

THE DEVELOPMENT OF DEFENCES IN UNFAIR DISCRIMINATION CASES (PART 1)

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SUMMARY

All anti-discrimination legislation that applies in the employment context contains defences to or justifications for discrimination. In South Africa, the defences available against a discrimination claim in the employment context are contained in the Employment Equity Act 55 of 1998.

The Employment Equity Act gives only a basic structure of a prohibition on unfair discrimination. It is left to our courts to give content to and develop discrimination law. It is within this context that the Employment Equity Act expressly mentions "affirmative action consistent with the purpose" of the Employment Equity Act and "an inherent requirement of a job" as two specific exceptions to the right to equal treatment. The Employment Equity Act does not, however, state these exceptions to be a *numerus clausus*. It has been questioned whether there may, in addition to the statutory exceptions, be a residual "general fairness" defence to a claim of unfair discrimination.

The Employment Equity Act is silent on a definition of the meaning and limits of these defences. A discussion of the development of the defences ensues, which leads to the conclusion that any possible derogations from the right to equal treatment must be strictly construed. This conclusion is mandated by the wording of the legislation itself and the influence of the Constitution. Accordingly, the notion of an implied "general fairness" defence is jettisoned. The remaining defences, it is submitted, should develop within the parameters of established principles in a disciplined manner, having due regard for the achievement of substantive equality. Part 1 of the article deals with the current legislative framework and the defence of inherent requirements of the job.

1 INTRODUCTION

Ten years of democracy can barely begin to eradicate the effects of the apartheid system. Enforced discrimination was part of everyday life in the old

South Africa. In its mildest forms, it was petty and offensive. At its worst, it brought destitution and death. Possibly the greatest challenge South Africa faces is divesting itself of a legacy of inequality, overtly demonstrated in employment by the disparity in the distribution of jobs, occupations and income.¹

Whilst the first steps toward removing discrimination in the workplace were introduced as early as 1979,² these measures were inadequate³ and few discrimination claims reached the Industrial Court for adjudication. However, the inadequacy of the measures should not have derogated from the development of a basic discrimination jurisprudence in South African labour law. From its inception, the Industrial Court was conscious of its obligation to “strike down discriminatory practices”.⁴ No conclusive rationale exists for this void in the law.⁵ O’Regan comments as follows in this regard:

“Perhaps the most surprising aspect of our law on equality is that, given the deeply divided nature of our society, there is so little of it. The unfair labour practice has provided a basis for equality litigation since 1981, but only a handful of such cases have been brought to court. Where are the discrimination cases, the equal pay suits and harassment litigation? Other countries with a less entrenched pattern of discriminatory behaviour are beset with anti-discrimination litigation.”⁶

The introduction of a true democracy in April 1994 culminated in the adoption of the Constitution of the Republic of South Africa Act 108 of 1996,⁷ a “revolutionary”⁸ document at the vanguard of a continuing struggle against discrimination in all its forms. Kriegler J describes it as follows:

“The South African Constitution is primarily and emphatically an egalitarian Constitution. The Supreme laws of comparable constitutional states may underscore other principles and rights. But in light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution’s focus and organising principle.”⁹

¹ See Explanatory Memorandum to the Employment Equity Bill GN 1840 of GG 18481 1 December 1997 5.

² The most important measure being the “unfair labour practice” definition in the Labour Relations Act, 1956.

³ The “unfair labour practice” definition was ridiculously elusive. An unfair labour practice was defined as “any labour practice which in the opinion of the court is an unfair labour practice”.

⁴ Cameron, Cheadle and Thompson *The New Labour Relations Act* (1989) 6.

⁵ See O’Regan (1994) *Employment Law* 13 and 23 for possible factors contributing to this phenomenon.

⁶ O’Regan 13. See also Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* (1994) 214.

⁷ Hereinafter “the Constitution”. The Constitution was preceded by the Interim Constitution, Act 200 of 1993, which came into force on 27 April 1994 and was repealed when the Constitution took effect on 4 February 1997.

⁸ De Waal, Currie and Erasmus *The Bill of Rights Handbook* (1998) 2.

