

# *The prohibition of unfair discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998*

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This 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) concerning Discrimination in Respect of Employment and Occupation.

– s 3(d), Employment Equity Act 55 of 1998.

## **1. Introduction**

This chapter sets out to examine the concept of ‘unfair discrimination’ in the employment context as it has evolved over the past three decades.<sup>1</sup> It will note the efforts made by the courts to clarify it and suggest that, in the process, the opposite may have happened. It will argue that much of this endeavour was unnecessary because, during the entire time, an answer was readily at hand. Since at least 1998, a peremptory signpost to that answer has been provided by s 3(d) of the Employment Equity Act<sup>2</sup> (EEA), hence the title above.

It is trite that the term ‘discrimination’ refers to differential treatment of a degrading or prejudicial nature, as opposed to ‘mere differentiation’ which refers to treating people differently in ways that are neutral or legally permitted.<sup>3</sup> However, discrimination only enters the purview of the law if it takes place on a ground that is legally proscribed. This chapter is concerned with discrimination in this sense only – that is, differentiation of a pejorative nature linked to an impermissible ground on which the differentiation is based.

<sup>1</sup> For a more detailed historical overview, see Du Toit, Darcy ‘The Evolution of the Concept of “Unfair Discrimination” in South African Labour Law’ (2006) 27 *Industrial Law Journal* 1311.

<sup>2</sup> Act 55 of 1998.

<sup>3</sup> See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) para 23ff. Discrimination must further be distinguished from unequal treatment, as dealt with in s 8(1) of the interim Constitution and s 9(1) of the final Constitution: see *Harksen v Lane NO* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 43; Currie & de Waal, *The Bill of Rights Handbook* 5 ed (Juta & Co 2005) 239–243.

In pursuing this inquiry, it is necessary to distinguish between discrimination in the employment context, which is regulated by the EEA, and discrimination in the broader constitutional context.<sup>4</sup> To the extent that a constitutional right is regulated by means of legislation, it must be interpreted primarily in terms of that legislation; it is not for the courts to bypass the legislation and purport to reinterpret the underlying constitutional rule. Yet, in the relationship between the fundamental protection against unfair discrimination enshrined in s 9 of the Constitution of the Republic of South Africa, 1996 (the final Constitution) and its regulation by chapter 2 of the EEA, this principle is frequently overlooked. It is not uncommon for judges and commentators to base themselves directly on s 9 of the Constitution in dealing with employment disputes, or oscillate seamlessly between judgments interpreting the constitutional and statutory provisions on the assumption that there is no distinction between them. It will be argued that this is wrong. There are important differences between the treatment of unfair discrimination in the Constitution and that of the EEA. It will be suggested that the necessarily broad brushstrokes with which the Constitution outlines the prohibition of unfair discrimination allows considerably more scope for interpretation than the more precise meaning that the EEA, construed in accordance with s 3(d), seeks to give it. Ignoring s 3(d), it is argued, potentially allows an employer scope for discrimination against employees on prohibited grounds such as race and sex which the EEA seeks to prevent. It is obvious that such an outcome, even though unintended, must blunt the purpose of the very constitutional clause which is purportedly being applied.

If this is true, how could such a basic error persist in such an important and sensitive area of our law?

One possible answer lies, ironically, in the very supremacy of the Constitution. Looking at our jurisprudence of the past decade and a half, there would seem to be a tendency to prefer the equality clause in the Bill of Rights to legislation implementing it – in other words, to assume that the basic right provides the true cause of action without considering whether the implementing legislation is unconstitutional, and must therefore be ‘read down’, or whether it is properly giving effect to the right in question. The Constitution, like the EEA, speaks of unfair discrimination rather than discrimination. From this it seems to follow, in a formalistic sense, that the concept of unfair discrimination on listed grounds, which the Constitution prohibits, must have its counterpart in a concept of fair discrimination on listed grounds, which the Constitution sanctions and the EEA must therefore permit. This chapter does not agree. Such an approach, it suggests, would misread the purpose of the Constitution and the EEA of promoting substantive equality by striking down unfair discrimination, rather than upholding a right to discriminate fairly. Furthermore, it would disregard the principle that any legal limitation of a basic right must be interpreted narrowly, ie in such a way as to

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<sup>4</sup> Regulated by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (‘the Equality Act’), giving effect to the prohibition of unfair discrimination contained in s 9 of the Constitution beyond the employment context.

limit the basic right as little as possible.<sup>5</sup> In effect, it would elevate the limitation of the right to equality to the same status as the right itself.

There is a further inference which, though muted, cannot be ignored. In a society where legally enforced discrimination had been the norm for centuries, it was never to be expected that every vestige of old perceptions would disappear at the stroke of a legislative pen. In the workplace it may still seem natural to many that certain categories of people – such as black people, or women, or young people, or people with disabilities – cannot reasonably be appointed to certain positions which they have never occupied or entrusted with certain responsibilities which they have never exercised. This is not to suggest that such exclusions are necessarily impermissible. ‘It is not unfair discrimination’, the EEA states, ‘to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job’.<sup>6</sup> The essence of unfair discrimination, however, is to perpetuate traditional distinctions, exclusions or preferences based on prohibited grounds even if the inherent requirements of a job do not demand it.

In this context, the danger presented by a notion of fair discrimination is obvious. By providing employers with an open-ended defence against claims of unfair discrimination, it may lend itself to justifying bad old habits which the Constitution and the EEA set out to uproot – for example, discriminatory measures reflecting the prejudices of employers or their clients or, more insidiously, the employer’s economic interests. Those who have mooted the existence of such a defence, it must be said, have been alive to the danger and have sought to limit it by hemming in the notion of fair discrimination with elaborate requirements.<sup>7</sup> This entire debate is unnecessary in the light of the International Labour Organisation (ILO) Convention 111 of 1958. The Convention makes it clear that discrimination on any of the grounds mentioned in the EEA must be prohibited and cannot be redeemed by demonstrating fairness. This, it will be argued, is fully in accordance with the purposes of the Constitution and the EEA. The alternative is ongoing uncertainty, with unfair discrimination claims against employers being determined on the basis of judges’ subjective notions of fairness. The problem is writ large in the casual statement of a judge of the Labour Appeal Court that ‘[i]t is not difficult to imagine situations outside of the inherent requirements of a particular job where discrimination would not be

<sup>5</sup> While the European Court of Justice may be criticised for treating affirmative action as a derogation from the right to equal treatment, it has upheld the principle that any derogation from that right must be interpreted strictly, ie exceptions to the right are limited to those which are expressly laid down by law. See, for example, *Johnston v Chief Constable of the Royal Ulster Constabulary* C-222/84 [1986] ECR 1651 (ECJ); *Kalanke v Freie Hansestadt Bremen* C-450/93, [1995] ECR I-3051 (ECJ).

