

# NOTES / AANTEKENINGE

## THE TAXONOMY OF AN “UNSPECIFIED” GROUND IN DISCRIMINATION LAW

### 1 Introduction

#### 1.1 *The law*

This note will look into cases which have dealt with “unspecified” (or “analogous”) grounds in terms of which direct and indirect unfair discrimination are prohibited by the Constitution of the Republic of South Africa, 1996 (the “Constitution”), the Employment Equity Act 55 of 1998 (“EEA”) and the Labour Relations Act 66 of 1995 (“LRA”).

The primary focus is on the classification of “unspecified” grounds in case law by briefly discussing and evaluating the correctness of these decisions. The secondary focus is on the possible expansion of these grounds (with only basic arguments set out).

#### 1.2 *Discrimination claims*

In a discrimination case, the complainant must show (i) that the alleged discrimination complained of had impacted on her/his dignity as a member of a vulnerable group (see par 3 below); (ii) differentiation based on one or more of the prohibited “specified” or “unspecified” grounds; and (iii) a link between the differentiation and the ground which will elevate the differentiation to “discrimination”. In this way, the basis of the claim has been laid, the discrimination is presumed to be unfair and the employer will then get an opportunity to justify the discrimination (Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* 2ed (2012) 134–137).

#### 1.3 *Specified grounds*

The prohibited grounds specified in the Constitution are extensive and include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (s 9(3)). The specified grounds listed in the EEA and LRA are very similar with the EEA adding family responsibility, HIV-status and political opinion to the grounds (s 6(1)) and providing for the ground at issue to be contained in an employment policy or practice whereas the LRA adds family responsibility (s 187(1)(f)).

#### 1 4 *Unspecified grounds*

Despite the extensive nature of the prohibited specified grounds, the possibility has been left open for so-called “unspecified” grounds. The word “including” in section 9(3) of the Constitution and section 6(1) of the EEA shows that the specified grounds are not limited to those mentioned in the Acts (*Harksen v Lane NO* 1998 (1) SA 300 (CC) par 47; and Van Niekerk *et al Law@work* 131ff). The same is true of the LRA using the words “arbitrary” and “including, but not limited to” in section 187(1)(f).

#### 1 5 *Specified grounds are broadly constitutive of “human identity”*

The prohibited specified grounds are broadly constitutive of “human identity” (*Mangena v Fila South Africa (Pty) Ltd* [2009] 12 BLLR 1224 (LC) 2271–J). “Human” means “human being, ... member of the human race, ... individual, (living) soul, being ... earthling” while “identity” means “self, selfhood, personality, character, originality, distinctiveness, singularity, uniqueness” (*Oxford Paperback Thesaurus* (2001)).

Specified grounds are thus closely and uniquely related to the self, form part of the character of the person and are often hard to change (see par 2 2 below).

## 2 **Nature and identification of unspecified grounds**

“Unspecified” grounds are based on:

“attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or if it affects them adversely in a comparably serious manner” (*Harksen v Lane NO supra* par 47).

“Dignity” thus *determines* the grounds for making differentiation illegitimate and, consequently, discrimination.

Importantly, the specified grounds largely determine what could be classified as “unspecified” grounds (McGregor “An Overview of Employment Discrimination Law” 2002 *SA Merc LJ* 157 167–168). In giving meaning to the notion “unspecified” grounds, it should be measured against the specified grounds and a wide-ranging approach should be followed.

The specified grounds relate to (i) immutable biological characteristics; (ii) the associational life of people; (iii) the intellectual, expressive and religious dimensions of humanity; or (iv) a combination of one or more of these aspects (*Harksen v Lane NO supra* par 50). Moreover, the specified grounds:

“have been used (or misused) in the past ... to *categorize, marginalize 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*” (*Harksen v Lane NO supra* par 50) (author’s own emphasis).

By describing the grounds, the law seeks to prevent the unequal treatment of people based on criteria which may cause patterns of disadvantage which the country has historically experienced.

