treated as individuals. To discriminate is to assign to them characteristics which are generalized assumptions about groups of people.' ¹⁰³

This, it will be noted, ascribes to 'discrimination' a meaning more akin to that of 'differentiation' ¹⁰⁴ than to the concept which has come to be generally accepted in our law - that is, unequal treatment which is inherently 'pejorative' in nature. ¹⁰⁵ The distinction was elaborated in the following often-cited passage from the judgment in *Harksen v Lane NO* ¹⁰⁶ (which, as it happens, was handed down three days after the judgment in *Dingler*):

'Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.'

Without the benefit of this interpretation, however, the court in *Dingler* took 'discrimination' as denoting treatment based on generalized assumptions that does not necessarily involve 'actual prejudice'. On this basis it may well be concluded that not all such 'discrimination' (or differentiation) - whether on listed or unlisted grounds - is necessarily prohibited, and that it must be 'reprehensible' (ie, severely prejudicial) in order to be regarded as 'unfair'. ¹⁰⁷ It is immediately apparent, however, that this line of reasoning has more bearing on the meaning of 'discrimination' than on that of 'unfair'. In effect, the court was saying that differentiation on a listed ground is only prohibited if it is 'reprehensible' - in other words, if it amounts to 'discrimination' in the now common sense of the word. This impression is reinforced by the following passage:

'The provision sorts permissible discrimination from impermissible discrimination. By this mechanism the legislation recognizes that discriminatory measures are not always unfair. What is less clear is where to draw the line between permissible and impermissible discrimination.' ¹⁰⁸

If 'discrimination' is indeed understood as not necessarily denoting

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prejudicial treatment, this is little more than a statement of the obvious. In effect, the court is saying that differential treatment of employees on listed grounds can be justified not only on the basis of affirmative action and inherent requirements of a job, but on any other ground that is not 'reprehensible' or 'impermissible'.

It may be noted, however, that much of the confusion surrounding this judgment might have been avoided if the court had regard to the meaning of 'discrimination' as embodied in Convention 111 - that is, 'any distinction, exclusion or preference . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. This definition is clearly consistent with the notion of discrimination as pejorative treatment embraced by the Constitutional Court and by our courts in general.

Subsequent judgments relying on the latter interpretation of 'discrimination' did not encounter the same difficulty. In *Louw v Golden Arrow Bus Services (Pty) Ltd*, ¹⁰⁹ for example, the court - despite a slightly ambiguous choice of words - arrived at an interpretation of 'unfair discrimination' that is to all intents and purposes identical to that suggested in the conclusion to this article (*w*):

'It is necessary to distinguish clearly between discrimination on permissible grounds and impermissible grounds. An unfair labour practice is only committed (even by omission) if the impermissible grounds are the cause of the discrimination. Discrimination on a particular 'ground' means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment.' ¹¹⁰

The test that emerged from the jurisprudence of the labour courts in interpreting item 2(1)(a), it may be concluded, was characterized by considerable terminological diversity but, underlying it, a broadly uniform approach. This approach is perhaps best summarized by the Labour Appeal Court in *Mias v Minister of Justice & others*: ¹¹¹

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

Two significant changes were introduced by s 6 of the EEA in repealing and superseding item 2(1)(a). The first was the abolition of the concept of unfair discrimination on an 'arbitrary' ground which, in

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practice, served as a further open-ended category of alleged unfair discrimination in addition to the unlisted grounds encompassed by the definition. ¹¹² The earlier case law dealing with the meaning of 'arbitrary' grounds is thus of academic interest only and need not be considered. The second change was the reversal of the onus of proof introduced by s 11 of the EEA. ¹¹³ This reversal, however, had been anticipated by the Industrial Court ¹¹⁴ and by the Labour Court in *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd*, ¹¹⁵ where it was ruled that 'once the applicants established that there was discrimination, the evidentiary burden shifted to the respondents to show that there was no unfair discrimination'. For all practical purposes, it is submitted, the meaning of the concept of 'unfair discrimination' had been firmly established by the time item 2(1)(a) was superseded by s 6 of the EEA, which has been accepted as embodying the same meaning. ¹¹⁶

Conclusion

The EEA conclusively settled the question of the applicability of Convention 111 in the context of our law of unfair discrimination, providing that the Act must be interpreted 'in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111)

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concerning Discrimination in Respect of Employment and Occupation.' ¹¹⁷ This has a number of consequences, all of which have been noted or, in some cases, adopted in earlier case law, but may now be accepted more clearly as the proper construction to be placed on the prohibition of unfair discrimination in s 6 of the EEA. These may be enumerated as follows:

- (a) 'Discrimination', interpreted in compliance with the convention, must be taken to mean 'any distinction, exclusion or preference . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. ¹¹⁸ While consistent with the meaning given to the term by the Constitutional Court in the matters discussed above, this lays to rest the sometimes convoluted efforts by the courts to define the term in an employment context.