<sup>6</sup> Section 6(2)(b), echoing the language of art 1(2) of the Convention 111.

<sup>7</sup> Cf *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC); [2000] 6 BLLR 640 (LAC) at para 124; De Villiers C, *Addressing Systemic Sex Discrimination: Employer Defences to Discrimination in Canada and South Africa* (LLM thesis, University of Toronto, 2000) at 81. In general, see Dupper & Garbers, ‘Employment Discrimination: A Commentary’ in Thompson & Benjamin (eds) *South African Labour Law* (Juta 2002) CC1.

unfair'.<sup>8</sup> A possible example of such a situation, we are told, is where granting 'fully-paid maternity leave would [impose] an unreasonable financial burden on the employer'.<sup>9</sup> Assuming that a claim of unfair discrimination could notionally arise under these circumstances,<sup>10</sup> the implications of such a proposition should be looked at carefully. In effect, it would balance the employer's commercial interest against the employee's basic right to equality and dignity and, potentially, allow the former to trump the latter. Surely this cannot be right.

The real challenge in combating unfair discrimination in the workplace is to persuade judges and arbitrators to apply the Convention as s 3(d) of the EEA enjoins them to do. This will not only provide employees with the protection to which they are entitled; it will help to at last bring order, in line with international standards, to this unsettled area of our law.

## 2. The notion of 'unfair' discrimination prior to 1994

South Africa is one of the few countries in the world, if not the only one, to have created a legal category of unfair discrimination. It is also one of the very few countries to have suffered policies of enforced racial discrimination in recent times. It is suggested that these two circumstances are not unconnected.

The term 'unfair discrimination' first entered the statute book by way of the ill-fated Labour Relations Amendment Act introduced by the apartheid government in 1988,<sup>11</sup> which set out to codify the meaning of unfair labour practice and, in so doing, included as one of its manifestations 'the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed'. The term 'discrimination' was not new. Debate about racial discrimination had been raging for decades. The Industrial Court had struck down instances of discrimination on various grounds, including race<sup>12</sup> and sex,<sup>13</sup> in the 1980s. What made this amendment remarkable was, first, the fact that it was introduced by a government

<sup>8</sup> Per Willis JA in *Woolworths v Whitehead* at para 123, with reference to 'the ILO Report of the Committee of Experts Chapter 3'. The source relied on by the learned judge is unclear. The most recent *Report of the Committee of Experts on the Application of Conventions and Recommendations* (International Labour Conference, 95th Session, Geneva, 2006) certainly does not bear out his assertion. The emphasis in the report is on interrogating 'inherent' job requirements (such as a light skin or no strong foreign accent) which the committee finds unconvincing. '[E]xclusion arising out of inherent requirements of a particular job', the committee pointed out, 'must be interpreted narrowly so as not to give rise to undue limitations on the protection afforded by the Convention': *ibid* at 263. In contrast, Willis JA went on to characterise fairness as 'an elastic and organic concept' (at para 127) ie stretching the employer's scope for excluding employees.

<sup>9</sup> De Villiers *op cit* at 80-81.

<sup>10</sup> Section 25 of the BCEA provides for maternity leave but does not require that it must be paid. It is difficult to see how mere compliance with s 25 of the Act could be regarded as a form of discrimination. Should paid maternity leave be granted to some employees but not to others, this could be presumably be challenged as unequal treatment but would be difficult to characterise as discrimination on the grounds of sex or pregnancy.

<sup>11</sup> Act 83 of 1988.

<sup>12</sup> *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC).

<sup>13</sup> *J v M Ltd* (1989) 10 ILJ 755 (IC).

committed to racial discrimination and, secondly, the addition of the adjective 'unfair'.

In reality, the second of these two factors followed logically from the first. A clue lies in the proviso to the abovementioned definition, stating that 'any action in compliance with any law or wage regulating measure shall not be regarded as an unfair labour practice'.<sup>14</sup> This needs to be unpacked. Under apartheid, South Africa's laws and wage-regulating measures were riddled with discriminatory provisions based explicitly on, above all, race and sex. The government at the time was fighting a savage rearguard battle in defence of that system. To insulate measures that were still central to its policies against challenge in the Industrial Court, it was necessary for P W Botha's parliament to stipulate that – whatever the rest of the world and the majority of South Africans might have thought – practising legally-sanctioned discrimination in the workplace was not unfair.<sup>15</sup> Unfair discrimination, it follows, was confined to discrimination *not* sanctioned by any law or wage-regulating measure.

This remarkable approach, in fact, followed earlier case law in which the former Appellate Division as well as the former Supreme Court had found that racial discrimination was permissible (only) when expressly authorised by statute. Discriminatory measures imposed in the absence of such authorisation were therefore open to attack. In *S v De Wet*<sup>16</sup> Boshoff AJP explained the doctrine as follows:

Unless the contrary appears it is to be presumed that the Legislature intended [ministerial] powers to be exercised impartially and without racial discrimination. It is the duty of the Courts to hold the scales evenly between the different classes of the community and to declare invalid any condition imposed by the Minister which in the absence of the authority of the Act results in partial and unequal treatment to a substantial degree between different sections of the community.

In one sense this reasoning, while submissive to apartheid, is pertinent and even radical in the post-1994 context. In effect, the proposition that discrimination is prohibited unless expressly provided for by law puts paid to the notion of fair or permissible discrimination not expressly provided for by law. In 1978, of course, the abolition of all laws permitting racial discrimination could hardly have been imagined; but if ever it came to pass, the judgment implied, any justification for such discrimination would likewise be removed. During the next two decades this is exactly what happened.

<sup>14</sup> Section 1 of the Labour Relations Act 28 of 1956.

<sup>15</sup> Indeed, the concept of 'unfair labour practice' itself was introduced by the apartheid government in 1979 as a means of protecting white workers from the 'unfair' exercise of employers' power to replace them with cheaper black labour upon the demise of job reservation – in other words, ringfencing enclaves of 'fair' racial discrimination: cf Cheadle, 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663 at para 27 fn 25; van Niekerk, 'In Search of Justification: The Origins of the Statutory Protection of Security of Employment in South Africa' (2004) 25 *ILJ* 853 at 856–857.