While complainants must generally identify the unspecified ground/s on which they rely to compare the same to the specified grounds (*Ntai v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) 227E–H), the court in *Roberts v Agricultural Research Council* (2001) ILJ 2112 (ARB) 2119A–C) held that the failure to identify an unspecified ground would not be lethal if the evidence clearly showed a ground that would impair the complainant's dignity or affect her/him negatively in a comparably serious manner. The author agrees with the latter viewpoint (McGregor 2002 SA Merc LJ 169).

### 3 Dignity

Dignity, as mentioned above, is the determining factor in classifying (specified and) "unspecified" grounds. Dignity, firstly, gives a person her/his intrinsic worth and value (Currie and De Waal *Bill of Rights Handbook* 5ed (2005) 273). Moreover, human beings' capacity to make rational choices makes them "uniquely" valuable and confers on them "dignity" (De Waal, Currie and Erasmus *Bill of Rights Handbook* 4ed (2001) 231–232 referring to (translated and analysed by Paton) *The Moral Law: Kant's Groundwork of the Metaphysics of Morals* (1948) 96). This capacity gives rise to special moral status; it distinguishes human beings from all other creatures and demands a special kind of respect. Dignity, Kant argued, is "above all price and so admits of no equivalent" (De Waal, Currie and Erasmus *Bill of Rights Handbook* 231-232).

Moreover, and secondly, dignity is included in the humanity of all people with nobody being able to escape its reach (Fredman "Equality: A New Generation? 2001 30 (2) ILJ 145 155 [UK]). While dignity is somewhat abstract and elusive, it can be explained to mean "the state of being worthy of respect ... a sense of pride in yourself ..." (*Pocket Oxford English Dictionary* (2005)), or:

"At its *least*, it is clear that the constitutional protection of dignity requires us to acknowledge the *value and worth of all individuals as members of our society*" (author's own emphasis) (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (1) SA 6 (CC) par 28).

Therefore, recognising the right to dignity is an acknowledgement of the intrinsic worth of human beings and their right to be treated as worthy of respect and concern (*S v Makwanyane* (1995) (3) SA 391 (CC) par 328–329).

Thirdly, other rights *flow* from dignity, for example, equality. As every person possesses human dignity alike, everyone must be treated as equally worthy of respect (Currie and De Waal *Bill of Rights Handbook* 273).

The Bill of Rights, fourthly, affirms the *values* of dignity and equality (s 7) and guarantees the *right* to have one's inherent dignity respected and protected (s 10) as well as the *right* to equality (s 9). The latter right provides for everyone to enjoy *all* rights and freedoms fully and equally and prohibits

direct and indirect unfair discrimination against any person. This prohibition provides protection against the invasion of people's dignity (*President of the Republic of South Africa v Hugo* 1997 (4) SA (CC) par 41).

The Constitutional Court, fifthly, has linked dignity and equality with dignity as the motif to link and unite equality (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* par 120). Put differently, dignity is the dimension of equality because of individuals' humanity, and not because of merit, rationality, citizenship or membership of any particular group (Fredman "Facing the Future: Substantive Equality under the Spotlight" in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 15 22).

"[Therefore] ... individuals should not be humiliated ... through racism, sexism, violence or other status-based prejudice. But *dignity is not a separate and additional element to socio-economic disadvantage in an equality claim. Socio-economic disadvantage is itself an assault on an individual's basic humanity.* The recognition and redistributive elements of equality should pull together rather than against each other" (Fredman in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 22 (author's own emphasis)).

Dignity is thus, sixthly, also used to interpret equality (*President of the Republic of South Africa v Hugo supra* par 41; *Harksen v Lane NO supra* par 51; and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* par 15–27).

But, seventhly, dignity carries risks as well. It might negate the link between socio-economic disadvantage and substantive equality (Fredman in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 20). This means that the complainant has to prove not only disadvantage, but also a lack of respect as a person. Thus, a measure which imposes socio-economic disadvantage on individuals based on grounds of their status would not in itself be regarded as discriminatory unless the complainant can also prove that such measure attacks her/his dignity (Fredman in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 20).