⁹ *The President of the RSA v Hugo* 1997 4 SA 1 (CC) par 74 (per Kriegler J).

Equality, as a value¹⁰ and as a right,¹¹ lies therefore at the heart of the South African Constitution. It is salient that a substantive rather than a formal conception of equality is endorsed.¹² This commitment to substantive equality has recently been confirmed by the Constitutional Court.¹³ Formal equality presupposes that all persons are the equal bearers of rights. Proceeding from this premise, inequality is viewed as a perversity that can be stamped out by ensuring all persons are treated alike. Formal equality is therefore a thick-skinned approach that ignores the reality of deep-rooted structural inequality. Substantive equality, on the other hand, is concerned with equality of outcome and as such it necessitates a proactive approach. It requires an investigation into the social conditions of groups and individuals in order to ensure equality is achieved, and not merely uttered down corridors of convenience.

The Constitution's commitment to substantive equality provides the rationale for the existence of an affirmative action policy. It follows that if supportive selection criteria are used for members of disadvantaged groups, these groups will gradually be represented in well-rewarded social positions more in proportion to their numbers in the population. It should be noted that the Constitution specifically sanctions the implementation of an affirmative action policy.¹⁴ The Legislature has responded with the promulgation of the Employment Equity Act (hereinafter "the EEA").¹⁵ Former president Nelson Mandela explained the need for affirmative action in an October 1991 speech:

"The primary aim of affirmative action must be to redress the imbalances created by apartheid. We are not ... asking for hand-outs for anyone, nor are we saying that just as a white skin was a passport to a privileged past, so a black skin should be the basis for privilege in future. Nor ... is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards: the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified

¹⁰ S 1 of the Constitution states South Africa to be founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism". S 7(1) describes the Bill of Rights as a "cornerstone of democracy ... [which] affirms the democratic values of human dignity, equality and freedom". S 36(1) permits limitations on the rights contained in the Bill of Rights only in instances where the limitations are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". S 39(1)(a) requires courts to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" when interpreting the Bill of Rights.

¹¹ S 9 of the Constitution. It contains an "equality before the law" provision [9(1)]; an approval of affirmative action measures [9(2)]; prohibitions on discrimination at the vertical and horizontal levels [9(3) and 9(4) respectively]; and a provision presuming "unfairness" if the discrimination is on a listed ground [9(5)].

¹² S 9(2) endorses affirmative action while ss 9(3)-(4) prohibit indirect as well as direct discrimination. These measures are reconcilable with a substantive, rather than formal, notion of equality as will be explained.

¹³ See *President of the RSA v Hugo supra* par 41; and *National Coalition for Gay and Lesbian Equality v Minister of Justice* CC 9 October 1998 (unreported) par 62.

¹⁴ S 9(2) states that in order "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination" may be taken.

¹⁵ Act 55 of 1998.

persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and those who have been qualified all along but overlooked because of past discrimination, are given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality.¹⁶

Another effective means to attain substantive equality is to prohibit not merely direct but also indirect¹⁷ discrimination. Indirect discrimination occurs when an employment practice is utilised that is *prima facie* neutral but which, when applied, has an unjustifiable discriminatory effect on members of a disadvantaged group. A prohibition against indirect discrimination is contained in the Constitution,¹⁸ and is reiterated in the Labour Relations Act (hereinafter "the LRA")¹⁹ and EEA.²⁰

Although discrimination jurisprudence is gradually gaining competency in South African labour law, the deep scars of apartheid are still evident. In 1996, the International Labour Organisation concluded that South Africa had the highest levels of inequality in income distribution in the world, of the countries for which there was data.²¹ Recent statistics reveal that poverty is disproportionately rife in the African and coloured populations.²² A white male is 5 000 times more likely than an African woman to be in a senior managerial position.²³ The Breakwater Monitor Report of July 1999 produced alarming statistics exposing discrimination against Africans and coloureds in the appointment of persons to managerial positions.²⁴ Although the quoted statistics are not current, and have probably improved, it is submitted that the position in South Africa today is far from satisfactory.