- (b) Discrimination (as defined) on any of the grounds referred to in the convention is absolutely forbidden. ¹¹⁹ All the grounds listed in the convention, together with further grounds determined in accordance with the convention, are contained in s 6 of the EEA. In *HOSPERSA v SA Nursing Council*, ¹²⁰ dealing with age discrimination (not mentioned expressly in the convention), Steenkamp AJ explains the application of the convention as follows:

'In the case of South Africa, the member state, the envisaged consultation took place within NEDLAC and age was included as a specified ground of discrimination in s 6 of the EEA. Section 9(2) read with s 9(4) of the Constitution ¹²¹ provided that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including age. It goes on to state that national legislation must be enacted to prevent or prohibit unfair discrimination. The EEA gives effect to this constitutional imperative. The effect is to prohibit age discrimination absolutely.'

- (c) 'Affirmative action measures' and measures dictated by 'inherent requirements of a job', interpreted in compliance with the convention, are not instances of 'fair discrimination' but are altogether excluded from the ambit of 'discrimination', whether 'fair' or otherwise. This much is clear from the wording of the convention. ¹²² The effect is that member states are at liberty to enact measures to give effect to the permitted exclusions but are not obliged to do

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so. ¹²³ 'Affirmative action measures' and measures dictated by 'inherent requirements of a job', it is submitted, may accordingly be conceptualized as sui generis forms of permitted differentiation, whether on listed or unlisted grounds, falling beyond the definition of unfair discrimination, deriving their authority from statute and sanctioned by Convention 111. ¹²⁴ The scope and content of these defences have been dealt with admirably in recent publications and need not be considered further in this article. ¹²⁵

- (d) Given the prohibition of discrimination on the grounds mentioned in s 6 of the EEA (listed or unlisted), it follows that a claim of unfair discrimination can only be met by showing that the conduct complained of fell outside the definition of discrimination on a prohibited ground. In the case of direct discrimination this would involve showing one of two things:
- (i) the employer's conduct was not 'discrimination' in the sense contemplated by s 6 and Convention 111 but amounted (in the language of the Constitutional Court) to mere 'differentiation'; and/or
 - (ii) the differentiation was not based on any of the grounds contemplated by s 6 (listed or unlisted).

In practice, to satisfy the burden of proof imposed by s 11 of the EEA, it will be incumbent on the employer to establish the true reason for the conduct in question. The effect of the two statutory defences is that any conduct justified by affirmative action or inherent requirements of a job will automatically fall beyond the scope of the prohibition, even if it involves differentiation on a listed ground. But even in the case of conduct falling outside the scope of the statutory defences it is open to the employer to prove that the differentiation was fairly based on a permissible or non-discriminatory ground: for example, skill or qualifications.

- (e) In the case of indirect discrimination the nature of the defences available to the employer will depend on the meaning that is given

to the concept itself. Two meanings may be noted. On the one hand 'indirect discrimination' has been explained as follows:

'It arises where an employer . . . adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce.' [126](#)

The problem with this approach is that any employment policy or practice, no matter how rational, may amount prima facie to indirect discrimination if it impacts disproportionately on a particular group and thus compels the employer to answer a case. [127](#) An alternative approach is to add a further element to the definition of indirect discrimination: the rule or standard in question must be unjustified. [128](#) This approach was outlined as follows in *Lagadien v University of Cape Town*: [129](#)

'An employer may be guilty of indirect discrimination if the use of an apparently neutral criterion has a significant adverse impact on a particular group and the criterion is not sufficiently relevant to workplace needs to justify that impact. Examples of such criteria are educational qualifications and physical characteristics (such as height) in situations where the employer is unable to justify the required standard.'

The difference is that this places an onus on the applicant to make out at least a prima facie case (or, in the language of s 11 of the EEA, 'allege') that the rule or standard is unfair or lacks objective justification. If the rule or standard is indeed suspect, this requirement would present no real obstacle to the applicant, while helping to narrow down anti-discrimination litigation to disputes where potential discrimination by the employer (as opposed to distortions in the job market) is indeed the issue. It follows that an objective justification for the rule or standard would enter the equation not as a defence at the employer's disposal but, rather, an assumption for the applicant to challenge. Assuming the applicant can make out a prima facie case to this effect, the defences available to the employer would be the same as in the case of direct discrimination (above).

