

Employment Equity into the Future

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1. Introduction

Since the middle of the last century the prohibition on discrimination in general, and in employment in particular, has gained prominence. The initial recognition of protection against discrimination at international level through the adoption of a number of important conventions¹ was followed by the irregular domestication of protection against discrimination across jurisdictions.

The development of employment discrimination law showed distinct phases and strands:² an initial focus on direct discrimination based on unequal treatment and motive; a move away from the confines of treatment and motive to a focus on effect; the recognition of indirect discrimination; an impetus to expand the grounds of discrimination; a continuous struggle to conceptualise and circumscribe the acceptable limits of discrimination; the recognition of certain non-obvious policies and practices – notably harassment – as discrimination; the recognition of the difficulties associated with proof of discrimination cases followed by measures to tinker with the onus of proof; the development of the idea of substantive equality and increased recognition and application of affirmative action as an integral part of the pursuit of equality; and, finally, where enforcement of the right not to be discriminated against laid a sufficient foundation for recognition of certain marginalised groups in society and a proper understanding of the prejudice associated with membership of those groups, the inclusion of specific rights in legislation to address that prejudice.

Throughout this development, perhaps the central theme has been that discrimination as a legal concept is fraught with difficulty and brings with it a number of challenges. These challenges - which constantly militate against equality law reaching full maturity - include uncertainty about the meaning of the concept itself, uncertainty about the limits of protection against discrimination, the difficulties in bringing a successful discrimination case to court, and the continued search for a

¹ Noteworthy for present purposes are the Universal Declaration of Human Rights, 1948 and, in the employment context, the International Labour Organisation's C 111 Discrimination (Employment and Occupation) Convention, 1958.

² See, in general, Garbers 'The prohibition of discrimination in employment: Performance and prognosis in a transformative context' in Malherbe and Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit Jura* (2012) at 18 ff.

sensible conceptual and practical articulation between a prohibition on discrimination and the idea of special measures or affirmative action.

From the outset, these challenges were especially acute in the 'new' South Africa. Prior to democracy, the organising principle of our society was discrimination, which excluded the majority of the population from effective and productive inclusion in the social, political and economic processes – including employment - that make up any individual and any society. After 1994, the immediate societal demand for transformation meant that South Africa jumped, and had to jump, straight into the deep end of equality law. Equality was ensconced as a foundational value,³ an organising principle,⁴ a substantive right⁵ and an interpretive tool⁶ in our Constitution. This was followed by the Employment Equity Act, 1998 (the EEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA) which aim to regulate equality in some detail in, respectively, employment and broader society. And, as far as the EEA is concerned, a comparison of its content with other jurisdictions is startling: section 6(1) prohibits unfair discrimination, both direct and indirect, on no less than 20 listed grounds (and this list is not exhaustive).⁷ From the outset the EEA declared that the onus to prove at least the fairness of discrimination rests on the employer.⁸ The EEA places a detailed obligation on designated employers⁹ to implement affirmative action and, in so doing, shows clear choices as to who the beneficiaries of affirmative action may be,¹⁰ what measures need to be taken (inclusive of preferential promotion and appointment)¹¹ and what the proxy or yardstick for past disadvantage and present success in addressing past discrimination is ('equitable representation' of these beneficiaries).¹² A pressing need to understand discrimination and to appreciate the relationship between affirmative action and discrimination was immediately apparent; it continues to exist as a precondition for the concept to flourish in the South African context. And, it has to be said, this conceptual search was to some extent bedevilled by one simple reality: neither the Constitution nor the EEA tells us what 'unfair discrimination' means.

³ Section 1(a) of the Constitution, 1996 declares (among others) that '[t]he Republic of South Africa is one, sovereign, democratic state founded on the values [of][h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.'

⁴ Equality, dignity and freedom are the three overarching guiding principles in the 1996 Constitution – see, for example, sections 7, 36 and 39(1).

⁵ Section 9 of the Constitution, 1996. Section 9 contains three substantive provisions – equality before the law (section 9(1)), affirmative action (section 9(2)) and protection against unfair discrimination (section 9(3)-(5)).

⁶ Section 39(2) of the Constitution, 1996 states that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights' of which, as illustrated above, equality is one of the core principles.

⁷ The listed grounds are race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth.

⁸ Section 11 of the EEA provided (before the 2014 amendments) that '[w]henver unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.'

⁹ As defined in section 1. Chapter III of the EEA regulates the implementation of affirmative action.

¹⁰ 'Suitably qualified persons' (as defined in section 20(3)) from the 'designated groups' (as defined in section 1).

¹¹ Section 15.

¹² Section 2.

With this in mind, 2014 was an important year for South African employment equity law, for at least three reasons. First, we saw important amendments to the EEA; amendments which may yet serve to better our understanding, and shape future development of, our employment equity law. Secondly, the Constitutional Court handed down its decision in *South African Police Service v Solidarity obo Barnard*¹³ (hereafter ‘*Barnard*’), a case where our highest court was, for the first time, squarely confronted with the question of the relationship between unfair discrimination and affirmative action in the employment context. Thirdly, the introduction of sections 198B and 198C of the Labour Relations Act, 1995 may yet serve as harbinger of things to come in the field of equality. These new sections (at least to the extent that they provide for equality of treatment of fixed-term and part-time employees) raise questions about the continued role, and perhaps goal, of discrimination law. Experience has shown that fixed-term and part-time employees are often predominantly female and the concept of indirect gender discrimination has been used to establish some parity with permanent employees.¹⁴ But if you have specific rights that address or overtake prejudice associated with discrimination, you do not need general protection against discrimination, especially a concept as challenging as indirect discrimination.

But that is the future. For now discrimination law remains important and will continue to be so – not only as a general baseline mechanism for the recognition and protection of marginalised and potentially marginalised groups in society, but also as a transformative mechanism that may provide the foundation for a potential future regime of specifically targeted legislative rights benefitting specific groups.

Against the background of these remarks, the purpose of this paper is to reflect on the challenges we have faced and continue to face in giving a sound and clear conceptual foundation to our equality law, a foundation which is a necessary precondition for its sensible, practical application and its proper impact – both in the sense of baseline recognition and protection, as well as in transformation. In doing so, it is necessary to address and consider a number of topics: we need to identify in more detail what exactly these challenges are, we need clarity about the ground rules in our search for sense, we need to consider what we knew (or thought we knew) about equality law prior to the 2014 amendments and *Barnard*, we need to reflect on what the amendments and *Barnard* tell us and, finally, we need an honest synthesis as basis for where we are going with our equality law. These issues will be addressed in turn.

2. Challenges and Ground Rules

¹³ 2014 (6) SA 123 (CC).

¹⁴ For example, in all of the following cases the practices were found to have a disproportionate impact on women: *Jenkins v Kingsgate Ltd* 2 CMLR 24 (paying part-time workers a lower hourly rate than full-time workers); *Clarke v Eley (IMI) Kynoch Ltd* [1982] IRLR 482 (retrenching part-time workers before considering full-time workers); *Bilka Kaufhaus v Weber von Harz* [1986] CMLR 701 (requiring full-time employment for occupational pension benefits); *Rinner Kuhn v FWW Spezial-Gebäudedereinigung GmbH & Co KG* [1989] IRLR 493 (granting sick leave only to employees working more than 10 hours per week or 45 hours per month); *Equal Opportunities Commission and another v Secretary of State for Employment* [1994] 1 All ER 910 (requiring part-time employees to work for three years longer than full-time employees to qualify for statutory dismissal protection and for dismissal and redundancy payments).

2.1 Challenges

The EEA seeks to regulate the right to equality in employment through the twin measures of protection against unfair discrimination and the implementation of affirmative action. As such, the EEA seeks to give effect to both the Constitutional vision of the pursuit of substantive equality, while it also seeks to protect what we may call formal equality. Right from the outset, commentators and courts have struggled with the meaning and import of the Act.

As far as unfair discrimination is concerned, the Act – despite prohibiting unfair discrimination in employment - did not (and still does not) provide us with a definition of the concept of unfair discrimination and is very sparse in telling us what its constituent elements are. This raises a whole range of further and more specific challenges. These are: the scope and meaning of the listed grounds of discrimination;¹⁵ the appropriate test for the recognition of so-called unlisted grounds; the question whether an appropriate comparator is always necessary in discrimination cases; the question as to how strong the link between an employment policy or practice and the alleged ground of discrimination should be; the test for indirect discrimination; whether there is such a thing as ‘fair’ discrimination (as opposed to the idea of non-discrimination); whether the two listed grounds of ‘justification’ in the Act – an inherent requirement of a job and affirmative action - are the only two available arguments available to employers to defeat discrimination claims or whether it is open to employers to argue fairness or justification as general concepts; whether the presence of these ‘justification’ grounds means that there is no discrimination, means that there is a concept of ‘fair discrimination’, or means that otherwise unfair discrimination is justifiable; and, lastly, who bears the onus of proving what.

In contrast, the EEA does regulate affirmative action in some detail. The interpretation of the affirmative action provisions will continue to challenge us. But in the context of affirmative action the real challenge has been a hidden one - how to find a sensible and legitimate articulation of the difference between a prohibition on unfair discrimination and an obligation to implement affirmative action, which, viewed through a discrimination prism, always starts life as exclusionary decisions expressly based on race and/ or gender. In particular, the challenge has been to find an answer to the questions whether a failure to implement affirmative action could constitute discrimination against a member of a designated group and whether the actual implementation of affirmative action could constitute unfair discrimination against members of the non-designated groups or members of other designated groups.

2.2 Ground rules

What we do know, as we search and have searched for answers to these questions, is that there are certain ground rules to be observed. First – to state the obvious – ascertaining the meaning of the EEA is a question of interpretation of the Act itself. The EEA, however, does not exist in a vacuum: it functions against the background of our international obligations – notably the International Labour

¹⁵ Of the twenty grounds listed, only ‘pregnancy’, ‘family responsibility’ and ‘HIV’ are defined in section 1. This section also contains a definition of ‘people with disabilities’ which has been applied in the discrimination context, but arguably should only apply in the context of affirmative action (where this phrase is actually used). See Garbers above n 2 at 28 n 45.