<sup>16</sup> 1978 (2) SA 515 (T) at 518A-B, relying on *Minister of Posts and Telegraphs v Rasool* 1934 AD 167; *R v Abdurahman* 1950 (3) SA 136 (A) at 143; *Tayob v Ermelo Local Board Transportation Board and Another* 1951 (4) SA 440 (A); *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 (A); *R v Lusu* 1953 (2) SA 484 (A) at 489-490. On this basis the court struck down a ministerial ruling prohibiting the employment of black bartenders in a 'white' hotel because the statute in terms of which the Minister purported to act (the Liquor Act of 1928) did not provide for racial discrimination.

In the case referred to above the court was concerned with the exercise of public power. Would the same apply in the context of the private employment relationship? As noted already, this question was answered by the 1988 amendment to the Labour Relations Act 28 of 1956. It stated that discrimination by an employer against an employee based solely on race, sex or creed, in the absence of legislation permitting such discrimination, was unfair and hence prohibited.

By then the apartheid system was on its last legs. The 1988 definition of unfair labour practice, including its concept of unfair discrimination, was swept aside in 1991 and the former, open-ended definition of unfair labour practice was reinstated. Thus, after just three years, the term 'unfair discrimination' disappeared from the statute book.

It made a comeback two years later *via* an unexpected route.

### 3. The constitutional prohibition of 'unfair discrimination'

The enactment of the interim Constitution in 1993 created a new dispensation based on the foundational values of human dignity, equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution, the rule of law and universal adult suffrage.<sup>17</sup> Few could have doubted that, in such a dispensation, there could be no place for pejorative discrimination based on innate human characteristics such as race or sex. Indeed, following the long night of apartheid, the eradication of such discrimination was a central purpose of the new Constitution.<sup>18</sup> In doing so, however, it chose a particular form of words. Section 8(2) puts it as follows:

No person shall be *unfairly* discriminated against, directly or indirectly, and, *without derogating from the generality of this provision*, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Two expressions stand out. The first is the word 'unfairly'. Why was this inserted? It is submitted that there are two parts to the answer. In the first place, as Davis, Cheadle & Haysom explain,

the phrase 'unfairly discriminate' arises from a concern that discrimination has both a pejorative and a benign meaning. The addition of the word 'unfair' is to make it absolutely clear that what is not permitted is invidious classification (the protected zone).<sup>19</sup>

<sup>17</sup> These values, implicit in the interim Constitution, are spelled out in s 1 of the Constitution of the Republic of South Africa, 1996 ('the [final] Constitution').

<sup>18</sup> The Preamble to the interim Constitution started by declaring that 'there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state 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'.

<sup>19</sup> Davis, Cheadle & Haysom *Fundamental Rights in the Constitution* (1997) 56.

Discrimination in the broad sense of differential or even unequal treatment in general, in other words, is not the issue.<sup>20</sup> Differential or unequal treatment – even though it is not necessarily benign – is permissible by law provided it falls within the bounds permitted by the Constitution's limitation clause.<sup>21</sup> This may be the case even when it is based on prohibited grounds of discrimination such as sex (for example, giving only women a right to maternity leave) or age (for example, in limiting the right to vote to persons over 18). Section 8(2), on the other hand, was concerned with striking down unequal treatment of a particular nature, that is, pejorative, demeaning or invidious distinctions among people which cannot be justified within the constitutional framework. What makes these distinctions reprehensible, as s 8(2) makes clear, is the fact that they amount to victimising people for being what they are. The listed grounds of discrimination singled out as being presumptively unfair are, without exception, aspects of the human personality. 'Discrimination', as encapsulated by the Constitutional Court, amounts to 'the unequal treatment of people based on attributes and characteristics attaching to them.'<sup>22</sup>

Unfair discrimination, then, emerges as a complex concept. It arises from the *combination* of discrimination in the pejorative sense with grounds of discrimination amounting to fundamental human 'attributes and characteristics'. This is underlined by the term 'without derogating from the generality of this provision'. In this regard South Africa goes further than other jurisdictions where, in general, discrimination is prohibited on specific grounds only (most typically, race and sex). In South Africa, it may be argued, a more comprehensive approach was called for in grappling with the legacy of apartheid. Faced with the political, social, economic and legal degradation imposed in countless forms on the majority of the population, the interim Constitution could not only target discrimination of specific types only but set out to protect human dignity as a whole by prohibiting discrimination in all its manifestations.<sup>23</sup> Section 8(2) laid down such a prohibition (now contained in s 9 of the final Constitution). The list of prohibited grounds of discrimination is deliberately open-ended. In addition to the specified grounds, discrimination based on 'analogous' aspects of the human condition is likewise prohibited.<sup>24</sup> The term 'unfair' thus emerges, not merely as a qualifier that

<sup>20</sup> Both the High Court and the Constitutional Court drew this distinction early on. See, for example, *AK Entertainment CC v Minister of Safety and Security and Others* 1995 (1) SA 783 (E); 1994 (4) BCLR 31 (E); *In re: The School Education Bill of 1995 (Gauteng)* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at para 67.

<sup>21</sup> Section 33 of the interim Constitution, superseded by s 36 of the final Constitution.

<sup>22</sup> *Prinsloo v Van der Linde* (fn 3 above) at para 31.

<sup>23</sup> As the Constitutional Court put it in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC): 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked' (at para 41). See also Ackermann, 'Equality and Non-discrimination: Some Analytical Thoughts' (2006) 22 *South African Journal on Human Rights* 597.

<sup>24</sup> For example, on grounds of nationality: see *Larbi-Odam v Member of the Executive Council for Education, North-West Province* 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

'sorts permissible [non-pejorative] discrimination from impermissible [pejorative] discrimination'<sup>25</sup> but, no less importantly, as an adjective made necessary by the open-ended nature of the list, denoting the prohibited grounds of discrimination in their generality.