Interpreting the EEA in compliance with Convention 111, thus, it

must be concluded that the term 'unfair discrimination' in s 6 signifies nothing less, or more, than the term 'discrimination' (on prohibited grounds) in Convention 111. 'Unfair', in other words, emerges as an adjective describing the open-ended range of discriminatory grounds, listed and unlisted, that are or might be prohibited in terms of s 6. [130](#) It might be objected that the value-laden term 'unfair' does little to clarify the issue but potentially confuses it by encouraging the notion (as reflected in *Association of Professional Teachers & another v Minister of Education*) [131](#) that discrimination on a prohibited ground must, in addition, be shown to be 'unfair'. Indeed, it is difficult to see the need for any adjective other than 'prohibited' or 'impermissible' in categorizing the grounds of discrimination stigmatized by s 6. But, like some other unfortunate words and phrases that have found their way into our labour legislation, [132](#) the term 'unfair' has, by now, a venerable pedigree and is likely to be with us for some time to come.

It is appropriate that the last word should go to the Constitution. The fact that the Constitution (like its predecessor) prohibits 'unfair discrimination' both vertically and horizontally [133](#) clearly gives the term an imprimatur transcending the employment arena. The question might therefore be asked: is it not in conflict with the Constitution to interpret

'unfair discrimination' as the equivalent of 'discrimination' in Convention 111? There are at least three answers to this question. In the first place, it is striking that no court considering the meaning of s 6 of the EEA or its predecessor, having regard to the Constitution and Convention 111, has at any point suggested such a conflict, let alone made a ruling to this effect. While silence does not constitute authority, it does at least suggest the absence of an issue. More importantly, as this article has tried to show, the substantive meaning of 'discrimination' on prohibited grounds as contemplated by Convention 111 is practically indistinguishable from that of 'unfair discrimination' on listed or unlisted grounds in terms of s 6.

In the last analysis, however, the Constitution provides its own answer. The contrast between the above two terms, it is submitted, offers a classic example of that which the legislature itself anticipated in seeking to define the relationship between the Constitution and international law. Mindful of potential semantic or conceptual differences, s 233 provides as follows:

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'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

It is submitted that the meaning given to the term 'unfair discrimination' by our courts over the past 23 years, as outlined above, is not only consistent with international law in the form of Convention 111, it is eminently reasonable, given the nature of the evil it is addressing and the need to eradicate it rather than mitigate it. As such, this interpretation must be preferred over any more limited interpretation of the term that would render s 6 inconsistent with international law.

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¹ Act 55 of 1998 (the EEA). 'Employee' is defined in this context as including 'an applicant for employment': s 9 of the EEA.

² ie, discrimination premised expressly on a prohibited ground of discrimination.

³ ie, discrimination on an apparently neutral ground which has the effect of discriminating on a prohibited ground of discrimination; discussed more fully at 1339-40 below.

⁴ Which must be understood in a substantive rather than a formal sense: see Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 ILJ 813 at 816-18; Dupper et al *Essential Employment Discrimination Law* (Juta 2004) at 16-20; Du Toit et al *Labour Relations Law: A Comprehensive Guide* (4 ed LexisNexis Butterworths 2003) at 543-4.

⁵ Constitution of the Republic of SA (Act 108 of 1996) (the Constitution).

⁶ s 9(4). Section 9(3) of the Constitution, read with s 9(4), prohibits unfair discrimination by the state or any other person 'against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

⁷ That is to say, in the context of 'any employment policy or practice' (s 6(1) of the EEA), as defined extensively in s 1 to include practically every aspect of the employment relationship.

⁸ Provided, of course, it does not violate any fundamental right enjoyed by any other person. It is difficult to see, however, how the prohibition of unfair discrimination in the workplace can have such an effect, given the absence of a corresponding fundamental right of employers to discriminate against employees on any of the prohibited grounds.

⁹ Leading European cases in this regard are *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 (ECJ); *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051 (ECJ). See also Hepple et al *Equality: A New Framework* (Hart 2000) at 35-6; Barnard 'The Changing Scope of the Fundamental Principle of Equality?' (2001) 46 *McGill LJ* 955.

¹⁰ 1950 (3) SA 136 (A) at 145.