Organisation's (the ILO) Convention on Discrimination (Employment and Occupation)¹⁶ – as well as the Constitution. The EEA itself recognises as much in section 3(a), which requires interpretation of the Act 'in compliance with the Constitution', and section 3(d), which requires interpretation 'in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation'.¹⁷ Ground rule number two thus requires interpretation of the EEA in light of both the Constitution and the ILO Convention. But one further important distinction made earlier bears repetition: as far as the meaning and the structure of the concept of unfair discrimination are concerned, the EEA is basically silent while, as far as affirmative action is concerned, the EEA provides a lot of detail. Ground rule number three is that we can expect the interpretive influence of the Constitution and the Convention to be the greatest in that area where it is needed most – the meaning of 'unfair discrimination'.

It is perhaps best to deal with the Convention first. It has been relied on as ostensibly creating a literal prescriptive structure for South African employment equality law, specifically in that it does not create room for the notion of unfair or fair discrimination (only discrimination or non-discrimination) and also that it does not allow for any defences to discrimination claims other than the inherent requirements of a job or affirmative action mentioned in the Convention.¹⁸ However, as far as interpretive role of the ILO Convention is concerned, a number of remarks may be made. First, the ILO Convention itself does not preclude the domestic implementation or operationalisation of the Convention by ratifying states in idiosyncratic fashion. While it is true that the Convention gives us a definition of discrimination (for purposes of the Convention),¹⁹ provides for so-called special measures²⁰ and declares that 'an inherent requirement of a job' and 'special measures' shall 'not be deemed to be discrimination',²¹ article 2 places an obligation on ratifying states 'to declare and pursue a *national policy* designed to promote, *by methods appropriate to national conditions*, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof' (own emphasis). In addition, article 3(b) provides for the discretionary enactment of legislation to secure acceptance and observance of the national policy referred to in article 2. Furthermore, focusing on the detail mentioned in the Convention, the definition of discrimination in article 1(1) of the Convention is ambiguous and arguably more fluid than we think. The definition reads as follows:

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

¹⁶ C 111 Discrimination (Employment and Occupation) Convention, 1958. The Convention was ratified by South Africa on 5 March 1997.

¹⁷ Subsections 3(b) and 3(c) furthermore require interpretation 'so as to give effect to [the] purpose of the EEA' and 'taking into account any relevant code of good practice issued in terms of [the EEA] or any other employment law'.

¹⁸ See Darcy du Toit 'Protection against Unfair Discrimination: Cleaning up the Act?' (2014) 35 *ILJ* 2623 and his own earlier work he references at fn 44.

¹⁹ In article 1(1).

²⁰ In article 5.

²¹ In articles 1(2) and article 5.

There are two ways to read this definition. One way is to say that the mere existence of a distinction based on, for example, race is discrimination in its pejorative sense and that the last part of the definition – the part about its effect – is merely a tautology. If, however, one works on the assumption that words mean something, then the meaning of the definition of discrimination changes. Then it seems clear that it is not the mere existence of a distinction, exclusion or preference based on the grounds listed that constitutes discrimination in its pejorative sense – it also has to have the effect of nullifying or impairing equality of opportunity or treatment. This would mean the acceptability or otherwise of discrimination is a more fluid concept than the mere existence of distinction, exclusion or preference on an identified ground. From a South African perspective, it then becomes easy to argue that the definition in the ILO Convention leaves room for (and arguably requires) the introduction of a ‘fair’ or ‘unfair’ approach (or something similar) to discrimination in order to accommodate consideration of the actual impact or effect of the distinction, exclusion or preference, even though it took place on one of the grounds listed (as is the case in both our Constitution and the EEA, which prohibit ‘unfair discrimination’). Furthermore, article 1(2) of the Convention leaves it open to member states to identify other distinctions, exclusions or preferences which have the effect of nullifying or impairing equality of treatment or opportunity. At the very least, these arguments already mean that any suggestion that the literal wording of the Convention is determinative of the meaning and development of our equality law (and the meaning of the EEA), or, for that matter, that our legislation as it stands is not in line with the Convention, is suspect.

In fact, one cannot help but notice that the Convention, which comes to us from 1958, shows its age compared to the EEA. It mentions only seven grounds of discrimination (including race), does not speak of affirmative action (but ‘special measures’) and does not immediately identify ‘race’ as a ground which is ‘generally recognised’ to ‘require special protection or assistance’ (it does mention ‘sex’ and ‘disablement’).²² Furthermore, by their very nature Conventions are generally formulated, constitute a ‘baseline’ and, as illustrated above, are fluid. While the Convention remains important and is a guiding light for domestic equality law, that law should ultimately be developed appropriate to our own national conditions. In any event, the Convention can never be taken to mean that it prohibits something provided for in domestic law that is not provided for in the Convention. Domestic law might well be more effective and better suited to national conditions than the Convention itself – especially where we prohibit discrimination on a large number of grounds in all employment policies and practices. In this regard, it may already be said that the word ‘unfair’ itself has an important value. It forces us to always consider the impact of discrimination and what makes it unfair. In contrast, if we were to take the Convention literally, it requires us to stick our heads in the sand (to deem something that looks discriminatory as non-discrimination). This means the real danger is that the underlying unfairness of discrimination will never be unpacked and we will never truly appreciate the marginalization of, and the effect of that marginalisation on, different groups in society. Ultimately, only the true appreciation of marginalisation will lead to true transformation (especially in case of the lesser known grounds). And, as will be argued below, the so-called dangers of ‘fairness’ is more apparent than real – in the South African context it has developed into a clearly defined and quite stringent approach to the acceptability of discrimination.²³ In any event, the

²² In articles 1(a) and 5(2) respectively.

²³ It has been pointed out that instead of using ‘fairness’, one could interpret ‘the inherent requirement of a job’ along the lines of ‘fairness’ as developed in South Africa – see Garbers op cit n 2 at 33 ff.

formulation of idiosyncratic standards to balance competing interests in the area of employment discrimination law across different jurisdiction – standards that depart from the exact wording of the Convention - is hardly contentious.²⁴

The interpretive influence of the Constitution on the EEA is, as point of departure, shaped by the principle of constitutional avoidance: where legislation gives effect to a Constitutional right (like the EEA does) any remedy for infringement of that right should be sought in the ordinary legislation itself.²⁵ At a first level, this simply means that the EEA is the primary source of employment equality law. By necessary implication it also means that, in the absence of constitutional challenge, the role of the Constitution becomes that of an interpretive guide to the EEA. It also means that the magnitude of this interpretive role will, and has to, vary according to the detail contained in legislation. In turn, this simply means that we can (rightly) expect a large measure of Constitutional influence where legislation itself is sparse (such as the meaning of unfair discrimination in the EEA) and relatively little Constitutional influence where legislation is detailed (such as affirmative action as regulated in the EEA). Having said this, one should be mindful of the dictate that even where legislation is clear, interpretation should be purposive and compliant with the Constitution, the more so where legislation relates to transformation and is ‘umbilically linked to the Constitution’.²⁶ A purposive interpretation can, however, never be understood to mean the complete disregard of the idea of constitutional avoidance or the clear wording of legislation.

3. What we knew (or thought we knew) about equality law and trends in litigation law prior to the amendments and *Barnard*

3.1 The structure and application of unfair discrimination

(a) Discrimination, unfair discrimination, and the justification of unfair discrimination

The past two decades or so have undeniably shown that the structure of ‘unfair discrimination’ laid down by the Constitutional Court in *Harksen v Lane NO & others*²⁷ remained and continues to remain determinative in employment discrimination cases. In terms of this view, discrimination (not unfair discrimination) exists when (in the employment context) a sufficient link is shown between the policy or practice in question and an identifiable and applicable ground of discrimination. This link, of course, may be direct or indirect. Secondly, *Harksen* made a clear distinction between ‘discrimination’ and ‘unfair discrimination’. In subsequent decisions – of the Labour Courts, the

²⁴ *Ibid.*

²⁵ See, for example, *South African National Defence Union v Minister of Defence and others* 2007 (5) SA 400 (CC) at par 51: ‘where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.’

²⁶ See *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 51-53.

²⁷ 1998 (1) SA 300 (CC).

Supreme Court of Appeal, as well as the Constitutional Court²⁸ – one recurring theme has been a clear measure of comfort with the idea of the ‘unfairness’ or ‘fairness’ of ‘discrimination’. Furthermore, this has been the approach not only in cases where the constitutionality of legislation has been attacked (as was the case in *Harksen*), but also where the alleged discriminatory conduct of both the State and private organisations was under scrutiny. This experience clearly contradicts the view that the word ‘unfair’ (especially in the employment context) is no more than a tautological adjective, a meaningless reminder of what ‘discrimination’ in any event means. In fact, *Harksen* went further and gave us a baseline approach to unfairness:

‘ In the final analysis, it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination. In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question...
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving 'precision and elaboration' to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event, it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.²⁹

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

Where things have become a bit muddled is that *Harksen* also tells us - at least in the Constitutional context – that unfair discrimination may be justified in terms of section 36 of the Constitution.³⁰ This

²⁸ For the most recent judgments, see part 3.1(d) below.

²⁹ *Harksen* paras 51-52.

³⁰ Section 36(1) of the Constitution, 1996 states that ‘[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the

section, however, only applies to laws of general application, clearly not to individualised conduct. In at least one case, even though decided in the context of PEPUDA, the Constitutional Court seemed to express doubt about the application of section 36 justification factors in the context of individualised discriminatory conduct.³¹ But at the same time, the meaning of ‘fairness’ as developed by the Constitutional Court itself – already apparent from the *Harksen* formulation quoted above – and also applied in the context of discriminatory conduct, includes more objective, ‘justification’ factors. In fact, it seems easy to make the argument that in *Harksen*, the Constitutional Court already made the idea of proportionality (in the sense of the importance of the goal, the extent of infringement and the relationship between means and ends), which is the cornerstone of justification (in the Constitutional sense), an integral part of ‘fairness’ - as it should be.