To South African lawyers in the early 1990s, however, these concepts were largely unfamiliar. The difficulties experienced by the courts in pinning down the meaning of unfair discrimination were reflected in the landmark decision of the Industrial Court in *Association of Professional Teachers and Another v Minister of Education*,<sup>26</sup> handed down in June 1995. In this matter the court ruled on the basis of s 8(2) of the interim Constitution that the denial of a home owner's allowance to married female teachers, as opposed to married male teachers, amounted to sexual discrimination and was therefore an unfair labour practice. With reference to the wording of s 8(2), the court said the following:

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'.<sup>27</sup>

The paragraphs that follow make clear that the distinction which the court was drawing was that between discrimination in a pejorative sense and distinctions between employees based on 'inherent requirements of the particular job'.<sup>28</sup> Only the former, the court correctly concluded, is intended by the term 'unfair'. Distinguishing among employees on the basis of race, sex and the like would not be unfair provided it was due to genuine job requirements, but would be unfair in the absence of such requirements. The conflation of the notions of 'distinction' and 'discrimination' in the quoted passage, however, served as an early warning of the kind of confusion to which the term 'unfair' was capable of giving rise.

Indeed, two further provisions contained in s 8 of the interim Constitution that were no doubt intended to clarify matters were widely misunderstood and ended up compounding the confusion.

First, sub-s (3) made provision for what is generally known as affirmative action measures.<sup>29</sup> It is arguable that this provision was not really necessary. Since affirmative action is about implementing the right to equality rather than limiting it, it might not seem to require any special authorisation – an approach subsequently

<sup>25</sup> *Leonard Dingler Employee Representative Council and Others v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC); [1997] 11 BLLR 1438 (LC) at 1448. For criticism of the approach adopted by the court in this matter, see fn 45 below.

<sup>26</sup> (1995) 16 ILJ 1048 (IC); [1995] 9 BLLR 29 (IC).

<sup>27</sup> At p 61.

<sup>28</sup> With reference to Cachalia et al (eds), *Fundamental Rights in the New Constitution* (Juta 1994) at 28.

<sup>29</sup> Subsection (3)(a) reads: 'This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.'



endorsed by the Constitutional Court.<sup>30</sup> However, the persistent characterisation of affirmative action as positive or reverse discrimination (both in South Africa and elsewhere) indicates why the drafters of both the interim Constitution and the final Constitution might have found it advisable to nip in the bud any argument over its constitutionality by expressly creating space for it. This did not transform affirmative action into a species of pejorative discrimination in need of justification. It was never anything more than a particular type of differential treatment (and there are others) aimed at turning the principle of equality into a societal reality. To lawyers schooled in formal reasoning, however, it reinforced the notion of 'fair discrimination' and served as a prime example.<sup>31</sup>

No less problematic was a second apparent qualification contained in s 8(4) of the interim Constitution. It read as follows:

*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. [Emphasis added.]

The obvious purpose of the provision was to define the burden of proof in discrimination disputes. *Prima facie* proof of discrimination on an expressly prohibited ground, it says, shall be conclusive unless the respondent (in practice, the state) is able to prove the contrary. Section 9(5) of the final Constitution, which superseded s 8(4), adopted a different form of words. It is convenient to consider s 9(5) at this point because it is considered to have restated the substance of s 8(4).<sup>32</sup> It reads as follows: 'Discrimination on one or more of the grounds listed in sub-s (3) is unfair unless it is established that the discrimination is fair.'

Can this be taken to mean that the Constitution, while setting out to abolish pejorative discrimination based on prohibited grounds, at the same time deliberately leaves scope for an undefined degree of pejorative discrimination, classified as fair, on those very grounds? This would surely be going too far. In relation to the question whether legislative<sup>33</sup> infringement of the right not to be unfairly discriminated against is capable of justification in terms of the limitation clause, Currie and De Waal say the following:

<sup>30</sup> See *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC); [2004] 12 BLLR 1181 (CC) at paras 28–32 (majority judgment) and 75–76 (minority judgment concurring with majority).

<sup>31</sup> A similar approach was taken by the Industrial Court with regard to the other statutory defence of 'inherent requirements of a job'. 'ILO Convention 111', it was said, 'distinguishes acceptable from unacceptable discrimination in terms of the "inherent requirements of the particular job"': *Collins v Volkskas Bank (Westonaria Branch), a division of Absa Bank Ltd* (1994) 14 ILJ 1398 (IC); [1994] 12 BLLR 73 (IC) at 85. As in *Association of Professional Teachers v Minister of Education* (above) and the *Leonard Dingler* case (above), the root of the confusion lay in the court's use of the term 'discrimination' in a broad sense that was not necessarily pejorative rather than – as both the Constitution and the Convention conceive of it – a form of differential treatment that is by definition pejorative.

<sup>32</sup> See eg *S v K* 1997 (9) BCLR 1283 (C) at para 28.

<sup>33</sup> Basic rights can be limited only by 'law of general application' in terms of s 36(1) of the Constitution. This does, of course, also leave scope for superior courts to interpret the common law in such a way as to limit fundamental rights (now in terms of s 8(3)(b) of the final Constitution). Legislation, however, is the primary source of new law.

It is ... difficult to see how discrimination that has already been characterised as 'unfair' because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons ... can ever be acceptable in an open and democratic society based on human dignity, freedom and equality.<sup>34</sup>

A similar point, it would seem, can be made in respect of s 9(5) of the final Constitution. It is equally difficult to see how discrimination based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons can ever be shown to be fair. This is not the place to examine the question in depth. For practical purposes, it may be noted that instances of fair discrimination in terms of s 9(5) have been identified only in exceptional cases where the discriminatory act complained of did not so much impair the complainant's dignity as extend special treatment to others.<sup>35</sup> Secondly and more fundamentally, it is submitted that s 9(5) needs to be understood in a wider constitutional perspective. A Bill of Rights deals primarily with the exercise of public power by the legislature, the executive and organs of state by way of innumerable laws, rules, decisions and measures differentiating between persons in every walk of social life. To regulate this vast range of activity, the scope for the exercise of public power as well as its limitation must necessarily be formulated in the broadest possible terms. This, it is suggested, offers a rationale for s 9(5) and its predecessor. Far from setting out to create room for fair discrimination, it serves as a further safeguard against discrimination by the state. In practice it is inevitable that laws will create (legitimate) distinctions on grounds such as age, sex or nationality which may, in terms of the test laid down in *Harksen v Lane*,<sup>36</sup> be capable *prima facie* of being stigmatised as unfair discrimination. In such cases, s 9(5) requires the state (if challenged) to prove that the measure is not unfair in terms of the test laid down in s 36.<sup>37</sup>

If that is so, what is the relevance of s 9(5) to employment law? Does it open up space for employers, like the legislature, to discriminate against employees on listed grounds if they can prove it is not unfair? For reasons discussed more fully below, it is submitted that it does not. The enactment of legislation regulating unfair discrimination in the employment sphere (the Labour Relations Act 66 of 1995 (LRA), followed by the EEA in 1998) precluded the possibility of by-passing the legislation and relying directly on the Constitution except to the extent that the legislation fails to give effect to the basic constitutional right – that is, the right not to be discriminated against unfairly. In fact, both the LRA and the EEA went further than the Constitution in defining that right, and omitted nothing that was stipulated in the constitutional provision. Neither statute, to be sure, made

<sup>34</sup> Currie & de Waal, *The Bill of Rights Handbook* 238.