It is obvious then that discrimination is still taking place in everyday South Africa. The Legislature has recently acknowledged that although progress has been made, forms of structural and systemic inequality still persist which undermine the values of our constitutional democracy.²⁵ Our law and society are still in a process of transformation in this regard. But it is envisaged that the Constitution, LRA and EEA will generate substantial legal activity in the ongoing struggle for equality.

¹⁶ October 1991 speech.

¹⁷ Direct discrimination occurs when a person is treated less favourably simply on the ground of a distinguishing feature, for example, sex or race.

¹⁸ See ss 9(3)-(4).

¹⁹ See s 187(1)(f) and Schedule 7 item 2(1)(a) of Act 66 of 1995.

²⁰ See s 6(1) of Act 55 of 1998.

²¹ Explanatory Memorandum to the Employment Equity Bill GN 1840 of GG 18481 1 December 1997 6.

²² The Labour Market Commission, cited in the Explanatory Memorandum to the Employment Equity Bill (fn 20 above 3), notes that 95% of the poor are African, and 65% of Africans are poor, and that approximately 33% of the coloured population live in poverty, compared to 2,5% for Asians and 0,7% for whites.

²³ Green Paper on Employment and Occupational Equity GG 17303 1 July 1996 14, citing results from the Central Statistical Service *October Household Survey*, 1994.

²⁴ The Breakwater Monitor Report of July 1999, cited in the *Employment Equity User Guide* (1999), notes that white men and women hold 84% of management positions in South African companies, and that white employees still constitute about 74% of management promotions.

²⁵ See Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Bill, 1999.

2 THE CURRENT LEGISLATIVE FRAMEWORK REGULATING THE PROHIBITION AGAINST UNFAIR DISCRIMINATION IN THE EMPLOYMENT CONTEXT

2.1 Introduction

The current legislative framework regulating employment-related discrimination is considerable. The scope is largely the result of the years of institutionalised discrimination that defined apartheid. The most pertinent pieces of legislation for the purposes of this synopsis are the Constitution, the LRA²⁶ and the EEA.²⁷ The Promotion of Equality and Prevention of Unfair Discrimination Act²⁸ (hereinafter “the Equality Act”), although relevant, plays a limited role in discrimination law.²⁹

2.2 The Constitution: A substantive approach to equality

The Constitution holds equality to be a foundational value which shapes South Africa’s new democracy.³⁰ As a value, equality influences the interpretation and application of every right protected by the Constitution. Section 39(1)(c) obliges courts, tribunals or any other forum interpreting the Bill of Rights “to promote the values that underlie an open and democratic society based on (*inter alia*) equality”. Section 36, the limitations clause, envisages a justifiable infringement of the Bill of Rights only in circumstances consistent with “an open and democratic society based on (*inter alia*) equality”. Indeed, equality is a central and pervasive component of the Constitution and our new society.

It is significant in discrimination discourse to consider the standing with which equality is perceived. In this regard, a formal and substantive notion of equality can be discerned. To recap, Kentridge describes the difference aptly:

“A formal approach to equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present.”³¹

Upon reading the Constitution, bearing in mind the historical burden of inequality it seeks to overcome, it is readily apparent that a substantive

²⁶ Act 66 of 1995.

²⁷ Act 55 of 1998.

²⁸ Act 4 of 2000.

²⁹ The Equality Act is applicable only to the extent that the EEA is not applicable. Given the scope of the EEA, the Equality Act will be of limited effect in the workplace.

³⁰ See the Preamble, s 1(a) and (b), s 7(1) and s 9 of the Constitution.

³¹ Kentridge “Equality” in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Stein and Woolman *Constitutional Law of South Africa* (1998) par 14.2.

conception of equality is embraced. Section 9(2) makes it clear that affirmative action measures are not viewed as an exception to the right of equal treatment, but as a means of achieving substantive equality. Sections 9(3) and (4) prohibit both direct and indirect unfair discrimination.³² The inclusion of both direct and indirect discrimination is indicative of the Constitution's sensitivity to structural inequality. The failure to distinguish between the two forms of discrimination is an acknowledgement of the debilitating impact of indirect discrimination on society.