What is also true is that the EEA continues to specifically mention only two defences to unfair discrimination claims – an inherent requirement of a job and affirmative action consistent with the purpose of the EEA.³² Mention of these defences is paired with the statement that should these defences apply, the employer’s conduct ‘is not unfair discrimination’. This gave rise to an academic debate as to whether these are the only defences available to discrimination claims and also whether the presence of these defences means there is no discrimination to begin with, whether it makes the discrimination fair, or whether it justifies unfair discrimination. By the time the amendments to the EEA came into force, the prevailing judicial view was that the two defences mentioned in the EEA are not the only available defences (but that employers may argue ‘fairness’ around these defences); that it is not necessary to enquire whether these defences make otherwise unfair discrimination fair; that the two defences mentioned rather should simply be seen as complete defences which defeat the case; and, based on the express wording of the old section 11 of the EEA, it was not possible for discrimination in the employment context to be ‘justified’.³³

These developments also address three arguments raised over the years. First, there is the argument that as a matter of South African employment discrimination law, there is no such thing as fair discrimination,³⁴ an argument clearly not supported by case law. Secondly, a more refined version of this argument held that the acceptability of ‘discrimination’ is and should be determined not by ‘fairness’, but by legitimacy and proportionality.³⁵ This argument is addressed by the reality that proportionality is part and parcel of our view of ‘fairness’. Thirdly, the flip-side of the second argument mentioned is that, given the importance of equality, we need a more exacting standard

limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

³¹ *MEC For Education, Kwazulu-Natal, and others v Pillay* 2008 (1) SA 474 (CC) where the court said, with reference to section 14 of PEPUDA (which provides a list of factors influencing the fairness or otherwise of discrimination): ‘The list of factors in s 14(3) includes issues that traditionally fall under a fairness analysis.... and questions normally relevant to a limitation analysis under s 36(1) of the Constitution. Accordingly, the fairness test under the Equality Act as it stands may involve a wider range of factors than are relevant to the test of fairness in terms of s 9 of the Constitution. Whether that approach is consistent with the Constitution is not before us, and we address the question on the legislation as it stands.’ (par 70)

³² In section 6(2).

³³ See part 3.1(d) below.

³⁴ This is the view of Du Toit – see above n 18.

³⁵ See Bob Hepple ‘Can discrimination ever be fair?’ in Malherbe and Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D’Arcy du Toit* Juta (2012) at 1 ff.

than fairness in our search for the limits of discrimination.³⁶ As the further discussion will show, this argument loses sight of one simple reality: the idea of 'fair' discrimination – started in *Harksen* and developed over the years - is, in fact, subject to a clear and stringent standard which rests on four pillars – dignity (as the prime determinant), rationality, proportionality and individual accommodation.

(b) The test for recognition of unlisted grounds of discrimination

Harksen (with reference to *Prinsloo*³⁷) also gave us a test for the recognition of so-called unlisted grounds for purposes of discrimination:

'There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.'³⁸

This test was subsequently expanded on by the Constitutional Court,³⁹ but it has never strayed from its early direction: discrimination is about an impact on dignity - it is about attributes or characteristics which make us who we are. It is not about mere difference - in the words of the Constitutional Court:

³⁶ See Hepple *ibid*. This view was also expressed by Van der Westhuizen J in *Barnard*.

³⁷ *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC).

³⁸ *Harksen* par 49.

³⁹ Already in *Harksen* the court elaborated as follows: 'I would caution against any narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. *In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features.*....Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in society' (Par 53). In accepting citizenship as an unlisted ground of discrimination the Constitutional Court in *Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) quoted with approval from *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1 (at 32): 'Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending".' The court in *Larbi-Odam* went on to state that 'citizenship is a personal attribute which is difficult to change. In that regard, I would like to note the following views of La Forest J, from [*Andrews* par 39]: 'The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.' What all of this seems to say is that the test for recognition of unlisted grounds is quite strict and includes the identification of a distinct group, sharing commonality and worthy of protection; the ground has to be related to the listed grounds in that it impacts, or has the potential to impact dignity; this required relationship with the listed grounds also requires immutability; immutability means that a person cannot control the attribute or characteristic in that it cannot be changed (albeit temporarily) by conscious action and, to the extent that the attribute or characteristic may be changed, this can only be done at unacceptable cost. See also the remarks focusing on the impact of the vulnerability and dignity of HIV – positive persons the court made in *Hoffman v SA Airways* (2000) 21 ILJ 2357 (CC) at 2370-2371 in the course of recognising HIV status to be an unlisted ground (for purposes of the Constitution).

[t]he Constitution ...prohibits the breach of equality not by mere fact of difference but rather by that of discrimination. This nuance is of importance so that the concept of equality is not trivialised or reduced to a simple matter of difference.⁴⁰

The test for unlisted grounds has also been accepted in the Labour Courts.⁴¹ What is also true is that for a brief period of transition, the general prohibition on discrimination in employment was contained as an unfair labour practice in Schedule 7 to the Labour Relations Act, 1995. During this time, unfair discrimination was prohibited on 'any arbitrary ground, including' the listed grounds. This resulted in at least one decision – *Kadiaka*⁴² – where the court took the word arbitrary at face value and sought discrimination in the lack of purpose or capriciousness of employer conduct, rather than in an identifiable ground based on the dignity inherent in the concept of discrimination. This decision is dealt with below.⁴³ Perhaps significant for purposes of the discussion to follow, is that the Labour Appeal Court has gone as far as equating the word 'arbitrary' in section 187(1)(f) of the Labour Relations Act, 1995 (which follows the same wording as the old Schedule 7 prohibition on discrimination) with the meaning of 'unlisted' grounds as established in *Harksen*. In dealing with a dismissal based on depression in the context of section 187(1)(f) of the Labour Relations Act, 1995, the court in *Marsland*⁴⁴ had this to say:

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

Further guidance from the Labour Appeal Court comes from an unlikely context. As we know, section 5 of the Labour Relations Act, 1995 curiously makes use of the word discrimination in the context of protection of freedom of association. In *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight & Dock Workers Union*⁴⁵ the court stated with reference to section 9(3) of the Constitution and union membership:

'as far as the anti-discrimination clause (s 9(3)) is concerned, it prohibits discrimination on the grounds listed therein or on analogous grounds. Union membership is not a listed ground and it is unlikely to be considered an analogous ground because such discrimination does not involve the requisite level of injury to human dignity.'⁴⁶

⁴⁰ *Hassam v Jacobs NO and others* [2009] ZACC 19 at par 30 (per Nkabinde J).

⁴¹ See *Middleton & others v Industrial Chemical Carriers (Pty) Ltd* (2001) 22 ILJ 472 (LC), *Ntai & others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC); *IMATU and another v City of Cape Town* [2005] 11 BLLR 1084 (LC).

⁴² *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC).

⁴³ See part 4.3 below.

⁴⁴ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (JA 15/2009 dd 13/8/2009) at paras 24-26

⁴⁵ (2013) 34 ILJ 335 (LAC).

⁴⁶ At par 18.

(c) The test for causation and the onus of proof

The courts have also determined, as far the onus was concerned, that the onus to establish discrimination in both the constitutional and employment contexts remained on the applicant (with the employer called on to show it was fair, if on a listed ground). This approach was facilitated by the wording of section 11 of the EEA.⁴⁷ What was also evident (and this will be discussed in more detail below) is that the sting in the onus tail was not so much in what it clearly meant, but what it was seen to say about the structure of discrimination law and about the relationship between discrimination and affirmative action. As far as the test for causation was concerned, the courts were not particularly consistent. The early decision of *Louw v Golden Arrow*⁴⁸ raised three possibilities – any contamination by a ground of discrimination is enough, an immaterial contamination is not sufficient, or discrimination exists to the extent of contamination. In general, one could say that the courts applied a mixture of the ‘but for’ test and a more standard approach to causation, largely flip sides of the same coin.⁴⁹ The last-mentioned approach consists of factual causation (would this have happened but for race, sex etc) and, if not, was race, sex etc the proximate or dominant cause for the discrimination (legal causation). It has to be said that the ‘but for’ test of causation applies to the differential treatment inherent in direct discrimination. In indirect discrimination cases, the link is established through proof of a disproportionate impact of a policy or practice on a protected group coupled with proof of membership of the prejudiced group. This requires an often statistically complex comparison of compliance rates between different groups (where those groups are distinguished based on a ground of discrimination).

(d) The latest words from the Constitutional Court, the Supreme Court of Appeal, the Labour Appeal Court and the Labour Court on the meaning of ‘unfair discrimination’

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

In *Mbana v Shepstone & Wylie*⁵⁰ the constitutional court considered an application for leave to appeal where the complainant alleged discrimination based on her ‘race and social origin or an arbitrary ground’. Her complaint was based on the refusal by a firm of attorneys to allow her to commence employment without having finished her LLB degree (the allegation was made that the firm had allowed other candidates - one black and two white - to commence employment without LLB degrees). In considering her prospects of success, a unanimous court stated, as point of departure and with reference to *Harksen*, that:

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

⁴⁷ Above n 8.

⁴⁸ *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) at 197-198.

⁴⁹ See, for example, *Whitehead* below n 119.

⁵⁰ (2015) 36 ILJ 1805 (CC). See also the remarks of Jafta J in *Sali v National Commissioner of the SA Police Service & others* (2014) 35 ILJ 2727 (CC) at paras 7-16.

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

The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair.' (footnotes omitted)⁵¹

This statement clearly shows that *Harksen* remains determinative in the context of discriminatory conduct in the employment context and that 'fairness' is the ultimate determinant of the acceptability or otherwise of discrimination (despite the specific mention of 'an inherent requirement of a job' in section 6(2) of the EEA).⁵² Particularly interesting in this regard was the acceptance by the court that 'business needs of the respondent dictated that these [other] candidate attorneys be retained under these circumstances', followed later by the statement that:

'it must be stressed that an employer's business and operational needs will not simply be accepted on the employer's own say-so. It must be shown, objectively, that there are genuine and legitimate business and operational needs that justify the differential treatment of employees. We believe that, in this case, the respondent has adequately done so.'⁵³

Clearly – and in line with the approach to fairness laid down in *Harksen* - the court was willing to consider (and this may be seen both as part of rationality and as part of proportionality as an aspect of fairness) the 'genuine and legitimate business and operational needs' as an important factor influencing the fairness of discriminatory conduct in employment. The Supreme Court of Appeal also adopted the *Harksen* approach in *Department of Correctional Services & another v POPCRU & others*⁵⁴ and was quite comfortable seeing the 'inherent requirement of a job' as justification for otherwise unfair discrimination (despite upholding the claim).⁵⁵

In a comprehensive judgment handed down barely two months before the amendments to the EEA were promulgated, the LAC was called on to consider – in *SA Airways v Jansen van Vuuren & another*⁵⁶ - a claim of unfair discrimination on the basis of age. The claim arose from a collective agreement which provided for the lower payment of pilots over the age of 60 compared to pilots under the age of 60. The employer sought to justify the discrimination on the basis that this differentiation was the product of collective bargaining and contained in a collective agreement. In rejecting this argument and upholding the claim, and in line with what was said above, the LAC accepted the following self-explanatory principles:

- (i) Despite the court being fully aware of the ILO Convention and its role in interpretation of the EEA, it accepted that 'material guidance is to be derived from the equality analyses that were conducted under the Constitution and the interim Constitution';⁵⁷

⁵¹ Paras 25-26.