- ¹¹ 1978 (2) SA 515 (T) at 517-18; cited in *Chamber of Mines v Mineworkers Union* (1989) 10 ILJ 133 (IC) at 157.
- ¹² Webster's Online Dictionary at http://www.websters-online-dictionary.org/Co/Constitutional_law.html.
- ¹³ *ibid.*
- ¹⁴ 2005 (10) BCLR 995 (C) at para 17. It may be noted that the constitutionality of s 6 of the EEA (or, for that matter, its compliance with international law) has never been called into question.
- ¹⁵ Act 2 of 2000 (PAIA).
- ¹⁶ 2006 (1) BCLR 1 (CC) at para 437, dealing with the relationship between the right to administrative justice, contained in s 33 of the Constitution, and the Promotion of Administrative Justice Act 3 of 2000. The remainder of the court did not disagree with the majority on this point but found it unnecessary to decide for purposes of their judgment. On the other hand, see *Stokwe v MEC, Department of Education, Eastern Cape Province* (2005) 26 ILJ 927 (LC); [2005] 8 BLLR 822 (LC) where an employee alleging unfair discrimination relied directly on s 9 of the Constitution.
- ¹⁷ Consistently with this principle, it follows that fundamental rights are enforced primarily by the High Court (in terms of s 169 of the Constitution) or, in labour matters, also by the Labour Court (in terms of s 157(2) of the Labour Relations Act 66 of 1995 (the LRA)), and that direct access to the Constitutional Court is allowed in 'only the most exceptional cases': *S v Zuma & others* 1995 (4) BCLR 401 (CC) at para 11. See also *S v Mbatha*; *S v Prinsloo* 1996 (3) BCLR 293 (CC) at para 29; *Satchwell v President of the Republic of SA & another* 2004 (1) BCLR 1 (CC) at para 6; *Van der Westhuizen v S* 2004 (2) BCLR 117 (CC) at para 3; and see rule 18 of the Rules of the Constitutional Court (GN R1675 of 31 October 2003).
- ¹⁸ item 2(1)(a) of schedule 7 to the LRA; repealed and replaced by the EEA.
- ¹⁹ or its predecessor, s 8 of the interim Constitution (Act 200 of 1993). In particular, *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) has been much cited by the labour courts.
- ²⁰ Discrimination (Employment and Occupation) Convention 111 of 1958.
- ²¹ in terms of the Labour Relations Act 28 of 1956 (the previous Act).
- ²² Cooper at 821.
- ²³ Section 7(1) of the Constitution reads: 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'
- ²⁴ 1997 (2) BCLR 153 (CC) at para 20. All references in this extract are to the interim Constitution. The 'limitation clause' in s 33 thereof is now contained in s 36 of the final Constitution. See also O'Shea 'International Law and the Bill of Rights' in *Bill of Rights Compendium* (LexisNexis Butterworths) (looseleaf) issue 5 at para 7A28.
- ²⁵ Or, as Cheadle put it: '[Fairness] is really no more than the balance of the respective interests of the employer and the employee in a capitalist society': 'The First Unfair Labour Practice Case' (1980) 1 ILJ 200 at 202. Cf the comment of Ngcobo J in *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC); 2003 (2) BCLR 154 (CC) at para 33: 'The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment.'
- ²⁶ (1983) 4 ILJ 202 (T) at 208.
- ²⁷ (1983) 4 ILJ 212 (IC) especially at 227.
- ²⁸ See Cameron et al *The New Labour Relations Act* (Juta & Co 1989) at 23-4. For a more critical note, see Theron 'Trade Unions and the Law: Victimisation and Self-help Remedies' (1997) 1 *Law Democracy & Development* 11 at 30.
- ²⁹ Article 1.2 of Convention 98 described 'discrimination' as 'acts calculated to - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours'.
- ³⁰ Convention 98 of 1949. Similarly, the court in *Metal & Allied Workers Union & others v Stobar Reinforcing (Pty) Ltd & another* (1983) 4 ILJ 84 (IC) had before it an industrial council agreement proscribing 'discrimination' against employees in the context of re-engagement and promotion; the case, however, was concerned with 'unfair dismissal'.
- ³¹ See, for example, *Biyela & others v Sneller Enterprises (Pty) Ltd* (1985) 6 ILJ 33 (IC); *MAWU & others v Siemens Ltd* (1986) 7 ILJ 547 (IC); *MAWU & others v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd*

(1986) 7 ILJ 703 (IC); *Mtshamba & others v Boland Houtnywerhede* (1986) 7 ILJ 563 (IC); *MAWU & others v Bonar Long NPC (SA) (Pty) Ltd* (1987) 8 ILJ 108 (IC); *Mkize & others v Tembisa Town Council & another* (1987) 8 ILJ 256 (W); *SA Iron, Steel & Allied Industries Union v Chief Inspector, Department of Manpower* (1987) 8 ILJ 303 (IC); *Kebeni & others v Cementile Products (Ciskei) (Pty) Ltd & another* (1987) 8 ILJ 442 (IC); *MWASA v The Minister of Manpower & another*; *NUM v The Minister of Manpower & another* (1987) 8 ILJ 614 (IC); *G v K* (1988) 9 ILJ 314 (IC); *Chetty v Raydee (Pty) Ltd* (1988) 9 ILJ 318 (IC); *SACWU & others v Sentrachem Ltd* (1988) 9 ILJ 410 (IC); (1989) 10 ILJ 249 (W); *NUM v Gold Fields of SA Ltd & others* (1989) 10 ILJ 86 (IC); *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC); *ERGO v NUM* (1989) 10 ILJ 683 (LAC); *J v M Ltd* (1989) 10 ILJ 755 (IC); *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A); *Mazibuko & others v Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC).