If, in the constitutional context, discrimination is found to be unfair then the question arises whether the discrimination can be justified under the limitations clause. Indeed, it is difficult to conceive of a situation where discrimination that is "unfair" can be justifiable in a society based on human dignity, equality and freedom.³³ Little constitutional jurisprudence exists on this issue given that most discrimination claims have been brought under the rubric of the EEA or the LRA.

2 3 The Labour Relations Act

The LRA, which came into operation mainly on 11 November 1996, contains several provisions specifically prohibiting the discriminatory treatment of employees and applicants for work. Section 187(1)(f) renders a dismissal automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee on any one or more of the listed grounds.³⁴ The dismissal may, however, be considered "fair" if the reason for the dismissal is based on an inherent requirement of the job or if the employee had reached the normal or agreed retirement age for persons employed in the same capacity.³⁵

The Act furthermore prohibits discrimination against job applicants and employees on the same grounds listed in section 187(1)(f).³⁶ The Act stipulates two instances in which discrimination by an employer will be deemed "fair". Schedule 7 item 2(2)(b) provides that an employer is not prevented from "adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination", whereas item 2(2)(c) provides that discrimination based on an inherent requirement of the job will not constitute unfair discrimination.

³² The terms "direct discrimination" and "indirect discrimination" are not defined in the Constitution. This task has been left to the judiciary. However, because the justification grounds remain the same for both forms of discrimination, the classification of the discrimination is insignificant. The failure to define the terms, it is submitted, evidences this insignificance.

³³ De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2000) 188. See also Kentridge ch 14 43.

³⁴ These grounds are identical to those listed in s 9(3) of the Constitution. The grounds listed include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

³⁵ S 187(2)(a) and (b).

³⁶ Schedule 7 item 2(1)(a).

2 4 The Employment Equity Act

The issue of unfair discrimination against applicants for employment and employees is currently regulated by the EEA, and no longer by Schedule 7 item 2(1)(a) of the LRA.³⁷ Section 6(1) of the EEA prohibits unfair discrimination on a number of listed grounds:

“No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”

The two defences contained in Schedule 7 item 2(2) of the LRA, namely affirmative action and an inherent job requirement, have been retained by the EEA.³⁸

2 5 The Equality Act

Unfair discrimination is also regulated by the Equality Act. The Act attempts to promote equality and prevent unfair discrimination in all spheres of social activity other than those to which the EEA applies.³⁹ The Act is therefore applicable to:

- members of the South African National Defence Force, the National Intelligence Service and the South African Secret Service;⁴⁰ and
- non-designated employers in respect of matters regulated by Chapter III of the EEA.⁴¹

Furthermore, the Act will apply in so far as the EEA does not specifically regulate an issue. For example, the Equality Act deals with hate speech whereas the EEA does not specifically deal with the matter.

It is readily apparent that anti-discrimination legislation is not in short supply. The discrimination provisions of the LRA and EEA support the content of the equality clause contained in the Constitution. Affirmative action and an inherent requirement of a job are expressly introduced as justification grounds in the LRA and EEA, and it has been argued that the concept of “fair” discrimination has been retained by the Acts in the event that the facts do not support either of the two listed defences. To date, the pronouncements of the Labour Court and arbitrators on a “general fairness” defence have created uncertainty. As the law stands, the defence is at best a disjointed one.

The discussion that ensues considers in detail the defences open to an employer against a discrimination claim in the workplace.

³⁷ Schedule 7 item 2(1)(a), 2(2) and 3(4)(a) were repealed by Schedule 2 of the EEA. Discriminatory dismissals, however, are still dealt with in terms of ch VII of the LRA.

³⁸ S 6(2)(a) and (b).

³⁹ S 5(3) of the Equality Act.

⁴⁰ S 4 of the EEA.

⁴¹ S 12 of the EEA.