⁵² While the court used the word 'justified' in the course of its judgment, it is clear that it was considering the 'fairness' of the employer's conduct.

⁵³ Par 38.

⁵⁴ [2013] ZASCA 40.

⁵⁵ At paras 21, 23 and 25.

⁵⁶ (2014) 35 *ILJ* 2774 (LAC).

⁵⁷ Par 29.

- (ii) With reference to *Harksen* and *Prinsloo*, the court adopted a two stage analysis: ‘the first stage would be to determine whether the conduct or measure of the employer, which the employee is complaining about, constitutes ‘discrimination’. The second stage is to consider whether it is ‘unfair’;⁵⁸
- (iii) As far as the onus is concerned, and despite the absence of an express deeming provision in (the old) section 11 of the EEA, the effect of (the old) section 11 of the EEA is the same as the onus provision in the Constitution – ‘unless the employer establishes that the discrimination is fair, it would be unfair’;⁵⁹
- (iv) Section 11 of the EEA (as it was worded prior to the amendments) does not allow for justification of otherwise unfair discrimination;⁶⁰
- (v) With reference to *Hugo*,⁶¹ *Walker*,⁶² *Hoffmann*,⁶³ *Dingler*,⁶⁴ *Vetsak*⁶⁵ as well as the wording of (the old) section 11 of the EEA, the court formulated the following principles relating to the fairness of discrimination:
- ‘no clear distinction can be drawn between the considerations involved in determining fairness and those involved when determining justification’;⁶⁶
 - ‘ideally, in determining fairness, moral considerations and the impact of the measure complained of ... should be assessed’;⁶⁷
 - Section 11 of ‘the EEA recognises that there may be considerations other than those specifically referred to in section 6(2) which may render the discrimination fair’;⁶⁸
 - An inherent requirement of a job and affirmative action specifically mentioned in s 6(2) of the EEA ‘are complete defences to an allegation of unfair discrimination’;⁶⁹
 - In determining fairness in the general sense, the court will have to exercise a value judgment based on consideration of all relevant factors. The determining factor remains the impact of the discrimination on the victim,⁷⁰ but relevant factors may include economic arguments, commercial requirements, the approach of competitors,⁷¹ the legitimacy of the goal of the discrimination, as well as the proportionality and rationality of the mode of discrimination relative to its goal.⁷²

⁵⁸ Par 35.

⁵⁹ Par 36.

⁶⁰ Par 38. The new section 11 now expressly allows for justification – see part 4.4 below.

⁶¹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

⁶² *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).

⁶³ Above n 39.

⁶⁴ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC).

⁶⁵ *NUMSA v Vetsak Co-operative Ltd & others* (1996) 17 ILJ 455 (A).

⁶⁶ *Jansen van Vuuren* par 39.

⁶⁷ *Ibid.*

⁶⁸ Par 45.

⁶⁹ *Ibid.*

⁷⁰ This comes from *Hugo*, *Harksen* and *Hoffman*.

⁷¹ These three factors come from *Hoffman*.

⁷² This comes primarily from *Dingler* where the court stated that ‘[d]iscrimination is unfair if it is reprehensible in terms of society’s prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational’ (at 295 H).

This, in essence, calls for a balancing of the interests of the employer with that of employees.⁷³

Further down the ladder, the Labour Court continues to apply the *Harksen* approach to discrimination and unfair discrimination – the most recently reported cases include *Bandat v De Kock & another*⁷⁴ and *Brink v Legal Aid SA*.⁷⁵

3.2 The relationship between unfair discrimination and affirmative action

Against the backdrop of section 9(2) of the Constitution, the EEA regulates affirmative action in detail. Through the obligation placed on designated employers to implement affirmative action on the basis of race, gender and disability, it ensures that designated employers will continue to distinguish, exclude and prefer employees and prospective employees on grounds which also form the basis of unfair discrimination claims. Put differently, should the *Harksen* approach apply to cases where applicants are excluded based on affirmative action, the employer admits to discrimination (differentiation on a listed ground) which, in turn, is presumptively unfair and may only be defeated (in the employment context) if the employer can show that the affirmative action measures were consistent with the purpose of the EEA. The past two decades have seen a number of unfair discrimination cases arising from affirmative action measures come before the courts. For the most part, the courts took these cases at face value and required of the employer to carry the onus of establishing the ‘fairness’ of the affirmative action measures, most notably when the Supreme Court of Appeal handed down their judgment in *Barnard*.⁷⁶

Both as a matter of common sense and as a matter of law, this approach has always been suspect. The Constitution is transformative and section 9(2) allows for and, arguably, requires affirmative action measures. If the equality we pursue is substantive equality (which requires transformation by means of affirmative action), then how can it be said that affirmative action is, in principle, suspect and that it is, at best, an exception to the prohibition on unfair discrimination? Different answers and approaches to these questions have surfaced, both from academia and the courts. One solution is to say that lawful affirmative action means there is no discrimination to begin with (let alone unfair discrimination). Another solution would be to say – a la *Jansen van Vuuren*⁷⁷ – that lawful affirmative action simply and expressly is a complete defence against any allegation of unfair discrimination and that the question whether it is non-discrimination or fair discrimination is simply irrelevant. The only relevant question then would be whether the affirmative action could be said to be consistent with the purpose of the EEA, which, in a catch 22 way, also includes the elimination of unfair discrimination.⁷⁸ A third solution would be to try and be a little thick skinned and simply view

⁷³ *Jansen van Vuuren* paras 39-45. The idea that fairness is not one-sided but remains a double edged sword and always calls for a balancing act comes from *Vetsak*.

⁷⁴ (2015) 36 ILJ 979 (LC) at par 16 ff.

⁷⁵ (2015) 36 ILJ 1020 (LC) at par 64 ff.

⁷⁶ *Solidarity on behalf of Barnard v SA Police Service (Vereniging van Regslui vir Afrikaans as amicus curiae)* (2014) 35 ILJ 416 (SCA) at par 55.

⁷⁷ Above n 56.

⁷⁸ Section 2 of the EEA.

affirmative action as fair or justified discrimination (as was often done prior to the amendments and *Barnard*).

For now, what is important is that prior to *Barnard*, the Constitutional Court dealt with the issue of affirmative action only once, and then in a context vastly different to employment and the nature of affirmative action as envisaged by the EEA. In *Minister of Finance and Other v Van Heerden*⁷⁹ the court was called on to consider whether a parliamentary pension scheme which differentiated between employer contributions made on behalf of different categories of members according to a fixed formula constituted unfair discrimination. The scheme allegedly treated black persons more favourably than their white, coloured and Indian counterparts (who had been part of the tri-cameral parliament prior to 1994). In the context of section 9 of the Constitution, Moseneke J formulated the following approach and test on behalf of the majority of the Court:

‘The pivotal enquiry in this matter is not whether the Minister and the Fund discharged the presumption of unfairness under section 9(5), but whether the measure in issue passes muster under section 9(2). If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination. *However, if the measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the Harksen test in order to ascertain whether the measures offend the anti-discrimination prohibition in section 9(3)It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.*⁸⁰ (own emphasis)

There can be little quarrel with the approach that affirmative action measures should not be seen as a suspect exception to the prohibition on discrimination and, as such, presumptively unfair. However, for purposes of the further discussion, three points should be made. First, *Van Heerden* clearly stated that affirmative action outside the limits of section 9(2) (ie lawful limits) could constitute unfair discrimination. Unlawful affirmative action may well constitute unfair discrimination. Secondly, *Van Heerden* laid down a general constitutional approach where the measure itself consisted of a calculable specific outcome. In the employment world, we already have the Constitutional section 9(2) measure – the EEA. The EEA is a specific, tailor-made and detailed piece of legislation and its provisions should, in light of constitutional avoidance, already be respected. It bears repeating that section 6(2) elevates affirmative action to a defence against unfair discrimination claims if it is *consistent with the purpose of the EEA*,⁸¹ not when affirmative action is in line with section 9(2) of the Constitution.⁸² Furthermore, the EEA at best allows for discretionary measures (employment equity plans), which in turn requires discretionary implementation on a daily basis. Ultimately, individual affirmative action decisions are twice removed from section 9(2) of the Constitution. Clearly, things can and will go wrong, and when they do – at least on the authority of *Van Heerden* – they may well constitute unfair discrimination. While affirmative action measures may not be presumptively unfair – in their design and in their implementation – this does not mean

⁷⁹ 2004 (6) SA 121 (CC).

⁸⁰ Paras 36-37.

⁸¹ Section 2 of the EEA includes both the elimination of unfair discrimination and the implementation of affirmative action measures in its purpose.

⁸² The implication of this is discussed in part 5 below.

that they cannot be unfair. This much, at least, *Van Heerden* recognises. Thirdly, *Van Heerden* also gave a rather worrying insight into the inconsistencies of thinking of our highest court on how to reconcile affirmative action and unfair discrimination. *Van Heerden* includes at least the views that affirmative action is not discrimination because section 9(2) insulates affirmative action from a discrimination enquiry, that affirmative action is not unfair discrimination because collective dignity overrides individual dignity and makes it fair, or affirmative action is not unfair discrimination because the dignity of previously advantaged people here weigh less and this makes it fair. In this sense at least – ie the inconsistent thinking in our highest court - *Van Heerden* was a sign of things to come in *Barnard*.