³² Thus, in *Biyela & others v Sneller Enterprises (Pty) Ltd* (1985) 6 ILJ 33 (IC) the court found that it did not amount to 'racial discrimination' to dismiss only African workers where, following a strike by African and Indian workers, the Indian workers had heeded the employer's ultimatum to return to work (at 35-6).

³³ (1987) 8 ILJ 303 (IC) at 307, 311.

³⁴ 1934 AD 167 at 186.

³⁵ Ten years later the Constitutional Court in *Prinsloo v Van der Linde & another* 1997 (6) BCLR 759 (CC) defined 'discrimination' as 'treating persons differently in a way which impairs their fundamental dignity as human beings' (para 31). In *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) it was held (at para 53) that differentiation on any of the grounds specified in s 8(1) of the interim Constitution (now superseded by s 9(3) of the Constitution) ipso facto amounts to 'discrimination' and is presumed to be 'unfair' unless the contrary is proved. It must be noted that the court in this case was dealing with discrimination in the context of national legislation - in other words, laying down a principle in the broadest possible terms that could find application in any aspect of legal regulation. In the employment context, it is submitted, it would be absurd to regard (for example) separate toilets for male and female employees as prima facie unfair discrimination. Such absurdity can be avoided by interpreting 'discrimination' in the more specific sense evolved by the labour courts, now embodied by the EEA, which is in accordance with the principle laid down in *Prinsloo v Van der Linde*.

³⁶ (1988) 9 ILJ 410 (IC) at 429; cited with approval in *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC) at 157. The fact that South Africa had not ratified the convention at that stage did not appear to weigh with the court in either case in applying the criterion of fairness rather than legality.

³⁷ eg *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC).

³⁸ eg *J v M Ltd* (1989) 10 ILJ 755 (IC).

³⁹ *Mtshamba & others v Boland Houtnywerhede* (1986) 7 ILJ 563 (IC).

⁴⁰ See Cooper at 816; Du Toit et al at 541. Equally instructive are cases where claims of unfair labour practices involving acts of alleged discrimination were rejected; see, for example, *MAWU & others v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd* (1986) 7 ILJ 703 (IC) at 717-18; *ERGO v NUM* (1989) 10 ILJ 683 (LAC) at 699.

⁴¹ *G v K* (1988) 9 ILJ 314 (IC).

⁴² *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC).

⁴³ A possible discrepancy exists to the extent that the concept of unfair labour practice in terms of the previous Act applied to employee conduct as well as employer conduct, thus making it possible for discriminatory practices by, for example, a trade union to be struck down: see *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC). It is uncertain whether the prohibition of unfair discrimination in the EEA applies only to employer conduct or to any discriminatory conduct against an employee: see Du Toit et al at 545 n 47.

⁴⁴ Act 83 of 1988.

⁴⁵ Section 1 of the previous Act, subject (in deference to the then prevailing apartheid dispensation) to the proviso that 'any action in compliance with any law or wage regulating measure shall not be regarded as an unfair labour practice'.

⁴⁶ (1990) 11 ILJ 52 (IC). The case dealt with the refusal by white trade unions to allow employees of other races to join a pension fund.

⁴⁷ at 70, with reference to discussion at 65-66 (emphasis in the original). In casu, given that para (o) of the definition included 'any labour practice which has or may have the effect that labour unrest is or may be created thereby and/or that the relationship between employer and employee is or may be detrimentally affected', the court had ample scope for declaring the conduct of the respondent trade unions to be an unfair labour practice.

⁴⁸ (1989) 10 ILJ 483 (IC) at 486. The dispute arose shortly before the amended definition came into effect.

⁴⁹ (1990) 11 ILJ 52 (IC) at 69; and see n 47 above.

[50](#) at 72.

[51](#) at 161-62, with reference inter alia to ILO Convention 111 of 1958.

[52](#) For example, para (o): see n 47 above.

[53](#) See also Cameron et al at 100, where the authors state without more that 'an employer may not discriminate on the basis of race, sex or creed'.

[54](#) The Labour Appeal Court (LAC) was also established in terms of the 1988 amendments to the Act.

[55](#) (1992) 13 ILJ 422 (IC) at 423. The matter dealt with alleged discrimination based on union membership.

[56](#) (1991) 12 ILJ 796 (LAC) at 800-1.

[57](#) See, for example, *MWU v ERGO Ltd* (1990) 11 ILJ 1070 (IC); *NUMSA v Siemens Ltd* (1990) 11 ILJ 610 (ARB); *Ntsangani & others v Golden Lay Farms Ltd* (1992) 13 ILJ 1199 (IC).

[58](#) Labour Relations Amendment Act 9 of 1991.

[59](#) (1994) 15 ILJ 1398 (IC). Although the interim Constitution was not yet in force at the time the dispute arose, the court was guided by s 8(2) (above) as well as ILO Convention 111: at 1410.