<sup>35</sup> See, for example, *President of the RSA v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC); Currie & De Waal op cit 245–246. Interestingly, the term 'fair discrimination', as opposed to 'discrimination' that is 'not unfair', has been used very sparingly by the courts. In *Public Servants' Association of South Africa and Another v Minister of Justice and Others* 1997 (3) SA 925 (T); 1997 (5) BCLR 577 (T) the High Court used it to describe affirmative action measures – which, for reasons given already, is not appropriate.

<sup>36</sup> See fn 3, 47 and 57.

<sup>37</sup> Despite the wording of s 9(5), it is submitted, it must also be open to the state to argue that an impugned measure does not amount to discrimination in the legal sense.

provision for the possibility of fair discrimination by employers. However, this is not a limitation of the right not to be discriminated against unfairly; if anything, the absence of legislative scope for fair discrimination secures the protection of employees all the more firmly. There is certainly no basis for arguing that the Constitution may be invoked to reduce that protection by legitimising a degree of discrimination against employees which the legislature chose not to enact – for example, in cases where employees are persuaded to consent to discriminatory measures.<sup>38</sup> The notion of fair discrimination arising from s 9(5), for these reasons, finds no application in the employment context.

#### 4. The statutory prohibition of ‘unfair discrimination’

To set the scene for what followed, it is necessary to note the chronology of post-1993 legislation and its impact.

- In 1995 the current LRA was enacted in terms of the interim Constitution, taking effect in November 1996. In item 2(1)(a) of Schedule 7, the new Act gave effect to the constitutional prohibition of unfair discrimination in the employment sphere by providing that an ‘unfair labour practice’ included ‘any unfair act or omission that arises between an employer and an employee involving the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground,<sup>39</sup> 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.’ No less importantly, it provided two complete defences to a claim of unfair discrimination: affirmative action measures, and measures dictated by inherent job requirements, were expressly permitted.<sup>40</sup> Hardly noticed amidst these paradigm shifts was the fact that the LRA also had to be interpreted ‘in compliance with the public international law obligations of the Republic’.<sup>41</sup>
- In 1996 the final Constitution was enacted, taking effect in February 1997. It meant that the LRA (and item 2(1)(a) of Schedule 7) henceforth had to be tested against the final Constitution rather than the interim Constitution.

<sup>38</sup> See *Parry v Astral Operations Ltd* (2005) 26 ILJ 1479 (LC); [2005] 10 BLLR 989 (LC), where it was held that the prohibition of unfair discrimination is one of the ‘[p]ublic policy norms governing an employment relationship, which cannot be excluded by contract’: (at para 58). See also Woolman, ‘Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on *Barkhuizen*’ (2008) 125 SALJ 10.

<sup>39</sup> It is noteworthy that, by stigmatising the prohibited grounds of discrimination as arbitrary rather than as infringements of the right to equality, the LRA departed from the constitutional paradigm. While this formulation influenced some of the case law of the late 1990s, it was soon superseded by s 6 of the EEA, which reverted to the constitutional approach. The notion of ‘arbitrary ground’ and its interpretation will therefore not be dealt with here.

<sup>40</sup> Item 2(2)(b) and (c) of Schedule 7. Although South Africa had yet to ratify the Convention. 111 at that point, it will be seen (below) that these two statutory exceptions fell squarely within the provisions of the Convention.

<sup>41</sup> Section 3(c) of the LRA. It will not be considered here whether Convention 111, as one of the ILO’s core conventions, formed part of customary international law and was, as such, automatically binding even prior to ratification.

Apart from the rephrased provision in s 9(5) relating to the onus of proof in court proceedings, discussed above, the prohibition of unfair discrimination remained essentially unchanged.

- Immediately thereafter, in March 1997, South Africa ratified Convention 111.<sup>42</sup> The following year the EEA was enacted, *inter alia* to 'give effect to the obligations of the Republic as a member of the International Labour Organisation.'<sup>43</sup> More specifically, s 3(d) of the EEA stated that the EEA must be interpreted 'in compliance with the international law obligations of the Republic, in particular those contained in Convention 111 concerning Discrimination in Respect of Employment and Occupation.'
- In August 1999, s 6 of the EEA superseded item 2(1)(a) of Schedule 7 to the LRA. Section 6(1) reads as follows:

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.

Throughout all these legal changes, the term 'unfair discrimination' was maintained. From the interim Constitution it was transmitted to Schedule 7 to the LRA, then adopted by the final Constitution and from there, it quite naturally found its way into the EEA. It would also resurface in the Equality Act of 2000. Despite this formal continuity, however, the configuration of applicable law in the field of employment discrimination was changing constantly. Different judgments, sometimes approaching the meaning of 'unfair discrimination' differently, were thus handed down in terms of different legal frameworks without this always being realised.<sup>44</sup>

Having said that, at least since March 1997 consistency should have emerged. At that point South Africa's ratification of Convention 111 (to which the LRA and, thereafter, the EEA were bound to give effect) should have provided a framework for interpreting the meaning of 'unfair discrimination'. For reasons that are not always clear, this did not happen.<sup>45</sup>

<sup>42</sup> See fn 41 above.

<sup>43</sup> Preamble to the Act.

<sup>44</sup> For example, *Association of Professional Teachers and Another v Minister of Education and Hoffmann v South African Airways* 2001 (1) SA 1 (CC); [2000] 12 BLLR 1365 (CC) were both decided in terms of the equality clause in the Constitution because the LRA had not yet been promulgated when these disputes arose. In *Hoffmann*, therefore, the statutory defence that the impugned measure was based on an inherent requirement of the job – even though this was, in essence, the employer's initial defence – was not yet available.