3 AN INHERENT JOB REQUIREMENT

3 1 Introduction

The EEA makes it clear that it is not unfair discrimination for an employer to “distinguish, exclude, or prefer any person on the basis of an inherent requirement of a job”.⁴² An employer wishing to justify discrimination on the basis of an inherent job requirement will bear the burden of proving the applicability of the defence. Contrary to the position in other jurisdictions,⁴³ there exists no clear guideline in our law to determine whether a discriminatory criterion embodies “an inherent requirement of the job”.⁴⁴

Bearing in mind the similar aims of anti-discrimination legislation the world over, the current lack of clarity in South Africa regarding the defence, and the constitutional duty to interpret legislation in accordance with foreign law, it is submitted that the jurisprudence of foreign jurisdictions with regard to an “inherent requirements”⁴⁵ defence will be of value when considering its application in our own country.

As Rowe points out, in discussing anti-discrimination legislation in the Australian context:

“The principles incorporated in such legislation are not *sui generis* and have not been discovered by the Australian legislatures independently of developments or goals in other parts of the world. Reliance is placed on widely accepted concepts of anti-discrimination law and policy, concepts which, while receiving differently worded expression in different countries, provide an appropriate guide to the reading of the Australian provisions.”⁴⁶

The discussion that follows will consider the “inherent requirements” defence in the United Kingdom, the United States and Canada. A brief survey of the defence from an ILO perspective is included with the discussion on Canadian law.⁴⁷

3 2 The United Kingdom

In the United Kingdom discrimination is prohibited on the grounds of sex (by the Sex Discrimination Act, 1975 – hereinafter SDA) and race (by the Race

⁴² S 6(2)(b) of the EEA.

⁴³ Most notably the United Kingdom, the United States and Canada. See further the discussion that follows.

⁴⁴ In *Association of Professional Teachers v Minister of Education* 1995 16 ILJ 1048 (IC); and 1995 9 BLLR 29 (IC), the (then) Industrial Court held that a differentiation based on the inherent requirements of a job “should only be allowed in very limited circumstances and should not be allowed where the decision to differentiate is based on a subconscious (or worse, a conscious) perception that one sex is superior to the other” (1081 ILJ; 60 BLLR).

⁴⁵ In the UK, the term used is a “genuine occupational qualification”. In the USA, the defence is referred to as a “*bona fide* occupational qualification”. The terminology differs, but the essence of the defences are the same.

⁴⁶ Rowe “Misunderstanding Anti-Discrimination Law” 1985 10 *Adelaide LR* 318.

⁴⁷ The reason for the merger is explained below at par 3 5.

Relations Act, 1976 – hereinafter “RRA”). The UK statutes define the term,⁴⁸ unlike the EEA. Both Acts contain a closed list of circumstances in which the defence may be validly raised.

The SDA lists a number of specific instances in which sex may constitute a “genuine occupational qualification (hereinafter “GOQ”) for the job”, including:

- authenticity (for example, it would be justifiable for a producer to consider only male applicants for a male role in a theatre production);
- the need to preserve privacy or decency (especially in situations in which physical contact or the use of sanitary facilities are involved);
- the nature of the establishment or part of it in which the work is done (for example, a female applicant for a job as a prison security guard could possibly be declined appointment on the basis of her physical inadequacy).⁴⁹

In the RRA, the term includes instances where “the holder of a job provides persons of a particular racial group with personal services promoting their welfare, and those services can most effectively be rendered by a person of that racial group”.⁵⁰

As far as the application of the GOQ in practice is concerned, a number of general principles can be distilled:

- The defence is applicable where only some of the duties of the job fall within the listed exceptions. In this regard, the Employment Appeal Tribunal has held that it will consider any duty in determining whether the exception applies, unless it is a trivial or fictitious duty.⁵¹ The tribunal will therefore not consider the importance of an alleged duty provided it is *prima facie* relevant to the job to be performed.
- The defence will fail if an employer restructures the duties of a job so as to deliberately bring a job within the defence’s scope.
- The defence will not succeed where an employer has existing employees who could reasonably be assigned to carry out the duties without undue hardship.
- Employers may not discriminate in the terms on which a job is offered or provided, nor in relation to other benefits, facilities or services provided, nor may employers discriminate in dismissal.⁵²

⁴⁸ The term used is a “genuine occupational qualification”. See s 7 of the SDA, s 5 of the RRA in this regard.