Still on the topic of the relationship between affirmative action and unfair discrimination prior to *Barnard*, mention should be made of the decisions in *Harmse*⁸³ and *Dudley*.⁸⁴ In both cases, the claim of unfair discrimination was located in an absence or lack of affirmative action *as such* to the benefit of a member of a designated group. While *Harmse* accepted this possibility, it was authoritatively dismissed in *Dudley* and did not arise in any other case prior to the amendments and *Barnard*. Despite our highest court holding in *Van Heerden* that section 9 of the Constitution makes it clear that affirmative action is an integral part of equality, the arguments which defeated the idea that a lack of affirmative action in itself could constitute discrimination in the context of the EEA, still ring true.

3.3 Trends and patterns in discrimination litigation prior to the amendments⁸⁵

Despite growing certainty about the meaning and structure of ‘unfair discrimination’ as described above, litigation of the right not to be unfairly discriminated against showed certain trends prior to 2014, trends worthy of consideration as we look to the future. A review of reported cases showed, firstly, that there were relatively few discrimination cases, a state of affairs in all probability caused by jurisdiction vesting in the Labour Court only, as well as the uncertainty about and the challenges inherent in, the concept of discrimination. Secondly, of the cases that went to court, by far the majority were direct discrimination cases, with indirect discrimination finding little application in practice (and serving as no more than an intellectual curiosity). Thirdly, by far the majority of these cases were unsuccessful. Fourthly, the majority of the unsuccessful cases were unsuccessful because they were defeated at the ‘discrimination’ stage (and not the ‘fairness’ stage). This, in turn was usually the result of one of three reasons: the inability of applicants to show differentiation to begin with; the development of a curious culture of unsupported reliance on unlisted grounds of discrimination evidenced by the inability of applicants to identify a ground or to show that the unlisted ground meets the test for recognition as an unlisted ground; or the inability of applicants to establish a sufficient ‘but for’ link between the policy and the ground in question. Fifthly, this meant that in many cases reliance was placed on unfair discrimination where there was no more than a vague notion of unfairness, but little appreciation that you always need a link with an identifiable and applicable ground in a discrimination case. Put differently, rather than being a frontline

⁸³ *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC).

⁸⁴ *Dudley v City of Cape Town & another* (2004) 25 ILJ 305 (LC). The appeal was dismissed – reported at [2008] 12 BLLR 1155 (LAC).

⁸⁵ This is a summary of the review included in Garbers *op cit* above n 2.

mechanism for the recognition of dignity, the elimination of marginalization and transformation in workplaces, unfair discrimination was often reduced to a vague and opportunistic (if unsuccessful) possibility triggered by less lofty considerations (such as money). Sixthly, ironically, the discrimination cases that were successful were the so-called affirmative action cases (where the employer in effect conceded the merits of 'discrimination' and bore the onus of proving that the affirmative action was consistent with the purpose of the EEA). Lastly, because most discrimination cases were defeated at the discrimination stage, the courts never really grappled with the available defences against discrimination claims – either 'fairness' generally or in the sense of an 'inherent requirement of a job'.

It is against this backdrop that the EEA was amended and the Constitutional Court gave their decision in *Barnard*.

4. The 2014 Amendments to the EEA⁸⁶

4.1 Overview of the amendments

For present purposes, and in line with the theme of the earlier discussion, the important amendments are those that have the potential to impact on the structure and our understanding of unfair discrimination law and how this part of our equality law might contribute to transformation. This in mind, the focus will be on:

- the expansion of the CCMA's jurisdiction to include sexual harassment cases (harassment as unfair discrimination) and all unfair discrimination cases where applicants earn below the threshold;⁸⁷
- the insertion of the words 'any other arbitrary ground' into section 6(1) of the EEA after the list of 20 grounds expressly mentioned in that section (ostensibly for 'clarification' and to bring section 6(1) of the EEA in line with section 187(1)(f) of the LRA)⁸⁸;
- the inclusion of a completely overhauled section 11, dealing with the onus of proof in discrimination cases;⁸⁹ and
- the express prohibition of 'equal pay' discrimination⁹⁰ and the refinement of the regulation of equal pay discrimination in the regulations published in terms of the EEA.⁹¹ Note,

⁸⁶ See the Employment Equity Amendment Act 47 of 2013 which came into operation on 1 August 2014.

⁸⁷ Section 10(6)(aA) now allows for employees referring discrimination disputes to the CCMA for arbitration (even in the absence of consent by the employer) 'if (i) the employee alleges unfair discrimination on the grounds of sexual harassment; or (b) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.'

⁸⁸ According to the Explanatory Memorandum to the 2012 Employment Equity Amendment Bill published in GG 35799 dd 19/10/2012.

⁸⁹ This section is discussed in part 4.4 below.

however, that the remarks below will not focus on equal pay as such, rather on what these provisions contribute to our understanding of unfair discrimination.

4.2 The jurisdiction of the CCMA

Given the reservations expressed earlier about the relative paucity of discrimination cases leading up to 2014, the broadening of the CCMA's jurisdiction will lead, and already has led, to a significant increase in the number of discrimination cases referred to the CCMA. In principle, this development holds true potential for the contribution of discrimination law to baseline protection as well as transformation. Added to this, the powers given to commissioners in discrimination cases include not only the award of compensation and damages, but also to make 'an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice from occurring in the future in respect of similar employees.'⁹² At the same time, it raises serious questions about the capacity of the CCMA to deal with a new flood of cases. Heed should again be taken of some of the trends identified in discrimination litigation mentioned earlier⁹³ – notably what we referred to as the curious culture of a reliance on unlisted grounds and the fact that discrimination cases more often than not originate in a vague notion of unfairness (rather than actual impairment of dignity). It is to be expected that this will be aggravated by insertion of the word 'arbitrary' in section 6(1),⁹⁴ at least to the extent that this word will perpetuate and presumably increase allegations of discrimination on grounds other than those listed in section 6(1) of the EEA.

But, it is submitted, there are a number of ways the CCMA may address this danger, ways which also depend on how we view the meaning of the new 'arbitrary ground' in section 6(1)⁹⁴ and how we view the new onus provision in section 11⁹⁵:

- In all discrimination cases, the CCMA may insist that section 10(4)(b) of the EEA has been complied with prior to conciliation. This section requires evidence to the satisfaction of the CCMA at the time of referral that the 'referring party has made a reasonable attempt to resolve the dispute'. This could be interpreted to mean that the allegation of discrimination was properly raised with the employer (along the lines explained below), that the employer was given the opportunity to respond to these allegations and that this response was considered and rejected by the referring party. This information may already assist in reaching sensible solutions at conciliation.
- If a discrimination case based on a listed ground is referred to arbitration, section 11 now states that the full onus of persuasion (both the absence of discrimination or the fairness

⁹⁰ Section 6(4) of the EEA now reads as follows: 'A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.'

⁹¹ Regulations 2-7 of the Employment Equity Regulations, 2014 published as GN R595 in GG 37873 dd 1/8/2014.

⁹² Section 50(2)(c) read with section 48 of the EEA.

⁹³ See the discussion in part 3.3 above

⁹⁴ Discussed in part 4.3 below.

⁹⁵ Discussed in part 4.4 below.

thereof) rests on the employer in the face of a mere allegation of unfair discrimination. At the same time, it is a fundamental principle of our law that every litigant is at least entitled to know what the case against him or her is. To the extent that the word 'allege' really means 'allege', one could at least expect employees to refer their cases properly (ie to 'allege' properly) – in the sense that the referral identifies the policy or practice concerned, the ground or grounds allegedly applicable, and the reason why the applicant says it constitutes discrimination (ie causation). If not, any employer faced with a mere allegation has to control for at least 12 broad possible employment practices⁹⁶ and 20 possible (listed) grounds. Put differently, a bland allegation of discrimination could be any one of 240 different discrimination cases (taking only listed grounds into consideration). In this regard, there are two rules⁹⁷ the CCMA may fruitfully use prior to arbitration - rule 19, which empowers the CCMA or an arbitrating commissioner to direct the referring party to deliver a statement of case containing the material facts on which reliance is placed and the legal issues arising from those facts and rule 20, which empowers the CCMA to direct the parties to hold a pre-arbitration meeting. Even in the absence of such a statement or meeting (and despite the onus being on the employer), there is also nothing wrong with expecting the applicant to testify first and to produce 'some credible evidence' that unfair discrimination might be involved at which point the onus proper passes to the employer to prove the absence of discrimination, fairness or justification. This evidence should primarily be about the existence of discrimination⁹⁸ (ie whether there is differentiation, a valid comparison, an identified and applicable ground of discrimination, and a sufficient link between the differentiation and the ground in question). Our experience in the area of automatically unfair dismissal makes it clear that such an approach – of placing an evidential burden on the employee - does not violate a provision that the onus proper remains on the employer.⁹⁹

- Commissioners will do well to constantly bear in mind that there are many ways to defeat allegations of discrimination, even if on a listed ground: the absence of a valid comparison, the inapplicability of the alleged listed ground of discrimination; the absence of a 'but for' link¹⁰⁰(in direct discrimination cases) or a disproportionate impact (in indirect discrimination cases); and only then, consideration whether the discrimination was rational and not unfair, or otherwise justifiable (as to this, see the remarks below);
- If discrimination is alleged on an arbitrary ground, the full onus, of course, remains on the employee. Most of the remarks made above are also applicable here, but there is one important variation. Section 6(1) prohibits discrimination not on 'arbitrariness' (ie a vague feeling that there is differentiation and no good reason), but on an 'arbitrary ground'.¹⁰¹

⁹⁶ In section 1 of the EEA there is a definition of 'employment policy or practice' which includes (in a non-exhaustive list) 13 broad policies and practices, inclusive of dismissal. Discriminatory dismissal is still dealt with in terms of sections 187(1)(f) and 191(5)(b) of the Labour Relations Act, 1995 (which assigns jurisdiction to the Labour Court) and is left aside for the present discussion.

⁹⁷ See the Rules for the Conduct of Proceedings before the CCMA GN 223 in GG 38572 dd 17/3/2015.

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

⁹⁹ See, for example, *Mashava v Cuzen & Woods Attorneys* (20000) 21 ILJ 402 (LC at 407) and *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at par 28 and 88.

¹⁰⁰ See the discussion in part 3.1(c) above.

¹⁰¹ See the discussion in part 4.4 below.