While *Harksen* has been criticised as "formulaic," it has been argued that, if it is engaged in a process of substantive equality, it enables positive results (Albertyn "Constitutional Equality in South Africa" in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75 93). This requires:

"courts to recognise that the adjudication of *context, impact and the differing views of the groups of complainants and values are closely bound up with each other.* Failure to engage context disables the court from engaging values in a substantive manner, resulting ... in statements about dignity that amount to *mere assertion rather than a concern with the actual effects of the discrimination.* ... The complexity of inequality requires a flexible test as the court needs to respond to different forms of disadvantage, stigma and vulnerability, and to differing claims of recognition and redistribution" (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 92–93) (author's own emphasis).

With the contextual approach being inherently flexible and allowing a court to focus on the conditions of the particular type of claim before it, the singular use of dignity undermines that flexibility. And although dignity is a pliant concept, it is not necessarily a positive feature of case law if dignity is given different meanings in different cases (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 93).

More recently, and eighthly, calls had been made to use more principles (over and above dignity) supporting section 9, such as identity, redistribution, participation and democracy when assessing unfair discrimination claims (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 93, referring to Fredman “Redistribution and Recognition: Reconciling Inequalities” 2007 23 *SAJHR* 214; and Botha “Equality, Dignity, and the Politics of Interpretation” 2004 19 *SA Public Law* 724).

## 4 Case law

A small number of cases based on “unspecified” grounds (in contrast to numerous cases based on specified grounds) have come before the courts. All the cases have emphasised dignity as an indicator in determining “unspecified” grounds.

### 4.1 Constitutional Court cases

Cases based on “unspecified” grounds included marital status, citizenship and HIV-status (none of them specified grounds in terms of the interim Constitution of the Republic of South Africa 200 of 1993 (“interim Constitution”)) in operation at that stage. These grounds have been discussed elsewhere (Currie and De Waal *Bill of Rights Handbook* 254–260; Dupper *et al Essential Employment Discrimination Law* (2010) 60–62; McGregor 2002 *SA Merc LJ* 168), and it will suffice to state that with regards to the ground of marital status (“*Harksen*”), citizenship (*Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC)) and HIV-status (*Hoffmann v SA Airways* 2000 21 *ILJ* 2357 (CC)), the Constitutional Court held that these grounds were analogous to those in the interim Constitution. With regard to marital status, however, unfair discrimination could not be established. With regard to non-citizenship, the court held that excluding permanent residents in terms of an (overly broad) regulation on the basis that they did not hold citizenship, was analogous to the specified grounds in the interim Constitution and “suspect”. It found that (i) non-citizens were a minority with little political muscle and thus a vulnerable group with their interests/rights being overlooked/violated easily; (ii) citizenship was a personal attribute “difficult to change;” and (iii) it appeared that non-citizens were (for that reason alone) generally not *worthy* of being appointed to permanent posts as teachers (757H). With regard to HIV status, the court held that (i) people with HIV/AIDS were one of the *most vulnerable groups* in society; (ii) any discrimination against them could be interpreted as a fresh instance of stigmatisation and to be an assault on their dignity; and (iii) conferred special protection on them (2370–2371).

It is submitted that these findings were correct as marital status, citizenship and HIV-status complied with all the requirements for unspecified grounds.

Further cases like *S v Jordan* (2002 (6) SA 642 (CC)) (involving a request for adult prostitution to be decriminalised), *Volks NO v Robinson* ([2005] (5) BCLR 446 (CC)) (involving co-habiting relationships) and *Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* (2007 (4) SA 395 (CC)) (involving refugee status), resulted in majority decisions against the applicants. These cases showed no contextual analysis, hardly any engagement with values and used formalistic reasoning (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 92).