⁴⁹ These exclusions must be narrowly interpreted: see *Johnston v Royal Ulster Constabulary* [1986] ECR 1651 (ECJ). In *Etam plc v Rowan* [1989] IRLR 150 (EAT) a male applicant for a post in dress shop was declined appointment because considerations of privacy and decency would prevent him from entering fitting rooms. The Employment Appeals Tribunal found that the other, female, employees could work in the fitting rooms and therefore the refusal to employ the applicant was discriminatory.

⁵⁰ S 5(2)(d).

⁵¹ *Tottenham Green Under Fives’ Centre v Marshall (No 2)* [1991] IRLR 162 EAT.

⁵² SDA s 7(1)(a) and (b) read with s 6(1) and (2); RRA s 5(1)(a) and (b) read with s 4(1) and (2).

Finally, it should be pointed out that although the inclusion of a legislative list of circumstances in which discrimination is justified has created legal certainty in anti-discrimination discourse in the United Kingdom, the inclusion of a legislative list of justifiable exceptions can be criticised. Such lists, according to Hervey,⁵³ can never be exhaustive. They close the door to legal development and it is submitted that they transform a dynamic principle (equality) into a static inflexible boundary. The dynamic nature of equality necessitates a case-by-case approach on the merits to discriminatory conduct.

3 3 The United States

Title VII of the Civil Rights Act of 1964⁵⁴ prohibits employment discrimination based on race, colour, religion, sex, pregnancy or national origin. Discrimination in employment on the basis of age is prohibited by the Age Discrimination in Employment Act of 1967⁵⁵ (hereinafter "ADEA").

It is significant that Title VII provides a statutory defence to discrimination on the basis of religion, sex or national origin, but not race. The justification is provided only in instances where religion, sex or national origin is a "*bona fide* occupational qualification (hereinafter "the BFOQ") reasonably necessary to the normal operation of that particular business or enterprise".

The ADEA contains an almost identical defence. The test for a BFOQ in Title VII and the ADEA are therefore the same, subject to the substitution of age as the prohibited ground.⁵⁶

3 4 Title VII of the Civil Rights Act

The Equal Employment Opportunities Commission (hereinafter EEOC)⁵⁷ established guidelines in 1968 interpreting the BFOQ exception. The guidelines make it clear that the defence should be narrowly interpreted.⁵⁸ This was confirmed by the Supreme Court in *Dothard v Rawlinson*.⁵⁹

The definitive test for evaluating the BFOQ defence was confirmed in *Usery v Tamiami Trails*.⁶⁰ The test is two-dimensional. The first part of the test seeks to ascertain whether the discrimination by the employer is reasonably necessary to the *essence* of the employer's business. Should the employer overcome the first hurdle, the employer would have to show a factual basis for believing that the victims of the discriminatory measures would be incapable of performing the essential duties of the job involved.

⁵³ Hervey *Justifications for Sex Discrimination in Employment* (1993) 144.

⁵⁴ Codified as amended at 42 USC ss 2000e to 2000e-17.

⁵⁵ Codified at 29 USC ss 621 to 634.

⁵⁶ This approach was confirmed in *Western Airlines v Criswell* 472 US 400.

⁵⁷ The EEOC is a federal agency responsible for the enforcement of Title VII.

⁵⁸ 1965 Code of Federal Regulations s 1604.2(a).

⁵⁹ 433 US 321 (1977) 334.

⁶⁰ 531 F.2d 224 (1976).

This test was subsequently approved by the United States Supreme Court in *Western Airlines v Criswell*.⁶¹

Lastly, it should be noted that the EEOC guidelines expressly disallow the preferences of co-workers, the employer, clients or customers from constituting a BFOQ.⁶² In *Wilson v South West Airlines Co*⁶³ an airline sought to employ only stewardesses in order to attract male customers. In rejecting the argument that the preferences of male customers can justify employing females exclusively, the court held that sex is not an essential criterion of the job at issue.

3 5 Canada and the ILO

Canadian law, together with the documents and guidelines of the ILO, will most likely provide the most assistance to South African courts when developing the defence of an inherent requirement of a job.⁶⁴ For this reason, these two sources of law are grouped under the same heading.