There is a difference between the two – discrimination requires identification of a ground. To the extent that ‘arbitrary ground’ means the same as the established meaning of ‘unlisted grounds’ (and it will be submitted below that it does), many spurious discrimination cases should already be dismissed on this basis.

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

4.3 The structure of unfair discrimination – the meaning of ‘or any other arbitrary ground’

An ‘arbitrary ground’ as a prohibited ground for differentiation was included in the prohibition against discrimination was contained in the repealed Schedule 7 to the LRA – the first unfair discrimination prohibition relating to employment. As originally enacted, the EEA did not contain such a ground although it did find a place in section 187(1)(f) of the LRA which characterised discriminatory dismissals as automatically unfair dismissals. The 2014 amendments reintroduced the concept of an ‘arbitrary ground’ into the EEA. The explanatory memorandum to the amending statute stated that this amendments was introduced in order to bring the EEA in line with section 187(1)(f) of the LRA.¹⁰²

As to the meaning of ‘or any other arbitrary ground’, we have also had the benefit of at least one academic view – that of D’Arcy du Toit.¹⁰³ According to Du Toit, relying on *Kadiaka*,¹⁰⁴ arbitrary means ‘capricious’; its introduction broadens ‘the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational’ and, in so doing, ‘places an additional remedy at workers’ disposal which may further encourage employers to pay serious attention to workplace practices and procedures’. In coming to this conclusion, Du Toit relies heavily on the fact that the re-introduction of the word arbitrary signifies a decisive break from especially constitutional court jurisprudence which expressly ties discrimination to dignity and grounds impacting on dignity.¹⁰⁵

There is no doubt that Du Toit is correct in his assessment that should section 6(1) be interpreted to in effect include a general right to rational differentiation, it would have a sweeping effect on the employment landscape. But, it is submitted that this view is wrong, for a number of reasons. *First*, to state the obvious, the EEA does not prohibit ‘differentiation’, it prohibits ‘discrimination’. Equality jurisprudence has consistently made it clear that while there is a right to equality before the law in section 9(1) of the Constitution, which is taken to mean protection against irrational differentiation, *this right is distinct from protection against discrimination* (or, for that matter, unfair discrimination in sections 9(3)-9(5) of the Constitution.). The same jurisprudence has made it clear that

¹⁰² Above n 88.

¹⁰³ Above n 18.

¹⁰⁴ Above n 42.

¹⁰⁵ Above n 18 at 2624 – 2628. The two quotations are at 2627 and 2628.

differentiation in the section 9(1) sense can only ever be discrimination if the differentiation is based on a ground contemplated in section 9(3)-9(5) – listed or unlisted (in the sense of an impact on dignity). *Secondly*, section 6(1) of the EEA does not prohibit ‘differentiation’, ‘arbitrariness’ or ‘arbitrary discrimination’, it prohibits unfair discrimination on an ‘arbitrary ground’. It was mentioned earlier that the Constitutional Court has said that

[t]he Constitution ...prohibits the breach of equality not by mere fact of difference but rather by that of discrimination. This nuance is of importance so that the concept of equality is not trivialised or reduced to a simple matter of difference.¹⁰⁶

The Constitutional Court has also stated that:

‘Discrimination is a particular form of differentiation. Unlike ‘mere differentiation’, discrimination is differentiation on illegitimate grounds or on grounds that have historically been associated with patterns of disadvantage.’¹⁰⁷

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

‘In my view....unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. But even if there is a reason, the discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job seeker.’¹⁰⁸

Kadiaka shows a clear confusion in thinking between ‘arbitrariness’ (in the sense of irrational differentiation) and an ‘arbitrary ground’ (in the sense of a reason for or identifiable ground that has to exist before discrimination can be said to exist). For discrimination you always need a ground, for arbitrariness (or irrationality) you do not. But that is not the concern of the EEA, discrimination is. *Thirdly*, section 6(1) prohibits discrimination through the phrase ‘or on any *other* arbitrary ground’ (not, it should be emphasised, ‘any arbitrary ground’). This phrase follows the 20 listed grounds, which also means the wording of section 6(1) is different to section 187(1)(f) of the Labour Relations Act and to that of the repealed Schedule 7. As such, it is easy to make the argument that the meaning of ‘arbitrary ground’ is, in the first instance, to be determined by reference to the preceding listed grounds and they are, as we know, all about dignity (not arbitrariness) which is what discrimination is about. This already means the established test for unlisted grounds should remain controlling. In any event, even in the context of section 187(1)(f) - where the word ‘arbitrary’ precedes the listed grounds (as was the case with the old Item 2(1)(a) of Schedule 7) - the Labour Appeal Court adopted the established test for unlisted grounds to give meaning to the word ‘arbitrary’.¹⁰⁹ *Fourthly*, if one reads ‘arbitrary ground’ in conjunction with the new section 11(2),¹¹⁰ it is clear that the irrationality of differentiation itself (as the flip-side of ‘arbitrary’) will not win a

¹⁰⁶ *Hassam v Jacobs NO and others* [2009] ZACC 19 at par 30 (per Nkabinde J).

¹⁰⁷ *Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* 2007 (4) SA 395 (CC) at par 43.

¹⁰⁸ *Kadiaka* above n 42 at par 43.

¹⁰⁹ See *Marsland* above n 44.

¹¹⁰ Section 11 is quoted in the text in part 4.4 below.

discrimination case based on an arbitrary ground. The complainant also has to show discrimination (which needs an identifiable ground) and unfairness. In this sense, arbitrariness/ irrationality is clearly subjected to the established notions of discrimination and unfair discrimination, as it should be. While it is true that the provisions of section 11(1), which deals with discrimination on listed grounds, makes it clear that irrationality might 'win' a discrimination claim, the section also makes it clear that discrimination (in the sense of direct or indirect differentiation on a listed ground) has to exist to begin with (before rationality is considered). Put differently, irrationality itself does not win cases for complainants, the *irrationality of discrimination* (in its established meaning) does. *Fifthly*, constitutional jurisprudence has told us that the defence against a section 9(1) 'differentiation' allegation is 'rationality'. Rationality is a fairly easy argument to make and is about the link between means and ends – about whether conduct (the differentiation) furthers a legitimate purpose. Rationality is not the same as proportionality, which also looks at how important the goal is, its impact and whether there are better ways to achieve that goal.¹¹¹ Rationality does not mean what the court said in *Kadiaka*. While the absence of a purpose would indeed constitute irrationality, rationality is not about the quality of a goal measured against the impact on the complainant as *Kadiaka* suggests. Recently, the Constitutional Court said the following about this in the context of section 9(1) of the Constitution:

'Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The test for determining whether s 9(1) is violated was set out by the court in *Prinsloo v Van der Linde and Harksen v Lane*. A law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose. The question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious.'¹¹² (footnotes omitted)

Rationality and proportionality (which includes the importance of the goal measured against the impact on the complainant, as well as the question whether there were other less invasive ways to achieve the goal) are not the same. The irony, for those who want to elevate irrational differentiation in general (even without an accepted or acceptable ground) to discrimination, is the inherent danger of the argument. In those cases the allegation of discrimination is defeated simply by commercial reasons – all you need is a legitimate goal (which in the employment context would always be no more than a genuine operational requirement or business need) and a showing that the differentiation furthers (is rationally linked to) this goal – much like substantive fairness in case of operational reasons dismissals, and much as happened in *Mbana*.¹¹³ And the further irony, of course, is that proportionality (which requires a goal to begin with and by necessary implication requires a link between the measure and the goal) embraces rationality. This means, to the extent that proportionality already is part and parcel of our 'fairness' or 'unfairness' of discrimination as

¹¹¹ See, for a general discussion on rationality in the context of section 9(1) of the Constitution, Currie & De Waal *The Bill of Rights Handbook* 6ed Juta (2013) at 219 ff. Also note the distinction the authors make between s 9(1) rationality (based on differentiation between groups) and what they call general 'rule of law' rationality (last- mentioned being premised on the general notion of arbitrariness, but limited to the exercise of public power). The EEA, of course, was expressly enacted in the context of, and to give effect to, section 9 of the Constitution.

¹¹² *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC) par 46.

¹¹³ Above n 50.

illustrated above,¹¹⁴ there was no need to introduce rationality into the EEA, other than to expressly state what we already know.

In short, the argument that arbitrary differentiation *per se* constitutes discrimination shows a clear disregard for Constitutional Court jurisprudence, the nature of discrimination, the wording of the EEA itself and Labour Appeal Court authority. Discrimination is about an identifiable and unacceptable ground for differentiation and the link between that ground and the differentiation. Should a ground not be listed, it should meet the well-established test for unlisted grounds: it must have the potential to impair the fundamental human dignity of a person and has to show a relationship with the listed grounds.¹¹⁵

4.4 The structure of unfair discrimination – the new onus provision

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

As mentioned earlier, experience has shown that most discrimination cases are lost at the discrimination stage (not on fairness or justification) for two reasons. First, ‘discrimination’ already requires a valid comparison (in most cases), the identification of a ground of discrimination and the applicability of that ground to the facts at hand, as well as a sufficient link (causation) between the ground and the conduct complained of. In addition, in a case of discrimination on an unlisted or arbitrary ground, the case has to be made that the ground is worthy of recognition in terms of the applicable test. Put differently, there are a whole host of potential hurdles in getting from the conduct complained of to the point where we can say discrimination (in the legal sense) exists. If any one of these elements is missing, the claim fails. Secondly, closely related, there are the evidentiary problems associated with proof of discrimination claims. In cases of direct discrimination, the fundamental difficulty has always been that evidence to bolster comparison with other employees, as well as the reasons for the employer’s conduct, remain in the domain of the employer and is not readily available to complainants. This in turn means that complainants often have to rely on evidence which by its very nature is circumstantial and weak. Not surprisingly, many direct discrimination claims in the past – with the onus on the employee to prove ‘discrimination’ – never progressed beyond a mere allegation of discrimination. In case of indirect discrimination claims, evidentiary problems also exist. Sometimes (the easy indirect discrimination cases), the disproportionate impact on a protected group of a seemingly neutral requirement or condition is readily evident and a matter of common sense.¹¹⁶ But often the evidence (or the raw statistics) about the impact of workplace policies or practices will fall in the domain of the employer, or will

¹¹⁴ As discussed above in part 3.