It appears that the court has addressed mainly cases with the focus on legal provisions that excluded certain groups from *social recognition* so far. These judgments had been *inclusive* rather than *transformative* and had not altered structural inequalities (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 96). More transformative outcomes had been mooted to the effect that the courts need to apply equality jurisprudence consistently and pay specific attention to *context and impact*, and identify the *systemic nature of group-based disparities* and the *place of the complainant group and the comparator group within this*. Further:

“the nature of intersectionality and the list of *additional prohibited grounds need to be carefully considered, and the nature and content of the values underpinning s 9 need to be further articulated and applied*” (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 96) (author’s own emphasis).

It was argued that context, impact, and an understanding of vulnerable groups’ needs for protection, should be used to classify *further* grounds (*ibid*). Moreover, in showing an understanding of section 9, the values of dignity, identity, redistribution, participation and democracy have to be used as well (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 93). It has been further mooted that the value of “substantive equality,” with a focus on remedying group-based social and economic disadvantage, should permeate the solution of unfair discrimination claims (and not be only used in section 9(2) dealing with affirmative action) (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 93). In identifying and giving meaning to such values, equality jurisprudence would be further developed (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 93). (See also Albertyn and Goldblatt “Facing the Challenge of Transformation: The Development of an Indigenous Jurisprudence of Equality” 1998 14 *SAJHR* 253; Klare “Legal Culture and Transformative Constitutionalism” 1998 14 *SAJHR* 146; and Albertyn “Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court” 2011 *Stell LR* 591, generally).

## 4 2 Cases under the LRA and EEA

### 4 2 1 Introduction

This note will not address cases decided under the early unfair discrimination regime where the latter was outlawed on any “arbitrary” grounds (in terms of the repealed item 2(1)(a) of Schedule 7 to the LRA) as this has been discussed previously (McGregor 2002 *SA Merc LJ* 167–171; and Dupper *et al Essential Employment Discrimination Law* 60–65). An arbitrary ground is capricious, proceeding from whim, not based on reason/principle or purposeless (*Kadiaka v Amalgamated Beverage Industries* 2001 *ILJ* 214 (LC) 384A).

It has been argued that the courts have *not* interpreted “arbitrary grounds” within the broader context of discrimination, with the emphasis *not* on a person’s dignity and independent of the specified grounds. For example, this was found in (i) *Whitehead v Woolworths (Pty) Ltd* (1999 20 *ILJ* 2133 (LC)) and *Woolworths (Pty) Ltd v Whitehead* (2000 21 *ILJ* 571 (LAC)), where the issue revolved around the operational needs of the employer; (ii) *Kadiaka*, where association with a previous competitor of the employer was at issue; (iii) *Lagadien v University of Cape Town* (2000 21 *ILJ* 2469 (LC)), where lack of tertiary qualifications was involved; and (iv) *Middleton v Industrial Chemical Carriers (Pty) Ltd* (2001 *ILJ* 2112 (ARB)), where the issue revolved around being salaried or pay-roll employees. It has been argued that these grounds could not constitute arbitrary grounds as they could not affect a person’s dignity (McGregor 2002 *SA Merc LJ* 170).

Further analogous grounds in terms of the LRA and the EEA include lack of qualifications/tertiary teaching and research experience, temporary status of employment, professional ethics, mental health and political/cultural affiliation, which will be discussed below.

### 4 2 2 *Stojce v University of KZN (Natal)* ([2007] 3 BLLR 246 (LC)) (lack of qualifications/tertiary teaching and research experience)

*Stojce* (a Bulgarian) unsuccessfully applied for a post as lecturer in the university’s engineering faculty. He claimed unfair discrimination on the specified grounds of race and language (which will not be discussed) and the unspecified grounds of lack of qualifications, tertiary teaching and research experience. (These grounds seem more like inherent requirements of the job, but this was not argued).