<sup>45</sup> For example, the much cited judgment in the *Leonard Dingler* case – the first reported judgment in terms of item 2(1)(a) of Schedule 7 to the LRA handed down seven months after ratification of Convention 111 – made only passing reference to its existence; and, while acknowledging the applicability of item 2(1)(a), went on (at 1447–1449) to decide the meaning of unfair discrimination in a purely constitutional context without reference to labour jurisprudence. Had the appropriate sources of law been considered, it is submitted that the same conclusion would have been reached but the false trail laid in getting there, which was to prove the cause of much confusion, would have been avoided.

The departure of our employment discrimination jurisprudence from the general principles of legal interpretation can be pinpointed more precisely. In the judgment in *Harksen v Lane NO*,<sup>46</sup> handed down in October 1997, the Constitutional Court put forward a systematic test for determining the constitutionality of differential treatment contained in legislation in terms of the equality clause of the Constitution. Unfortunately, as it turned out, this careful piece of legal analysis was to have unintended consequences that would bedevil the labour courts' approach to employment discrimination up to the present day. In judgment after judgment from 1998 onwards, the test for statutory constitutionality laid down in *Harksen v Lane* was routinely invoked by judges (and, presumably, the advocates and attorneys appearing before them) to determine whether the conduct of a private employer vis-à-vis a private employee amounted to 'unfair discrimination'. It was seldom understood, or understood fully, that the *Harksen* test is inappropriate in an employment context for at least two reasons.<sup>47</sup>

First, the relationship between the Constitution and a statute implementing one of its provisions translates into a rule which the Constitutional Court has had occasion to emphasise in several recent judgments. In *SANDU v Minister of Defence and Others*<sup>48</sup> it was put as follows:

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

In *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others*<sup>49</sup> the Constitutional Court had added the following important point:

[W]here a litigant finds a cause of action on such legislation [ie legislation giving effect to a constitutional right], 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.

On this basis it is clear that employment discrimination disputes arising during the period November 1996 to August 1999 should have been decided in terms of item 2(1)(a) of Schedule 7 to the LRA and, thereafter, in terms of s 6 of the EEA. Despite this, the courts have remained willing to entertain claims of unfair discrimination by employees brought directly in terms of the Constitution instead of the EEA.<sup>50</sup> Even where claims were properly brought in terms of the EEA or LRA, judges have readily reverted to case law dealing with the interpretation of the constitutional right to equality (especially in *Harksen v Lane*) rather than the EEA. This is not to

<sup>46</sup> Supra. At issue in this matter was the question whether s 21(1) of the Insolvency Act of 1936 unfairly discriminated against the solvent spouses of insolvent persons. See, in particular, paras 43–53.

<sup>47</sup> Most recently, Van Niekerk et al, *Law@work* (LexisNexis 2008) at 131 again assert, without comment, that the test in *Harksen v Lane* 'has been adopted by the Labour Courts and forms the basis of any enquiry into unfair discrimination in the workplace'. While the first part of the statement is factually correct, the second part clearly is not.

<sup>48</sup> 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) at para 55; cited in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 123.

<sup>49</sup> 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 437.

<sup>50</sup> See, for example, *Stokwe v MEC, Department of Education, Eastern Cape Province* (2005) 26 ILJ 927 (LC); [2005] 8 BLLR 822 (LC).

suggest that constitutional jurisprudence is irrelevant or may not be considered in employment discrimination disputes. The EEA must, after all, also be interpreted in compliance with the Constitution. It is only to say that such reference should be duly qualified as being concerned with general principle rather than a substitute for directly applicable international law and labour jurisprudence. Exclusive reliance on constitutional interpretation, it is submitted, amounts in all but name to bypassing the EEA.<sup>51</sup>

It may be objected that – as noted above – the terms of item 2(1)(a) as well as s 6 are very similar to those of the equality clause. In law, unfortunately, very similar is not the same as identical. The statutory prohibitions are located in the specific context of employment, which is very different from the general and far more complex arena of socio-economic relations which the constitutional prohibition engages with. Thus, as already noted, both statutes laid down specific defences to a claim of unfair discrimination in an employment relationship which are appropriate in that context but are not to be found in the Constitution. And, even more importantly, both statutes were made subject to interpretation in terms of Convention 111. While international law must be ‘considered’ when interpreting the Bill of Rights,<sup>52</sup> this is less than the ‘compliance’ required by s 3(d) of the EEA.

This brings us to the second reason why direct reliance on the Constitution, and on the test in *Harksen v Lane*, is inappropriate for defining ‘unfair discrimination’ in an employment context. The reason is, quite simply, that Convention 111 already contains a definition of such discrimination. Since the EEA must be interpreted in compliance with the Convention,<sup>53</sup> it means that discrimination for purposes of the EEA must be given the same meaning as in Convention 111, thus making it unnecessary to seek a definition in *Harksen v Lane*.

It might be interjected: but what about the Constitution? In the event of conflict between the Constitution and international law, what happens? Fortunately, this problem does not arise. There is no conflict between Convention 111 and the Constitution as far as employment discrimination is concerned.<sup>54</sup> While Convention 111 defines discrimination, the Constitution does not. The courts have at no stage detected any conflict between the definition of the Convention and the meaning to be given to discrimination in terms of the Constitution. Indeed, the Constitutional Court has tacitly accepted discrimination in terms of the Convention as the equivalent of unfair discrimination in the employment sphere.<sup>55</sup> In fact, it is submitted, there is a fundamental congruence between the two concepts.

<sup>51</sup> See, for example, *Dlamini and Others v Green Four Security* (2006) 27 ILJ 2098 (LC); [2006] 11 BLLR 1074 (LC).

<sup>52</sup> Section 39(1)(c) of the Constitution.

<sup>53</sup> In *Van Niekerk et al Law@work* (LexisNexis 2008) it is flatteringly, but inaccurately, suggested that the present author (in the article ‘The Evolution of the Concept of “Unfair Discrimination” in South African Labour Law’ (2006) 27 ILJ 1311) is the source of this proposition: op cit 124 fn 19. The actual and more authoritative source, is of course, s 3(d) of the EEA.

<sup>54</sup> To the extent that the terminology of the Constitution differs from that of the Convention, s 233 of the Constitution provides that ‘[w]hen 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.’

<sup>55</sup> *Hoffmann v South African Airways* at para 51.

As will be seen, the Convention upholds the constitutional objective of substantive equality and provides employees with no less protection against unfair discrimination than that required by the Constitution. In addition – in contrast to some of the complicated explanations offered by the courts – the definition in Convention 111 has the inestimable advantages of simplicity and precision.