[60](#) (1988) 9 ILJ 410 (IC) at 429.

[61](#) For example, sex, as defined in s 1 of the UK Sex Discrimination Act 1975.

[62](#) The definition reads: 'For the purpose of this Convention the term *discrimination* includes -

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies' (art 1.1).

[63](#) Cf Cooper at 822ff; Du Toit et al at 543ff.

[64](#) (1995) 16 ILJ 1048 (IC).

[65](#) at 1080.

[66](#) *ibid*, with reference to General Comment 18(37) of the Human Rights Committee (1989) para 7 as quoted by Davis 'Equality and Equal Protection' in Van Wyk et al *Rights and Constitutionalism: The SA Legal Order* (Juta 1994) 196 at 201.

[67](#) at 1081.

[68](#) at 1082. In *Collins v Volkskas*, in contrast, the possibility of 'fair discrimination' on the basis of sex was not entertained.

[69](#) at 1082.

[70](#) See n 62 above.

[71](#) at 1085.

[72](#) Given that the EEA must be interpreted 'in compliance with' Convention 111 (s 3(d) of the EEA) and that 'discrimination' in terms of the convention is by definition impermissible.

[73](#) (2000) 21 ILJ 2357 (CC); [2000] 12 BLLR 1365 (CC).

[74](#) The dispute appears to have arisen in October 1996, when the LRA had not yet taken effect and the interim Constitution was still in force. Both the High Court and the Constitutional Court, for reasons that are not clear, decided the matter in terms of s 9 of the final Constitution which came into effect in February 1997: see *Hoffmann v SA Airways* 2000 (2) SA 628 (W); (2000) 21 ILJ 891 (W). Given the substantial similarity between its provisions and those of s 8 of the interim Constitution, however, it is convenient to consider its interpretation in the present context.

[75](#) at para 24.

[76](#) para 27.

[77](#) at para 40.

[78](#) ie the 'limitation clause', applicable to laws of general application. A similar test has been suggested in the context of the so-called 'general fairness' defence which, for reasons that are apparent from this article, is incompatible with the EEA: see Dupper et al at 92-5.

[79](#) ILO Convention 111 permits adverse differentiation also on grounds of state security. The South African legislature chose not to include a defence to this effect in the EEA.

[80](#) Notwithstanding the principle that constitutional rights regulated by legislation should be litigated in terms of such legislation, the courts still appear willing to hear claims brought in terms of the constitutional right itself: cf *Stokwe v MEC, Department of Education, Eastern Cape Province* (2005) 26 ILJ 927 (LC); [2005] 8 BLLR 822 (LC).

[81](#) schedule 7 item 2(1)(a). To this was added that an employer is (a) not prevented from adopting 'policies and practices that are designed to achieve the adequate protection and advancement of persons or . . . categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms' (item 2(2)(b)) and (b) that 'any *discrimination* based on an inherent requirement of the particular job does not constitute unfair discrimination' (item 2(2)(c)). In the light of the characterization of 'unfair discrimination' set out above, it is submitted that the reference to 'discrimination' in item 2(2)(c) (italicized above) should be understood as 'differentiation'. The wording adopted by the EEA, as noted below, went some way to remove any confusion that might have existed.

[82](#) As discussed in the Introduction above.

[83](#) ILO Convention 111 of 1958 arts 2 and 3.

[84](#) s 6 of the EEA. The Act also places restrictions on medical and psychometric testing (ss 7 and 8) and provides that '[f]or purposes of sections 6, 7 and 8, "employee" includes an applicant for employment' (s 9).

[85](#) In contrast to the relative paucity of such decisions during the 16 years that the unfair labour practice jurisdiction of the Industrial Court prevailed: cf O'Regan's comment in (1994) 11 *Employment Law* at 13 as cited by Cooper at 815. The difference can be explained, most obviously, by the impact of a justiciable Bill of Rights and a legal culture premised on the principle of equality.

[86](#) See, in particular, *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC); [1997] 11 BLLR 1438 (LC); *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC); [1999] 2 BLLR 115 (LC); *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC); [1999] 8 BLLR 862 (LC); *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC); [2000] 3 BLLR 311 (LC); *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC); [2000] 6 BLLR 640 (LAC); *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC); [2000] 6 BLLR 701 (LC); *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC); [2000] 8 BLLR 877 (LC); *Lagadien v University of Cape Town* (2000) 21 ILJ 2469 (LC); [2001] 1 BLLR 76 (LC); *Walters v Transitional Local Council of Port Elizabeth* (2000) 21 ILJ 2723 (LC); [2001] 1 BLLR 98 (LC); *Ntai & others v SA Breweries Ltd* (2000) 21 ILJ 1758 (LC); [2001] 2 BLLR 186 (LC); *Germishuys v Upington Municipality* (2000) 21 ILJ 2439 (LC); [2001] 3 BLLR 345 (LC); *Middleton & others v Industrial Chemical Carriers (Pty) Ltd* (2001) 22 ILJ 472 (LC); [2001] 6 BLLR 637 (LC); *Mias v Minister of Justice* (2002) 23 ILJ 884 (LAC); [2002] 1 BLLR 1 (LAC); *Reddy v KZN Department of Education & Culture* (2003) 24 ILJ 1358 (LAC); [2003] 7 BLLR 661 (LAC).