The court accepted the interviewing panel’s decision that *Stojce* had to show that (i) the grounds impaired or had the potential to impair his dignity; (ii) he was a member of a vulnerable group; and (iii) the conduct was inherently derogatory (par 27). It held that:

“Not every attribute or characteristic qualifies for protection against discrimination. Smokers, thugs, rapists, hunters of endangered wildlife and millionaires, as a class, do not qualify for protection. What distinguishes these

groups from those who deserve protection? The element of injustice arising from oppression, exploitation, marginalisation, powerless, cultural imperialism, violence and harm endured by particular groups or the worth and value of their attributes are qualifying characteristics that distinguish differentiation from unfair discrimination" (par 26).

Stojce failed to provide evidence to refute the interviewing panel's decisions. His qualifications, tertiary teaching and research experience did not qualify him as a member of a particular group, least of all a group meriting protection (par 28):

*"To warrant protection, the Applicant must show that the conduct complained of impairs on him as a class or group of vulnerable persons, such as persons with disabilities or family responsibilities, or that conduct is inherently pejorative as a racist or sexist utterance might be"* (author's own emphasis).

The grounds at issue could thus not be classified as "unspecified" grounds.

#### 4 2 3 *McPherson v University of KwaZulu-Natal* (2008 29 ILJ 674 (LC)) (temporary employment status)

Here, the Universities of Durban Westville ("UDW") and Natal ("UN") had merged to form the University of KwaZulu-Natal ("UKZN"). All staff members had been accommodated into the newly formed UKZN, including staff on fixed-term contracts such as McPherson, the director of the School of Physical Sciences and an associate professor at the UDW.

The merger produced one School of Physics and made provision for one School head.

A subcommittee's report on recommendations for the requirements for senior staff of the merged UKN had been adopted by Senate recommending that heads of schools ("heads") had to come *only* from permanent staff (with no motivation) and this was not applicable to other categories of staff (par 6; 33; and 35). The selection process for heads was further regulated by the employment equity policy ("EEP") which endorsed the principle of equal opportunity for all (par 22).

The post of Head of the School of Physics was advertised accordingly. McPherson submitted an application but was informed that since he did not qualify to apply, his application was rejected (par 22). McPherson believed that the UKZN's EEP was unfairly discriminatory and he unsuccessfully referred the dispute to the CCMA (par 9) and approached the Labour Court for an interdict (par 10). The matter was referred to the Labour Court (par 10).

Soon thereafter McPherson resigned (par 11).

The UKZN argued that the decision to exclude McPherson (i) was neither irrational nor improperly motivated; (ii) the alleged discrimination was not based on a prohibited ground as set out in the EEA and was not in any way designed to impair the dignity of a person; (iii) was not arbitrary as there was a commercial rationale for it; and (iv) the policy was to be measured against



the operational requirements of the UKZN in general; it was not to be measured against its effect on individuals (par 13–17).

McPherson refuted all the evidence by the UKZN in justification of the permanency requirement for heads by, *inter alia*, showing that (i) the UKZN made a generalised assumption that permanent employees were more likely to stay on in their departments after their tenure as heads but the statistics showed that 60% of heads appointed in 2005 had already resigned from their positions; (ii) a head's managerial functions could be passed on before a contract comes to an end by a handing-over process; (iii) while academic functions require continuity, academics were often appointed on contract basis; (iv) the physical presence of a former head was not necessary for assistance – the e-mail system could be used; (v) though a head has to be close to the discipline, command respect, be part of the ranks of the discipline and supervise post-graduate students and workloads, this did not mean that she/he had to be a permanent member of staff – McPherson had, in fact, earned the respect of his peers at the UDW in that he was an academic leader as well as a manager; (vi) the screening process for heads would be able to exclude those contract-staff members who were not subjected to rigorous screening when they were originally employed; (vii) temporary appointments could be converted to permanent posts; (viii) where it suited the UKZN, it appointed temporary staff as acting heads of schools for Dentistry, Medical Science and Education; (ix) the post of head was a promotional post carrying extra responsibilities and authority; (x) it was unfairly discriminatory not to consider contract members as heads merely because of their temporary status; and (xi) *but for* the status of permanency, McPherson had been treated less favourably than permanent staff since he met all the requirements for the post (par 13–14; 20–21; and 36–39).