¹¹⁵ See the discussion in part 3.1(b) above.

¹¹⁶ For example, *Leonard Dingler* above n 64

only be available through statistical impact analysis requiring varying degrees of sophistication. For indirect discrimination cases data, which is not always available or reliable, is needed. The bold step to place an onus of persuasion on the employer – also in relation to the presence or absence of discrimination – should go a long way to ensure that evidentiary issues are canvassed fully and properly. At the same time there is the danger that the floodgates of discriminatory allegations based on vague notions of unfairness, or poorly identified or merely incidental grounds will require a disproportionate allocation of resources by the CCMA. Earlier, suggestions were made as to how the CCMA may sensibly cope with this; the most important of which, perhaps, is a sound knowledge of discrimination law and the concomitant capacity to identify and weed out weak cases at an early stage.

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

11. Burden of proof

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

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

- a proper allegation of unfair discrimination by the complainant;¹¹⁷
- followed by the opportunity of the employer to show the absence of discrimination (which could be any one or more of an invalid comparison, the inapplicability of the ground of discrimination, or the absence of the required link between differentiation and the alleged ground);

¹¹⁷ As to what this means, see the discussion in part 4.2 above.

- if the employer cannot disprove the allegation of the existence of discrimination, there is the opportunity to show – as a general and in principle unlimited opportunity – that the discrimination is ‘rational and not unfair, or is otherwise justifiable’.
- if the employer chooses to rely on affirmative action consistent with the purpose of the EEA, or an inherent requirement of a job and be successful, it would constitute a complete defence against the allegation of unfair discrimination.

Having said this, Du Toit¹¹⁸ has endeavoured to ascribe a different meaning to section 11. His view, if we understand it correctly, is that the words ‘such discrimination’ in section 11 refer only to the ‘alleged discrimination’ mentioned in the introduction to that section, that section 11 deals with proof after the allegation and, presumably, that this then means that paragraphs (a) and (b) (especially (b), which allows for fair or justifiable discrimination) relates only to the ‘allegation’, and not the ‘actual discrimination’. This, in turn, creates room for the argument that there is no question about fairness or justifiability of discrimination on a listed ground, rather a question only about the presence or absence of discrimination. In support of this construction, Du Toit relies on the much maligned judgment of Willis JA in *Whitehead*¹¹⁹ to illustrate the dangers of an open ended defence of fairness, the argument that *Harksen*¹²⁰ is about the constitutionality of legislation (and inapplicable in the employment context), constitutional avoidance, as well as the dictates of ILO Convention 111 and the role it should play in the South African context.¹²¹

Most of these arguments have already been addressed in the course of this paper. At the risk of repetition, the following may be said: First, Du Toit’s proposed interpretation of section 11 seems inconsistent with the clear wording of section 11. Secondly, it is clear that the Constitutional Court and all other courts have applied *Harksen* – and continues to do so - in the context of (employer) conduct and has shown itself to be quite comfortable with the idea of fair discrimination (except in case of affirmative action).¹²² Thirdly, the principle of constitutional avoidance does not mean the Constitution plays no role in the interpretation of legislation giving effect to the Constitution (as the EEA does). As mentioned earlier, the less legislation says (and the EEA did not and does not say much about ‘unfair discrimination’), the more the role of the Constitution.¹²³ And now, with the amendment of section 11, the EEA has arguably expressly been brought in line with the Constitution and the past two decades of jurisprudence. The ILO Convention was also dealt with earlier. The EEA prohibits unfair discrimination and allows for ‘special measures’ (affirmative action) and an inherent requirement of a job as complete defences to discrimination claims. In this sense, the EEA is absolutely compliant with the ILO Convention. The only complaint could be that the EEA – by consistently using the word ‘unfair’ and calling for the word to be taken seriously - allows for more than the Convention and in this sense violates the Convention. But it was shown earlier that the definition of discrimination in the Convention itself arguably allows for a nuanced approach to acceptable and unacceptable discrimination¹²⁴ and that our chosen route – that of fairness or

¹¹⁸ Above n 18.

¹¹⁹ *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) at paras 129-149.

¹²⁰ Above n 27.

¹²¹ At 2632-2636.

¹²² See the discussion in part 3 above and the cases referred to there.

¹²³ See the discussion in part 2 above.

¹²⁴ See the discussion in part 2 above.

unfairness – actually adds value to discrimination law. The so-called dangers of ‘general fairness’ are also more apparent than real. One arguably aberrant judgment does not detract from the validity of the broader argument. Further, if we take rationality and fairness together (in the sense of section 11) and read it against the backdrop of our jurisprudence, there are clear and strict guiding principles for the application of this general defence. We know fairness primarily is about the impact on the complainant (dignity) and that the legitimacy of the goal and the relationship between the measure and the goal are important (through rationality). It was also illustrated that proportionality is included in the way the ‘fairness’ of discrimination has been approached by our courts and that this includes a consideration of how important the goal is, measuring the goal against its impact, as well as a consideration of less invasive ways to achieve the goal. Under ‘less invasive ways’ we can include the idea of reasonable accommodation, a principle clearly accepted by our Constitutional Court in the context of discrimination.¹²⁵ Put differently – before an employer will be successful in showing rationality and fairness (in the general section 11 sense of the phrase) – the employer will have to clear the hurdles of dignity, rationality and proportionality (inclusive of reasonable accommodation). Clearly this will be difficult, and it should be. But the fact that more often than not employers will fail does not mean the possibility does not or should not exist that it can succeed – especially if we take the Constitution, constitutional jurisprudence, other precedent and the clear wording of the EEA seriously.¹²⁶ As already mentioned – if one simply combines the different policies and practices envisaged by the EEA (let alone the myriad more specific requirements and conditions in any workplace underlying those policies and practices) with the 20 listed grounds, we start off with the possibility of 240 different types of discrimination claims. Can we really say, in advance, that a proper application of dignity, rationality, proportionality and individual accommodation might not show a defence for an employer or might lead to an irresponsible dilution of protection against discrimination?

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

¹²⁵ See *Pillay* above n 31 at par 71 ff.

¹²⁶ To this may be added the persuasive influence of comparative law and analogous legislation – notably section 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. See the discussion in *Garbers op cit* n 2 at 33 ff.

The conclusion is inescapable that section 11 means exactly what it says – and that is the meaning we ascribed to earlier in this section. First, employers may defeat discrimination claims by showing the absence of discrimination. If this is not possible, employers may try to show the discrimination is rational and not unfair, taking into consideration the four guiding principles mentioned above. And if this is not possible, employers may show that the discrimination is ‘otherwise justifiable’.

What the phrase ‘otherwise justifiable’ means is not clear. It may mean justification in the section 36 Constitutional sense,¹²⁷ but then, as discussed above, ‘justification’ (ie proportionality) is already part of fairness. In this regard it may be a deliberate effort to split fairness and justification (proportionality), or to create room for proportionality to be a self- standing test (apart from fairness). It may also mean justification in the section 6(2) EEA sense – ie where the employer relies on affirmative action or the inherent requirement of a job and these are seen as complete defences to allegations of unfair discrimination. As far as the inherent requirement of job is concerned, the Supreme Court of Appeal recently was quite comfortable to view this defence as justification for unfair discrimination.¹²⁸

But, as far as affirmative action is concerned, the problem is the argument that affirmative action should not be seen as discrimination to begin with. But that argument is, in effect, based on the constitutional presumption of unfairness. In other words, the stronger argument is not that affirmative action is not discrimination (in the sense of an exclusion or preference based on race or gender), but that it is not presumptively unfair discrimination. This argument has, in any event, now been overtaken in the employment context by the full onus being on employers – to show the absence of discrimination or its fairness or justification. Presumption or no presumption – the employer has to show (in the face of an allegation of unfair discrimination arising from affirmative action) that its conduct ‘was consistent with the purpose of the Act’. ‘Otherwise justifiable’ may also mean something else – for example justification in the section 7¹²⁹ sense of the word or as provided for by Regulation 7 in respect of ‘equal pay’ (ie something other than proportionality or the section 6(2) defences). It may also mean more or all of the above. The courts will have to provide clarity on this. In doing so, it is as well to remind ourselves that the word ‘justification’ in its ordinary sense means ‘vindication’ or ‘exculpation’ – in other words, while it may have looked as if there was something wrong, there is nothing wrong with what you did to begin with.

As a last thought, note should be taken of one curiosity arising from the equal pay regulations. Regulation 7 – headed ‘Factors justifying differentiation in terms and conditions of employment’ - provides that a difference in terms and conditions of employment is not unfair discrimination if it is ‘fair and rational *and* is based on’ one or more of seven reasons mentioned in the regulation. The first problem with this regulation is that it is not in line with section 11 of the EEA (which only requires rationality and fairness, not something more, to defeat discrimination claims). Secondly, regulation 7(2) tells us what is ‘rational and not unfair’ in the area of equal pay: the differentiation must not be biased against a group on any listed ground and it must be applied in a proportionate manner. But section 11 rationality has nothing to do with bias, and is only part of proportionality.

¹²⁷ This section is quoted above n 30.

¹²⁸ *Department of Correctional Services* above n 54. The contrary view that discrimination may not be justified expressed by the Labour Appeal Court in *Jansen van Vuuren* above n 56 was based on the previous wording of section 11 of the EEA which did not mention justification.

¹²⁹ Section 7(1)(b) of the EEA provides for ‘justification’ of medical testing.

This means these two requirements (in regulation 7(2)) are presumably about fairness, but even then the regulation seems curious as it is not in line with the established meaning of fairness discussed earlier in this paper: while proportionality is part of fairness, mere bias is not unfair. It is the impact on the complainant's dignity viewed in light of all relevant considerations which ultimately makes discrimination unfair. It is submitted that the only way in which regulation 7 might make sense section is if we recognise that

- the presence of any one of the seven reasons in regulation 7 makes differentiation in pay rational;
- that the differentiation in pay will also be fair if it passes the dignity and proportionality test (if we read bias to mean impact on the dignity of the complainant).

But, above all, what we always have to bear in mind is that the controlling equal pay provision in section 6(4) of the EEA does not prohibit a differentiation in pay. It declares differentiation *on the grounds listed in section 6(1)* of the EEA to be *unfair discrimination*. The rules and principles arising from this reality and discussed throughout this paper apply with equal force here.