So what does it say?

## 5. ILO Convention No 111 of 1958 and (unfair) discrimination

Article 1 of the Convention defines discrimination as including –

- (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.

In essence, this definition covers the same ground as s 6(1) of the EEA, but in more functional terms, rooted in the specific realities of the workplace rather than the broad terms of the Constitution. Notably, it does not separate the element of discrimination from the grounds on which it is prohibited; instead, it combines the two elements into a single concept. The result is still a two-stage inquiry, resembling that derived by the labour courts from *Harksen v Lane*.<sup>56</sup> The questions, however, are more concrete and the answers correspondingly less prone to subjective predilections.<sup>57</sup> The two questions are –

1. Did the conduct complained of amount to –
  - (a) a distinction, exclusion or preference
  - (b) having the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation? And, if so,
2. was it made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin or on such other grounds as determined in accordance with art 1(b) (above)?

The first question is equivalent, in South African terms, to the inquiry whether discrimination had taken place. It has two elements: firstly, the nature of the employer's action and secondly, its consequences. Regarding the first element practically, the phrase 'distinction, exclusion or preference' is practically all-encompassing and it is difficult to imagine any act of alleged discrimination committed by an employer in the employment context falling beyond its ambit.<sup>58</sup> As regards

<sup>56</sup> ie (1) was there discrimination? And (2) was it unfair?

<sup>57</sup> Best illustrated, perhaps, by the famous *excursus* on the scope for fair discrimination against an employee on grounds of pregnancy by Willis JA in *Woolworths (Pty) Ltd v Whitehead* see especially paras 127–150.

<sup>58</sup> A similar effect is achieved by the catch-all concept of 'employment policy or practice': s 6(1) of the EEA, as defined in s 1.

the second element, the consequences set out in the Convention (nullifying or impairing equality of opportunity or treatment in employment or occupation) in practice correspond to the notion of pejorative treatment, as understood by the Constitutional Court, but are expressed in terms of criteria tailor-made for the employment context.

The second part of the first question, captures one aspect of unfairness as discussed above. The second question relates to causation, which is the other aspect of unfairness. Discrimination, in terms of the Convention, only arises if the pejorative treatment (as defined) is based on a prohibited ground. Once this has been established as a matter of fact, the inquiry is at an end. A parallel may be drawn with s 187 of the LRA, dealing with automatically unfair dismissal. In terms of s 187, the fact that a dismissal was based on a prohibited ground is conclusive; the unfairness of the dismissal is automatic and leaves the employer with no remaining defence. Similarly, if one interprets s 6 of the EEA in compliance with Convention 111, discrimination against an employee (as defined in the Convention) based on a prohibited ground will *ipso facto* be unfair.

This interpretation, it is submitted, is consistent with the understanding of unfair discrimination developed in certain South African judgments.<sup>59</sup> In any event, the effect of s 3(d) of the EEA is that the definition of discrimination in the Convention needs to be accepted as a codification of our law on this point.<sup>60</sup>

## 6. Limits to the concept of (unfair) discrimination

It follows from what has been said that not every 'distinction, exclusion or preference' having the effect of 'nullifying or impairing equality of opportunity or treatment in employment or occupation' amounts to discrimination. First, it must be based on a prohibited ground. More specifically, the Convention excludes the following three categories of conduct, whatever their effect, from the definition of 'discrimination':

- (a) '[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof';<sup>61</sup>
- (b) '[a]ny measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State', subject to a right of appeal;<sup>62</sup> and

<sup>59</sup> For example, *Association of Professional Teachers v Minister of Education*; *Eskom v Hiemstra NO and Others* (1999) 20 ILJ 2362 (LC); (1999) 11 BCLR 1320 (LC); *HOSPERSA on behalf of Venter v SA Nursing Council* (2006) 27 ILJ 1143 (LC); [2006] 6 BLLR 558 (LC).

<sup>60</sup> The terms of the Convention have been endorsed by various South African courts, from the Industrial Court to the Constitutional Court. In *PFG Building Glass (Pty) Ltd v CEPPAWU and Others* (2003) 24 ILJ 974 (LC); [2003] 5 BLLR 475 (LC) Pillay J confirmed that '[t]he values embodied in Convention 111 are well entrenched in both the EEA and the Constitution' (at para 75). Most recently, in *McPherson v University of KwaZulu-Natal and Another* (2008) 29 ILJ 674 (LC); [2008] 2 BLLR 170 (LC) the court again noted, but did not apply, the predication of s 6 of the EEA on art 1 of the Convention.

<sup>61</sup> Article 1(2).

<sup>62</sup> Article 4.



- (c) '[s]pecial measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference' as well as 'special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance'.<sup>63</sup>

Thus, while requiring member states to legally enforce the prohibition of discrimination contained in art 1(1), the Convention permits them to provide for any or all of the exclusions noted above.<sup>64</sup> The fact that the Convention does not use a term such as 'unfair' in describing prohibited discrimination avoids any suggestion that the above exclusions amount to acceptable forms of discrimination. The Convention states unambiguously that they are not discrimination. Distinctions between employees falling within the ambit of any of these exclusions, in other words, are not discriminatory because they are not based on a prohibited ground. Instead, they are based on grounds or purposes, as set out in the various paragraphs, which are *ipso facto* defined as being legitimate.

In terms of s 3(d), a similar approach must be followed in construing the exclusions from the concept of unfair discrimination contained in the EEA. It is noteworthy that the EEA, in giving effect to South Africa's obligations in terms of the Convention, follows its requirements precisely. The prohibited grounds of discrimination contained in s 6(1) are those stated in art 1(1)(a) together with additional grounds established in terms of art 1(1)(b). The two exclusions laid down in s 6(2) of the EEA, too, are strictly in accordance with those permitted by the Convention (see paragraphs (a) and (c) above).<sup>65</sup> They read as follows:

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.

If s 6(2) is interpreted in compliance with the Convention, it follows that measures or actions falling within its ambit must, as in the Convention, be excluded from the definition of discrimination. Affirmative action measures and measures arising from inherent job requirements, in other words, are *not* species of fair discrimination. In this fundamental respect, too, the approach of Convention 111 to affirmative action is on all fours with that of the Constitutional Court.<sup>66</sup>

## 7. Conclusion

Section 3(d) of the EEA tells us that the meaning given to the prohibition of unfair discrimination in s 6(1) must comply with that which art 1(1) of Convention 111 requires or permits.