According to international law, the defence requires a strict interpretation.⁶⁵ Derogations from the right to equal treatment should be permitted only in the narrowest of circumstances. "Inherent" has been interpreted to mean "existing in something, a permanent attribute or quality; forming an element, especially an essential element, of something essential".⁶⁶ Provided the requirement is essential to the job (that is, the criterion is necessary given the job's characteristics), the discrimination can be justified even if it impacts negatively on certain groups (for example, black people or women).

The ILO has regarded the following as examples of unacceptable requirements:

- the evaluation of an individual's competence for a task based on stereotypes of the group to which the employee belongs;
- requirements based on the preferences of employees and clients;
- requirements that tasks should be performed in a particular manner where other reasonable means exist to do the tasks; and
- qualifications based on "light" or "heavy" work which are in fact an attempted (veiled) distinction between the sexes.⁶⁷

⁶¹ *Supra* 414. See also *International Union, UAW v Johnson Controls* III S.Ct 1196 (1991) 1204.

⁶² 29 CFR s 1604.2(a)(2).

⁶³ 517 F.Supp 292 (1981).

⁶⁴ See the discussion that follows in par 3 6 below "An inherent requirement of a job: A South African approach" for reasons in this regard.

⁶⁵ ILO General Survey *Equality in Employment and Occupation: Measures Not Deemed to be Discrimination* (1996).

⁶⁶ ILO Commission of Enquiry into the Observance of the Discrimination Conventions by the Federal Republic of Germany *ILO Official Bulletin* Supplement 1 (Series B) 1987 Vol 70 par 531.

⁶⁷ *Equality in Employment and Occupation: Chapter III. Inherent requirements of the particular job and measures not deemed to be discrimination* (1988).

The concept of justification based on an inherent job requirement in Canadian law is contained in the term “*bona fide* occupational qualification”.⁶⁸

In *British Columbia (Public Service Relations Commission) v BCGEU*,⁶⁹ the Canadian Supreme Court enunciated an authoritative three-tier test to establish a BFOQ, which applies uniformly to direct and indirect discrimination cases alike. According to the court, the employer must show on a balance of probabilities that –

- (i) the standard was rationally connected to the performance of the job;
- (ii) the employer adopted the standard in an honest and good faith belief that such a standard was necessary to fulfil an essential job duty; and
- (iii) the standard was in fact necessary to accomplish the essential job duty (this requirement is not satisfied where the employer could reasonably accommodate an employee by, for example, reorganising his workforce without incurring undue hardship).

It is immediately apparent that the test established by the Canadian Supreme Court contains both an objective and subjective element. The objective element consists in establishing a rational connection between a standard and the performance of a particular job. The subjective part of the test requires an employer to have a non-discriminatory intent. The “objective-subjective” test, it is submitted, is a well-weighted approach to the defence as it affords an employer the opportunity to use discriminatory criteria that are necessitated by the employer’s unique circumstances while at the same time rejecting these criteria in instances where they are irrational (objectively speaking). The courts therefore have a guided discretion in considering the BFOQ exception. It is doubtful, however, given the particularly strict approach to derogations from the right to equal treatment in South Africa, that subjective considerations will find favour with South African courts interpreting the defence.

3 6 An inherent requirement of a job: Its application in South Africa

It has been mentioned that our law does not define “an inherent requirement of a job”. Contrary to the position in other jurisdictions, our jurisprudence is scant in regard to the application of the defence. It follows that our courts will probably turn to foreign jurisprudence in order to develop the defence.

The Constitution, LRA and EEA do not distinguish between direct and indirect discrimination. This is in keeping with a substantive notion of equality and it is submitted that any attempt to relax the defence in instances of

⁶⁸ In Canadian law, the term is not used consistently. However, its content does not differ therefore inconsistency is immaterial. BFOQ will be used for the purposes of this discussion for the sake of simplicity.

⁶⁹ 176 DLR (4th) 1, 35 CHRR D1257; [1999] 3 SCR 3 (SL) 24-25.

indirect discrimination should be rejected.⁷⁰ Our courts should not be enticed into developing separate standards for the two forms of discrimination.