The court held that the subcommittee's policy for appointments, in effect, held:

“We do not want temporary staff to work ... as head of school” (par 29).

There was overwhelming evidence that, at that stage, a “sizeable number” of staff from the UDW and UN were in fact temporary – the position of McPherson was therefore not an isolated case and that itself indicated that staff on contract belonged to a “vulnerable group” (par 30).

The need for continuity was found to be unconvincing (par 38). The court could find no valid ground for the exclusion on either the inherent requirements of the job or the operational requirements of the UKZN (par 38). Instead, permanency was *not* an essential attribute of the job but was a preference of senior employees and constituted differentiation on an “unspecified” ground (par 38).

McPherson had showed that *but for* the requirement of permanency, he could have applied for the post and the ground caused him to suffer humiliation (par 40). Though the criterion of permanence might appear on the face of it neutral, it was shown that when applied, it differentiated between employees in a way that amounted to direct unfair discrimination showing preference to senior employees (par 38–39). It appears that the decision of the subcommittee on permanency as an eligibility requirement

was short-sighted and without substance in the insecure atmosphere of the merger; and suggested that temporary staff were not regarded as valuable.

The court awarded McPherson compensation as he was not interested in returning to the UKZN (par 41).

The author argues that it is debatable whether “temporary employment status” could *always* be classified as an “unspecified” ground as there may be circumstances and contexts other than mergers and appointments, where it could be argued that the ground will not demean a person. The ground, further, does not relate to a person’s intellectual, biological, expressive, associational or religious features. The context, circumstances and facts of each case will, thus, determine whether it qualifies as an “unspecified” ground.

4 2 4 *Naude v Member of the Executive Council, Department of Health, Mpumalanga* (2009 30 ILJ 910 (LC)) (professional conscience and ethics)

Naude, a medical doctor who did his community service year, was dismissed on the basis that he provided (donated) post-exposure prophylaxis and anti-retroviral drugs to rape patients at the rape crisis centre in the area. He did this according to (i) his professional conscience; (ii) his ethical values; (iii) the efficiency of the treatment; (iv) and his belief that Government could not prescribe the treatment a doctor should give a patient (par 9).

By giving medicines to raped patients, he acted in opposition to the MEC’s instruction that HIV medicines should *not* be provided to such patients. He saw the MEC’s stance as:

“a blatant interference ... in the doctor-patient relationship ... the government was not in favour of any form of HIV drug based therapy, because at the time beetroot, garlic and olive oil took precedence over medication” (par 9).

The court found that the MEC had misused her powers and that Naude had rightfully resisted her attempts of interfering (par 110). She had violated the Constitution and the LRA in that she avoided Naude’s attempts to discuss the matter (par 114). Naude’s dismissal was found to be arbitrary and automatically unfair in terms of section 187(1)(f) (par 110 and 116).

This finding seems correct in terms of the discussion above since it involved Naude’s intellectual attributes.

4 2 5 *Marsland v New Way Motor & Diesel Engineering (Pty) Ltd* (2009 30 ILJ 169 (LC)); *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* ([2009] 12 BLLR 1181 (LAC)) (mental health) (all references made are to the Labour Appeal Court case)

Here, *New Way Motor & Diesel Engineering* (“New Way”), conceded on appeal that Marsland was constructively dismissed but disputed (i) the

dominant reason for the dismissal being a prohibited ground contained in section 187(1)(f); (ii) the maximum compensation of 24 months' remuneration as unreasonable; as well as (iii) the amount for outstanding overtime (1182G–H and 1187F).

Marsland, the marketing manager of *New Way*, had a nervous breakdown after his long-standing marriage had come to an end, resulting in depression and hospitalisation for weeks.