[87](#) *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) at para 18.

[88](#) (1998) 19 ILJ 285 (LC).

[89](#) Foreshadowed, unremarkably, by the observation in *Association of Professional Teachers & another v Minister of Education* (1995) 16 ILJ 1048 (IC) at 1082, criticized at 1326-7 above.

[90](#) ie, affirmative action and inherent requirements of a job: see n 81 above. Cf Dupper et al at 88.

[91](#) Support for such an approach is to be found in a direct application of s 8 of the interim Constitution (or s 9 of the final Constitution), in which discrimination on a listed ground is, in general, presumed to be unfair unless the contrary is proved. On the fallacy of relying on the constitutional regulation of a basic right in order to read a limitation into the statutory implementation of such a right, see 1311-13 above.

[92](#) at 1448.

[93](#) On the dangers inherent in such an interpretation, see Cooper at 830-1; Dupper et al at 91-4.

[94](#) In the words of Chaskalson P in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC): 'Our history is of particular relevance to the concept of equality. The policy of apartheid . . . systematically discriminated against black people in all aspects of social life. . . . The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted' (at para 40); and see the Preamble to the Constitution.

- ⁹⁵ Cf the comments of Zondo JP and Nicholson JA in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* (2002) 23 ILJ 863 (LAC); [2002] 6 BLLR 493 (LAC) at paras 35 and 63.
- ⁹⁶ As demonstrated by the obiter and much-criticized views of Willis JA in *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC); [2000] 6 BLLR 640 (LAC) where, having agreed with Zondo JP that discrimination on grounds of pregnancy had not been established (see paras 24, 84ff), so that the question of 'fairness' did not arise, nevertheless went on to consider the extent to which an employer might take the pregnancy of a workseeker into account in deciding not to appoint her (paras 94ff). Ironically, this unfortunate excursus is the only other point of reference (in addition to the passage in *Leonard Dingler* cited above) to be relied upon in extrapolating the existence of a 'general fairness' defence.
- ⁹⁷ for example, the Equal Treatment Directive of the European Council (Directive 76/207/EEC).
- ⁹⁸ s 1(b).
- ⁹⁹ The dispute was referred to the CCMA in January 1997, some two months before ratification of the convention.
- ¹⁰⁰ s 231(4) of the interim Constitution; s 232 of the Constitution. On customary international law, see O'Shea at para 7A5; and cf *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC); 2003 (2) BCLR 154 (CC) at para 34 n 33.
- ¹⁰¹ See, for example, the statement of the Constitutional Court in *Hoffmann v SA Airways* (2000) 21 ILJ 2357 (CC); [2000] 12 BLLR 1365 (CC) at para 51: 'The need to eliminate unfair discrimination does not arise only from chapter 2 of our Constitution. It also arises out of international obligation. . . . In the context of employment, the ILO Convention 111 . . . proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination.'
- ¹⁰² at 1442.
- ¹⁰³ *ibid*; emphasis added.
- ¹⁰⁴ As discussed at 1318 above.
- ¹⁰⁵ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para 31.
- ¹⁰⁶ 1997 (11) BCLR 1489 (CC) at para 53.
- ¹⁰⁷ It goes without saying - as was accepted in the judgment - that negative differentiation on grounds of race falls into this category.
- ¹⁰⁸ at 1448.
- ¹⁰⁹ (2000) 21 ILJ 188 (LC); [2000] 3 BLLR 311 (LC) at para 29.
- ¹¹⁰ The distinction becomes clearer, it is submitted, if 'discrimination on permissible and impermissible grounds' is understood - having regard to the wording of Convention 111 - as meaning 'differentiation and discrimination on impermissible grounds'. See also *Middleton & others v Industrial Chemical Carriers (Pty) Ltd* (2001) 22 ILJ 472 (LC); [2001] 6 BLLR 637 (LC) at para 15: 'Implicit in the notion of unfair discrimination is the requirement of disadvantage and prejudice.'
- ¹¹¹ (2002) 23 ILJ 884 (LAC); [2002] 1 BLLR 1 (LAC) at para 21.
- ¹¹² See, for example, *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC); *Ntai & others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC); [2001] 2 BLLR 186 (LC); *Germishuys v Upington Municipality* (2000) 21 ILJ 2439 (LC); [2001] 3 BLLR 345 (LC); *Middleton & others v Industrial Chemical Carriers (Pty) Ltd* (2001) 22 ILJ 472 (LC); [2001] 6 BLLR 637 (LC). Given the need to specify the alleged ground of 'arbitrary' treatment, indeed, the practical difference between such grounds and unlisted grounds in general as a cause of action is unclear: cf *Aarons v University of Stellenbosch* (2003) 24 ILJ 1123 (LC); [2003] 7 BLLR 704 (LC) at paras 16-17.
- ¹¹³ Section 11 reads, somewhat enigmatically: 'Whenever unfair discrimination is *alleged* in terms of this Act, the employer against whom the allegation is made must establish that it [*sic*] is fair.'
- ¹¹⁴ *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (LC); [1995] 9 BLLR 29 (LC) at 63.
- ¹¹⁵ (1998) 19 ILJ 285 (LC); [1997] 11 BLLR 1438 (LC) at 1452; bearing in mind that 'discrimination' is given a meaning akin to that of 'differentiation' (see above). In *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC); [1999] 2 BLLR 115 (LC) at para 9 the same approach was followed in respect of onus, while 'discrimination' was understood in the more conventional sense of having an 'effect' on the