Although English law may be helpful in indicating specific circumstances in which our law might condone an employer's discriminatory acts, it is submitted that the use of legislative lists of exceptions is incompatible with the South African approach of a general uniform test. In this regard, Canadian law probably bears the closest resemblance to South African law. Given the uniform test, which applies to cases of direct and indirect discrimination alike, Canadian law could well have the most impact on the development of the defence in South Africa.

The Labour Court in *Whitehead v Woolworths (Pty) Ltd*⁷¹ defined "an inherent requirement" as "an indispensable attribute" which "must relate in an inescapable way to the performing of the job".⁷² This formulation is clearly objective. It requires a criterion to relate to an essential job duty, and not a peripheral one. The fact that a requirement is urgent or amounts to commercial rationale does not mean it is indispensable or essential.⁷³ The court must satisfy itself that the requirement is reasonable.

In *Hoffmann v South African Airways*⁷⁴ the employee contended that an HIV-negative status was an inherent requirement for the job and that the refusal to appoint because of an applicant's positive HIV status accordingly did not constitute unfair discrimination. The court held that although legitimate commercial requirements were an important consideration in determining whether or not to employ an individual, allowing stereotyping and prejudice to creep in under the guise of commercial interests had to be guarded against. The greater interests of society required the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination.⁷⁵ The court accepted that some people who are HIV-positive may, under certain circumstances, be unsuitable for employment as cabin attendants, but that does not justify the exclusion of all people who are living with HIV.⁷⁶

In the recent judgment of *IMATU v City of Cape Town*⁷⁷ the city imposed a blanket ban on employing diabetics as firefighters. The Labour Court had to decide whether this amounted to unfair discrimination and whether the unfair discrimination could be justified based on the inherent requirements of the job. The applicant was an insulin-dependent diabetic and a great deal of medical evidence was adduced at the enquiry. The Labour Court came to the conclusion that discrimination against diabetics was a legitimate method of guaranteeing public safety and that bore a national relationship to that

⁷⁰ In the UK and US the test is relaxed so as to place an easier burden on an employer faced with an indirect discrimination claim seeking an "inherent requirements" justification. The basis for this approach in these jurisdictions is probably the (false) belief that indirect discrimination is somehow less reprehensible and damaging than direct discrimination.

⁷¹ (1999) 8 BLLR 862 (LC) par 34.

⁷² Par 34.

⁷³ For a discussion of a possible wider fairness-based test see Part 2 of this article.

⁷⁴ 2001 1 SA 1 (CC).

⁷⁵ 18(H-I).

⁷⁶ 18(A-B).

⁷⁷ (2005) 14 LC 6.12.2.

objective. The question was whether there was a rational decision for the differentiation that is connected to a legitimate purpose. The court held that there was. However, it was the court's view that by imposing a blanket ban on employing diabetics the employer had failed to justify the unfair discrimination. It assigned characteristics which were generalised assumptions about groups of people to each individual who was a member of the group, irrespective of whether the individual displayed the characteristics in question. The applicant, although insulin-dependent, was physically fit and in optimal control of his diabetes.⁷⁸

It is clear therefore that, like the Constitutional Court in *Hoffman v South African Airways*,⁷⁹ the court confirmed the approach that an individualised assessment should be followed in cases where an employer seeks to differentiate on health grounds in an employment policy or practice. The justification based on the inherent requirements of the job due to a health risk needs to be rationally connected or based upon medical evidence in regard to the particular applicant and a generalised justification will not be sufficient to establish justification.

Although the subjective circumstances of an employer could be considered by our courts in the future, it should be borne in mind that international law and our Constitution require defences to be strictly interpreted. The circumstances in which an employer will be able to raise the "inherent requirement" justification should be extremely narrow. For example, an employer may well use ostensibly valid discriminatory criteria that will not pass muster because that employer has failed to make reasonable accommodation for a job applicant in instances where the employer can do so without undue hardship.

⁷⁸ Par 113.

⁷⁹ *Supra*.