When he returned to work, he was victimised by members of senior management in that, for example, he was (i) excluded from decision-making processes; (ii) treated as if he had a “contagious disease;” and (iii) comments about his ex-wife by the managing director (Freed) were made to “forget about the b\*%#h” and “find yourself a slut and get over it”.

Marsland suffered a relapse due to the stressful work circumstances and was booked off sick for a week. On return, he was suspended and subjected to a disciplinary enquiry on charges of poor work performance, poor time keeping, misuse of company benefits and breaching company rules (par 9). He was found guilty of all charges except for poor work performance and received a final written warning (par 11). Marsland appealed against the finding.

Thereafter, he was treated even worse in that he was, for example, (i) denied access to his filing cabinet; (ii) his telephone line was blocked; and (vi) verbal and physical threats intensified. Eventually he was told that the marketing function was to be outsourced resulting in his position becoming redundant. Marsland's cell phone rang and Freed screamed and swore at him. With Marsland having witnessed Freed assaulting another employee previously, knowing that Freed always carried a firearm and that Freed was indeed armed at that stage, he feared for his safety and walked out of the meeting (par 11–15).

Marsland alleged that he was constructively and automatically unfairly dismissed. The dispute remained unresolved and was referred to the Labour Court (par 16–17).

The court *a quo* (where nobody of *New Way* gave evidence) found that Marsland was unfairly constructively dismissed (par 18–23). Management's discriminatory conduct against Marsland was (i) mainly and directly related to the fact that he suffered mental-health problems and this played a significant role in his dismissal; (ii) it created an *intolerable working environment* which forced Marsland to terminate his contract and (iii) discrimination on the basis of mental health, constituted an “arbitrary” ground (par 18). The evidence showed a deliberate strategy to exclude Marsland by, amongst others, (i) reallocating his work to other employees without explanation; (ii) giving him menial tasks to do; (iii) ostracizing him; and (iv) verbally abusing him by, for example, Freed telling him that he was “useless” (par 23).

While the court held that Marsland was *not* discriminated against based on the fact of his exercising his rights under the LRA (the appeal which he lodged), it held that this *exacerbated* *New Way*'s abusive conduct towards him (par 17). It further found that the entire working relationship had

“radically altered” after Marsland had returned to work and that he was treated disgracefully (par 17). New Way had acted in a manner which was calculated to destroy the trust relationship between the two parties (par 21).

Marsland suffered from “depression,” a form of mental illness (par 18 and 24). The discrimination suffered by Marsland was a result of his mental health and had the potential to impair his dignity. The atrocious attack on the dignity of Marsland (par 17–18 and 34) amounted to:

“a brutal regime of insult, psychological assault and egregious treatment for a significant period of time” (par 24–26).

His dismissal was confirmed to be automatically unfair on the grounds of mental health, an “arbitrary” ground in terms of section 187(1)(f) (par 36).

The court stressed that it had a duty to protect employees against cruel, inhuman and arbitrary treatment such as the “disgraceful” behaviour of senior management (par 35). It upheld the amount of compensation (par 27–28) but the amount of overtime pay was reduced after some miscalculations were rectified (par 33). The appeal was dismissed with costs (par 37). The court’s finding was not surprising.

#### 4 2 6 *Jansen v Minister of Correctional Services of the Republic of South Africa* ((2010 31 ILJ 650 (LC)) (political/cultural affiliation)

Jansen, an employee of the Department of Correctional Services (“Department”) with 34 years of service, propagated a human rights’ culture within the prison environment. After he made representations to the Jali Commission of Inquiry investigating corruption in prisons, he received a death-threatening letter. He was transferred and found not guilty of allegations of corruption.

Months later, Jansen and other employees held an unauthorised press conference in full uniform announcing a new organisation against domination of African minorities, and in particular, against Khoisan employees.