employee (at para 10). For a fuller discussion, see *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC); [2000] 3 BLLR 311 (LC) at paras 40ff.

- 116** Cf *Langeveldt v Vryburg Transitional Local Council & others* (2001) 22 ILJ 1116 (LAC); [2001] 5 BLLR 501 (LAC) at para 20; *NEHAWU obo Mofekeng & others v Charlotte Theron Children's Home* (2003) 24 ILJ 1572 (LC); [2003] 8 BLLR 781 (LC) at para 17; *Media 24 Ltd & another v Grobler* (2005) 26 ILJ 107 (SCA); [2005] 7 BLLR 649 (SCA) at para 9. There is no indication that the choice of words adopted in *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC); [1997] 11 BLLR 1438 (LC) (discussed above) has influenced the courts' understanding of the meaning of 'unfair discrimination' to any appreciable extent.
- 117** s 3(d). The EEA is furthermore intended to 'give effect to the obligations of the Republic as a member of the International Labour Organisation' (preamble).
- 118** art 1(1); see n 62 above.
- 119** ie, 'race, colour, sex, religion, political opinion, national extraction or social origin'; see n 62 above, and see *HOSPERSA v SA Nursing Council* (2006) 27 ILJ 1143 (LC) at paras 30-31.
- 120** (2006) 27 ILJ 1143 (LC) at para 32.
- 121** Act 108 of 1996.
- 122** arts 1(2) and 5 of the convention.
- 123** Article 4 of the Convention further provides that '[a]ny measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice'. The legislature chose not to give effect to this provision in the EEA.
- 124** In many if not most cases measures arising from 'inherent requirements of a job' will present themselves as ordinary incidents of the employment relationship, deriving from the employer's contractual right to issue lawful instructions or freedom to enter into contracts of employment with employees of its own choosing, and disputes may be played out in a contractual framework. Only if an employee invokes s 6 of the EEA will the statutory defence come into the picture.
- 125** See Cooper at 832-5; Dupper et al at 70-87; Partington & Van der Walt 'The Development of Defences to a Claim of Unfair Discrimination: Part 1' (2005) 26(2) *Obiter* 357.
- 126** *Ontario, Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536 at 551, cited in *Association of Professional Teachers & another v Minister of Education* (1995) 16 ILJ 1048 (IC); [1995] 9 BLLR 29 (IC) at 62.
- 127** For example: the requirement that airline pilots must have appropriate licences, in a job market where such licences are overwhelmingly in the hands of white males would - on this approach - constitute indirect discriminate discrimination against women and black people.
- 128** As in *Griggs v Duke Power Co* (1971) 401 US 424, where unjustified educational requirements that had the effect of excluding disproportionate numbers of black workseekers were held to constitute indirect racial discrimination.
- 129** (2000) 21 ILJ 2469 (LC); [2001] 1 BLLR 76 (LC) at para 14, citing Du Toit et al *The Labour Relations Act of 1995* (2 ed Butterworths 1998) at 434.
- 130** Arguably, the need for a similar catch-all adjective does not arise in jurisdictions (such as the European Union) where workplace discrimination is prohibited on specific grounds only. This, however, does not necessarily justify its use in South Africa.
- 131** (1995) 16 ILJ 1048 (IC).
- 132** Though some, at least, have been weeded out by subsequent amendments: for example, the replacement of the word 'despite' with 'subject to' in s 158(1)(g) of the LRA by Act 12 of 2002.
- 133** Subject to the qualification in s 8(2): 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'