<sup>63</sup> Article 5.

<sup>64</sup> See arts 2 and 3.

<sup>65</sup> Notwithstanding the use of the term 'affirmative action measures', which the Convention does not use, s 6(1) of the EEA is clearly within the contemplation of art 5 of the Convention.

<sup>66</sup> See *Minister of Finance and Another v Van Heerden* (fn 31 above and the passages cited there).

The only obvious difference between art 1(1) of the Convention and s 6(1) of the EEA is the latter's use of the term 'unfair'. This chapter has tried to show that this difference is technical rather than substantive – that is, relating to the manner in which the prohibited activity is identified rather than the nature of the activity itself.<sup>67</sup> In effect, the definition of discrimination in the Convention coincides in all its essentials with the meaning of unfair discrimination gleaned from our admittedly unsystematic labour jurisprudence and its underlying constitutional rationale. The Convention, like the EEA, makes provision for an open-ended list of prohibited grounds of discrimination, but in a different way. Avoiding any particular term for describing the unlisted grounds, the Convention is content to speak of 'such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment' which member states may decide upon within the consultative framework set out in art 1(b). The effect is that member states are charged with a straightforward task, namely the outright prohibition of discrimination as defined in the first part of art 1(a) on any of the grounds (listed or unlisted) referred to in the remainder of art 1.

Section 6(1) of the EEA interpreted in compliance with the Convention, offers no scope for legitimising prohibited discrimination by allowing employers to prove that it is fair. Pejorative discrimination on a prohibited ground (that is, once both elements have been proven) can never be fair. An example is where an employer's refusal to allow an elderly person to remain in a particular job is shown to amount to discrimination (as defined) based on age, and is not necessitated by an inherent requirement of that job, it will be prohibited 'absolutely'.<sup>68</sup>

It goes without saying that s 6(1) must also be interpreted in compliance with the Constitution. This has never been contentious. As noted already, only one difference stands out: s 9(5) of the Constitution, unlike any provision to be found in the EEA, creates scope for proving that discrimination on a listed ground could be fair.<sup>69</sup> This, however, cannot mean that s 6 must be 'read down' so as to limit the prohibition of discrimination on listed grounds only to discrimination which an employer cannot show to be fair. The answer, it has been argued, lies in the fact that the Constitution creates a floor and not a ceiling of rights. A law is in conflict with the Constitution if it fails to provide the minimum degree of protection which the Constitution requires. The objection to interpreting s 6(1) in compliance with Convention 111 would be the opposite of this ie that it provides employees with too much protection (by prohibiting all forms of discrimination based on prohibited grounds instead of only unfair forms). This cannot render it unconstitutional. Varying basic rights downward is impermissible. Varying basic rights upwards is surely to be applauded as long as it does not trespass on other basic rights.

<sup>67</sup> If it were not so, s 3(d) of the EEA means that the EEA would need to be 'read down' in terms of the Convention, thus leading to the same outcome.

<sup>68</sup> *HOSPERSA obo Venter v SA Nursing Council* (2006) 27 ILJ 1143 (LC); [2006] 6 BLLR 558 (LC) at para 32.

<sup>69</sup> Discrimination on unlisted grounds must in any event be proven to be unfair, in the sense discussed above.

In this respect, too, interpreting s 6 of the EEA in compliance with Convention 111 encounters no constitutional hurdle. As the Constitutional Court pointed out in *S v Makwanyane and Another*,<sup>70</sup> 'the interpretative task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms.'<sup>71</sup> However, there is no fundamental right or freedom of employers to discriminate fairly against employees, to be balanced against employees' fundamental right to equality. The only real question, in constitutional terms, is the impact of the alleged discrimination (assuming it is unrelated to any inherent job requirement) on the employee. This is essentially what is encapsulated in the definition of discrimination contained in Convention 111, which responds by prohibiting it absolutely. The Constitution, for reasons discussed above, may not demand an absolute prohibition of such discrimination but certainly does not forbid it. Equality and dignity are, after all, foundational values which must inform the interpretation of every other right and may only be limited for very good reason.<sup>72</sup> Certainly, an employer's commercial interests can hardly justify their limitation. Other than that, the Constitution throws up no obstacle to giving those values the widest possible expression.

Against this background, the so-called 'statutory defences' highlight the logic of the prohibition. Affirmative action measures are excluded from the purview of unfair discrimination because they are about privileging those who have been historically disadvantaged by unfair discrimination rather than undermining the dignity of those who have been historically privileged. If anything, affirmative action measures acknowledge and are premised on the (unfairly) advantaged status of the latter. Similarly, the inherent requirements of a job, as such, have nothing to do with the personal characteristics of employees and do not detract from their dignity. Within the framework of employment law employers are entitled to prefer employees who meet those requirements, exclude those who do not and, generally, exercise control over the performance of the job.

Distinguishing among employees to the extent required by the inherent requirements of the work they do, it follows, must mark the limits of employers' discretion.<sup>73</sup> Unfortunately not everyone sees it this way. For Willis JA, it will be recalled, it was 'not difficult to imagine situations outside of the inherent requirements of a particular job where discrimination would not be unfair'.<sup>74</sup> In fact, it is submitted, to imagine this is very difficult indeed. There can surely be no situation where an adverse distinction, exclusion or preference based on an employee's innate personal characteristics, unrelated to her or his conduct or work performance or the inherent requirements of the job, could reasonably be justified. This chapter

<sup>70</sup> 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 302.

<sup>71</sup> This, as De Waal & Currie in *The Bill of Rights Handbook* emphasise, is not an exercise in *limiting* the right in question but in arriving at its true meaning.

<sup>72</sup> That is, subject to the test laid down in s 36(1). Had the EEA enacted scope for employers to discriminate fairly against employees on listed grounds, it is submitted that such provision could not have passed the test.

<sup>73</sup> In terms of the contract of employment, after all, the employee places only her or his *services* at the employer's disposal. This includes everything that is necessarily bound up with those services, but nothing more – certainly not their dignity.

<sup>74</sup> Per Willis JA in *Woolworths (Pty) Ltd v Whitehead* at para 123.

has tried to show that discrimination in this sense is precisely what the EEA, grappling with the monumental legacy of generations of inequality and discrimination in the workplace, is seeking to root out. It is to be hoped that our courts will give effect to this central purpose of the Act with increasing consistency until, at last, the principle embodied in Convention 111 will become settled law.