5. The relationship between unfair discrimination and affirmative action – thoughts on the majority decision in *Barnard*

There is no doubt that affirmative action in South Africa is an emotive concept born from deprivation and unequal treatment. Its application is also a necessity for long term peace and prosperity. But it is also a legal concept: it is provided for in section 9(2) of the Constitution and regulated – at least as far as employment is concerned – in Chapter III of the EEA. By the time *Barnard* came before the Constitutional Court, a number of legal principles pertinent to the decision in *Barnard* had already been established, or were self-evident:

- (1) Affirmative action in employment is regulated in detail in the EEA (in contrast to unfair discrimination). This, in turn, means that the principle of constitutional avoidance requires primary importance being given to the legislative choices underlying and embodied in the EEA itself in adjudicating on affirmative action in employment;
- (2) The EEA is a measure envisaged by section 9(2) of the Constitution. In turn, the EEA allows for the discretionary design of employment equity plans and also for the discretionary implementation of those plans on a daily basis. In short – the EEA regulates both the design of affirmative action and its day to day implementation.¹³⁰ Both the design of equity plans and their day to day implementation must be consistent with the purpose of the EEA.
- (3) The purpose of the EEA is described in section 2 of the EEA and, as point of departure, includes both the elimination of unfair discrimination and the implementation of affirmative action. This already calls for some balance between the two. The requirements and limitations impacting on the design and implementation of affirmative action are by

¹³⁰ This much is clear from the words 'designed' and 'implemented' in subsections 15(1) and (2) respectively in the EEA, the word 'decision' in section 15(4) and the word 'take' in section 6(2) of the EEA.

necessary implication circumscribed by use of the words ‘measures’, ‘designated groups’ and ‘equitable representation’ in section 2(b) of the EEA and the meaning ascribed to those words in the rest of the EEA ;

- (4) Affirmative action is not presumptively unfair, but, in constitutional terms, if it goes beyond the confines of section 9(2), it may constitute unfair discrimination. By parity of reasoning (and this much is clear from the wording of section 6(2) of the EEA), affirmative action that is not consistent with the purpose of the EEA may well constitute unfair discrimination;
- (5) In the employment context, affirmative action consistent with the purpose of the EEA is an absolute defence to a claim of unfair discrimination. The onus to prove this consistency is on the employer – not because affirmative action is presumptively unfair, but simply because section 11 of the EEA now says so; affirmative action will always be on a listed ground and the full onus of persuasion is now placed on the employer by section 11 in discrimination cases based on listed grounds. If affirmative action is not consistent with the purpose of the EEA, it is no more than an exclusion based on race, gender or disability and, as such, may well constitute unfair discrimination;
- (6) The last two decades has seen the most aggressive affirmative action in the public service. Yet the public service is also bound by the EEA and affirmative action in the public service has to meet the requirements of the EEA. Furthermore, the Constitutional Court itself has said that employment decisions by the public service ordinarily do not constitute administrative action and are thus not ordinarily subject to a reasonableness review.¹³¹

Against this background, the facts of *Barnard* were simple. A white woman applied twice for promotion, twice she came out as the best candidate, twice she was recommended for promotion, twice she was denied promotion, the last and final time for essentially two reasons – that her promotion would not enhance diversity and the post was not seen to be critical to service delivery. In the course of rejecting her claim of unfair discrimination the majority of the Constitutional Court, with respect, did a number of curious things:

First, the court found that the SCA had earlier (in dealing with the same case) treated affirmative action as presumptively unfair (with the onus on the employer to establish fairness) and that this was wrong in light of *Van Heerden*.¹³² However, the court then proceeded to state that this means – because of the mere application of an incorrect legal principle – that the appeal of the employer should already succeed.¹³³ But can this be correct? Surely, if a lower court has erred on the law, an appeal requires correct application of the law (or the application of the correct law) to the facts before any opinion as to the merits of a case may validly be expressed. Secondly, the majority transformed the claim before it from an unfair discrimination claim to one of in which the implementation of an affirmative action plane was reviewed. This practice of transforming claims on behalf of complainants is something the Constitutional Court has done before,¹³⁴ and is not in line with established practice that pleadings determine the cause of action. Nevertheless, the majority did proceed (in its own words, it was being ‘benevolent’) to consider the merits of the claim. In this respect the court identified rationality as the baseline requirement for both the design and

¹³¹ *Gcaba v Minister for Safety and Security and others* 2010 (1) SA 238 (CC) par 64.

¹³² Above n 79.

¹³³ *Barnard* par 53.

¹³⁴ Notably in *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC).

implementation of an affirmative action plan; this clearly in accordance with section 9(2) of the Constitution. This notwithstanding it then expressly left open the question as to what the actual standard would be to determine the limits of the implementation of affirmative action; which means that opinions stated after this statement are actually *obiter*.¹³⁵ Finally, the majority proceeded to use a reasonableness analysis (along the lines of a review application which it had designated the employee's case to be) to evaluate the employer's conduct.

Whatever the outcome of the majority decision, this already means one should be careful of reading too much into it. The substance of the majority decision is *obiter*, based on an arguably incorrect designation of the employee's case, disregards its own principle that employment decisions do not ordinarily constitute administrative action, shows undue reliance on constitutional principle and not the specific provisions of the EEA, and disregards its own principle laid down in *Van Heerden* that unlawful affirmative action may constitute unfair discrimination. Perhaps the lasting impression of *Barnard* is that of a lost opportunity. An opportunity lost to properly explore the relationship between unfair discrimination and affirmative action in employment and an opportunity lost to give decisive consideration and guidance on important concepts underlying affirmative action in employment - such as 'suitably qualified', 'targets' and 'quotas', and what constitutes an 'absolute barrier' in terms of section 15(4) of the EEA – all concepts which delimit affirmative action and all concepts which determine whether affirmative action is consistent with the purpose of the EEA. And this, with respect, is all that stands between lawful affirmative action and unfair discrimination in employment.

Where *Barnard* does become interesting is when one juxtaposes what was said earlier about the 'fairness' of discrimination with the different approaches in the different judgments handed down in *Barnard*. As discussed earlier, 'fairness' means dignity, rationality, proportionality and accommodation. This in mind, the majority in *Barnard* stated that rationality is the baseline test for the lawfulness of affirmative action but then applied reasonableness - a concept which administrative lawyers will be quick to point out usually is taken to include both rationality and proportionality. A minority opinion written by Cameron, Froneman JJ and Majiedt AJ¹³⁶ judged the acceptability of the implementation of affirmative action in terms of fairness (determined in light of the provisions of the EEA). A further judgment written by Van der Westhuizen J¹³⁷ utilised a proportionality balance between equality and dignity as competing constitutional rights.¹³⁸

Whatever the merit of the different approaches - and it is submitted that only the approach in the Cameron judgment can be correct - the irony is that a combination of the other two judgments (not relying on fairness) shows at least three of the qualities required in general of any policy or practice to limit protection against unfair discrimination – the impact on the dignity of the complainant as well as the rationality and proportionality of the measure or decision in question. The only one missing (but it is actually part of proportionality) is accommodation. We call all of this fairness and

¹³⁵ *Barnard* paras 38-39.

¹³⁶ Paras 74 ff.

¹³⁷ Paras 125 ff.

¹³⁸ Van der Westhuizen J expressed unease with fairness as a standard (being too vague) and expressed an interest in preserving the internal consistency of section 9 of the Constitution (ie that section 9(2) affirmative action measures not be subjected to a section 9(3) analysis). With respect, this approach also suffers from most of the criticisms levelled against the majority judgment expressed earlier in the text.

we call it fairness, because – as illustrated throughout this paper - the Constitutional Court has told us, over the years, to call it fairness. What sets affirmative action apart is not that it cannot be unfair. What sets it apart –even though based on race and gender - is that it is not presumptively unfair. This is so because its goal and broad design are constitutionally mandated and because its finer mechanics relating to the design of employment equity plans and the implementation of those plans (the preconditions for rationality and proportionality in the employment context) are legislatively predetermined in the EEA. But if - in the design or implementation of an employment equity plan - it is neither rational, nor proportional, as circumscribed by the EEA (not the Constitution), there should be no question that it may constitute unfair discrimination.

6. Conclusion

The purpose of this paper was to investigate the conceptual foundation of our employment equality law, how this was affected by the amendments to the EEA and the decision in *Barnard* and how we can expect our law to develop into the future, especially with the increased role of the CCMA. What is clear from this review is that at the heart of the conceptual challenge is the meaning of ‘unfair discrimination’ and how this relates to affirmative action. What the review also shows is that focus is often lost in semantics. Words like arbitrary, fairness, justification, rationality, proportionality and the like are used too often and too loose and fast. A careful analysis, however, shows that this is all much ado about a few basic and clear principles. First, the idea of the ‘fairness’ or otherwise of discrimination does not violate the ILO Convention and is in line with the Constitution and constitutional jurisprudence, as it should be. Secondly, the ‘fairness’ of discrimination is not completely open-ended – in essence it consists in dignity, rationality, proportionality and accommodation (which is actually part and parcel of proportionality), principles we all accept as precondition for the limitation of protection against discrimination. Thirdly, the EEA is about discrimination, not about differentiation. Discrimination always requires an identifiable and unacceptable ground. And if the ground is not specifically listed, we should recognise and respect the nature of discrimination by insisting that that ground has the potential –as do the listed grounds – to impact on the dignity of the complainant. Fourthly, despite capacity challenges (and some proposals were made in this paper), it is foreseen that the increased jurisdiction of the CCMA will give our discrimination law (in the sense of promoting equality and transformation) decided impetus. Lastly, reconciling affirmative action and unfair discrimination in employment is not that difficult. It should be judged primarily in terms of the EEA and be based on the acceptance of two basic notions. While affirmative action (in its design and implementation) is not presumptively unfair, it may be unfair (in terms of the EEA). But the idea of calling ‘unlawful’ affirmative action unfair discrimination is not unacceptable: after all, it is based on listed grounds and even the most lofty of goals cannot escape that reality. Unfairness here is about dignity, rationality and proportionality, which is what we have all been saying – even the court in *Barnard* - but in different ways.

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