A disciplinary hearing was held with Jansen being charged with gross insubordination and gross negligence based on his appearance in the media without permission and in full uniform. He was found guilty of misconduct and was dismissed (par 13). Jansen claimed that he was automatically unfairly dismissed in terms of section 187(1)(f), based on grounds of belief and/or political opinion (specified grounds which will not be discussed), and political/cultural affiliation (unspecified grounds).

The court found that the “real” reason for Jansen’s dismissal was that the Department truly believed that he had (i) committed a disciplinary offence by appearing at a press conference in uniform; and (ii) expressed inaccurate/unacceptable views critical of the Department that could endanger the safety of inmates (par 36). The grounds therefore were endowed with reason and purpose. It found that the dismissal was not

automatically unfair (par 38 and 46) and correctly referred the issue back to the bargaining council for arbitration (par 46).

## 5 Other “unspecified” grounds

The question remains what other “unspecified” grounds would come to the fore in future. Personal appearance (eg, displaying tattoos, speech defects such as stuttering or accents, being obese, having deformed facial or other bodily features, such as a hunchback, wearing dreadlocks, a punk or hippy hairstyle, having a moustache or beard, being naturally bold, wearing nose, lip, tongue or eyebrow rings or other facial and bodily decorations), dressing in a certain style (eg, vintage, bling, militaristic, sloppy, provoking, artistic, wearing animal skin and head coverings, such as scarves and turbans), physical health, medical history, partaking in traditional ceremonies or rituals, geographic location, being poor or vegetarian, come to mind. Nepotism and cronyism have been also suggested as possible “unspecified” grounds (Grogan *Employment Rights* (2010) 221). But only time will tell.

“Socio-economic status” has been included as a directive in the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) (“PEPUDA”) to be specially considered for inclusion in the list of prohibited grounds (s 34), but this has not been done. It is possible to argue that socio-economic status is an “unspecified” ground in section 9 of the Constitution (but that it would be difficult to define same despite a definition given for it under the PEPUDA) (Fredman in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 39).

It must be remembered that Albertyn cautioned that the unspecified grounds should be carefully considered to *extend* their reach, not to be only inclusive but also *redistributive* (see par 3 above). This view is supported. But under section 9(3), the redistributive role of the courts is likely to be limited to claims by groups that are *defined by prohibited grounds* which are able to show *relative deprivation* (in lacking a good that another group has), and where budgetary issues are outweighed by dignity (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 96).

Arguments have been mooted that greater attention be paid to intersectionality and the development of *additional* grounds, for example, socio-economic status, which may enable courts to address equality cases of poor people, and specific groups such as poor black HIV-positive women (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 96 referring to Liebenberg and Goldbaltt “The Interrelationship Between Equality and Socio-economic Rights under South Africa’s Transformative Constitution” 2007 23 *SAJHR* 335 346ff). The courts’ role is to ensure *further* redistributive measures under section 9(3) because currently they are not *sufficiently inclusive* (Albertyn in Dupper and Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* 96). Recognising more “unspecified” grounds under the Constitution will, of course, have a ripple effect on the EEA and the LRA.

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## 6 Conclusions

To sum up, the taxonomy of an “unspecified” ground contains certain elements as discussed above. Calls to include other values besides dignity, such as identity, redistribution, participation and democracy, are supported and will have to be further explored (see par 3 above). Currently, the prohibited specified grounds contained in legislation will largely determine “unspecified” grounds in that the latter have to be *measured* against the former relating to attributes on fixed biological, associational, intellectual, expressive and religious features of humans. If the courts hold up further *other* “unspecified” grounds, its scope will be enlarged.

It is lastly submitted that the small number of “unspecified” grounds which come across in case law confirms the extensiveness of the specified grounds which the legislature seemed fit to include in the various laws discussed above. Again, “unspecified” grounds may, however, expand if other values besides dignity are included in its classification/taxonomy. This will lead to equality jurisprudence being positively influenced by enhancing inclusion, redistribution, transformation and participation, objectives for which the country strives.

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