A Comparative Analysis of Employment Discrimination in South Africa and Canada

by

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ABSTRACT

The purpose of the study is to address the effects of employment discrimination in the workplace focussing on designated groups, by comparing South Africa and Canada. Canada is one of the few countries that have addressed the employment barriers of target groups with one encompassing piece of legislation.

In this study reference was made at the constitutional provisions towards unfair discrimination, labour law materials, employment and statutory provision so that the future researcher could see where employment discrimination in South African and Canada originate and what is the position. In order to address employment discrimination in the workplace case laws, courts judgments and other jurisprudence were used. The scope focused in this study is broad as a researcher did not look at other forms of employment discrimination.

Employment discrimination in South Africa and Canada exists, this implies that the employment discrimination between two countries could be comparable. Policies and practices in order to identify employment barriers facing the disadvantaged groups were discussed.

Therefore critical look focused on the employment systems, policies and practices at workplaces and also identify employment barriers facing designated groups in relation to recruitment, job classification, remuneration, employment benefits, conditions of services and promotion.

South Africa and Canada emanated from a historical background of inequalities. Such inequalities lead to discrimination. South Africa and Canada's discrimination affected blacks, Aboriginal people, women and people with disabilities. The grounds of discrimination were discussed in full for both countries.

DECLARATION BY A STUDENT

I, **Mphiriseni Irene Netangaheni** hereby declare that the mini-dissertation for the Masters of Laws (LLM) in Labour Law degree at the University of Limpopo, hereby submitted by me, has not previously been submitted for a degree at this or any other institution and that it is my work in design and execution. All reference materials contained herein have been duly acknowledged.

_____ _____

Netangaheni, M.I. (Mrs) Date

DECLARATION BY A SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe** hereby declare that this mini-dissertation by **Mphiriseni Irene Netangaheni** for the degree of Masters of Laws (LLM) in Labour Law be accepted for examination.

Signature: _____ Date: _____

DEDICATION

I dedicate this work to the following people in my life:

- To my late father Mr Samson Mutheiwana Netangaheni, I wish you were still alive to share the achievements with me.
- To my daughter Paulette Mukwevho, follow my footsteps and do better than me.
- To my cousin Adv. J. Themeli for his support and encouragement.

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I would like to thank the Almighty God for his mercy and protection until I became what I am today. I believe that He still has a lot for me.

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- My siblings Ntungufhadzeni, Joe and Mulweli for being there when the situation was tough for me.
- To my proof reader, Mr. M.M. Sitsula, thanks for the work well done. You are a good teacher.

LIST OF INTERNATIONAL INSTRUMENTS

CEEA	Canadian Employment Equity Act
CHRT	Canadian Human Rights Tribunal
CHRC	Canadian Human Rights Commission
CCRF	Canadian Charter of Rights and Freedom
BCHRC	British Columbia Human Rights Code
OHRC	Ontario Human Rights Code

LIST OF ABBREVIATIONS

EEA	Employment Equity Act
EEP	Employment Equity Policy
AA	Affirmative Action
BCEA	Basic Conditions of Employment Act
CEE	Commission for Employment Equity
LRA	Labour Relations Act
MWA	Mines and Works Acts
NLA	Native Trust and Land Act
NTLA	Native Trust and Land Act
GAA	Group Area Act
ESA	Employment Standard Act
ESB	Employment Service Bill
DoL	Department of Labour
HRM	Human Resource Management
SAHRC	South African Human Rights Commission
CCMA	Commission for Conciliation, Mediation and Arbitration

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CHAPTER ONE: INTRODUCTION

1.1. BACKGROUND TO THE STUDY

Employment opportunity in South Africa was affected negatively by the laws passed during British and Dutch Colonial rule. Under the Mines and Works Act[1] jobs were reserved for whites. The Act indicated that Africans, coloureds and Indians were not legally allowed to work or even to receive salaries as skilled workers.

During the National Party, South Africa was a segregated and unequal society. Discriminatory laws were passed against black people. Worker during the apartheid era were expected to have work permit[2]. If found by police officials without a work permit a person was only allowed to be in the urban area for 72 hours or should be arrested.

The Native Land Act[3] and the Native Trust and Land Act[4]provide that black person could not acquire any or rights to land outside a black area except with the ministerial approval. According to Group Areas Act[5], areas proclaimed for exclusive use of a particular race group should not be used by another group but meant for the particular racial group, if found it is a criminal offence and a person should be deported to his or her racial group.

Black workers constituted the majority of the workforce, South African workplace always struggled for equality. Sullivan Code played a very important role in helping to increase the process of desegregation by highlighting the injustices that were common on South Africa during apartheid era. Signatory companies spent R777 million on black empowerment[6].

Employment Equity Act ("EEA")[7] aims at achieving equity in South African workplace by promoting equal opportunity and fair treatment in employment through elimination of unfair discrimination and implementing affirmative action measures to redress the

1 Act 12 of 1911.
2 Urban Area Consolidation Act 25 of 1945.
3 Act 27 of 1913.
4 Act 18 of 1936.
5 Act 36 of 1966.
6 Sullivan code.
7 Act, 55 of 1998.

disadvantages in employment experience by designated groups in order to ensure their equitable representation in all occupational categories and levels in workforce[8].

Employment equity in Canada is defined by the EEA of 1995 as amended, to require employers to engage in proactive employment practices to increase representation of four designated groups[9]. Those groups are women, disabled people, aboriginal people and visible minorities. The Act also indicated that employment equity means more than treating persons the same way but also requires special measures and the accommodation of differences. This Act requires employers to remove barriers to employment that disadvantages members of the four designated groups. Examples of employment barriers are wheelchair inaccessible buildings, which create physical barriers to people with disabilities and women[10].

Formal equality requires only that "likes must be treated as likes", that is, all persons must be treated in the same manner irrespective of their circumstances. The South African Constitution[11] clearly opts for a conception of substantive equality.

In developing world, women have become successful entrepreneurs but grossly underrepresented. Women continue to form a large majority of the world's working poor, earn less income and are more affected by long term unemployment than men. This is due to women's socio-economic disadvantages caused by gender based discrimination[12].

1.2. PROBLEM STATEMENT

In South Africa the pace of effecting change and bringing about employment equity is slow. Other organisations are reluctant to comply at all, while others do pay lip service to the need for affirmative action and employment equity initiatives and look for short-term solutions[13].

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8 Grogan, J.Workplace law. , 2004. 9th Ed. Cape Town Juta & Co. Publishers.
9 http://www.psc-cfp.gc.ca.
10 http://en.wikipedia.org.
11 Act, 108 of 1996.
12 www.ilo.org.
13 EE Report. 2003. Department of Labour. Also available on internet (www.labour.gov.za.) Accessed 31.10.2008.

Designated group throughout the world experience widespread discrimination in gaining access to and participating equally in labour markets. The main purpose of Section 2 of the EEA is to achieve equity in the workplace[14]. Equality in the workplace cannot be claimed if it excludes people who were previously disadvantaged during the apartheid era. People are living in the democratic society, this research wanted to find out if discrimination which was exercised during the apartheid era to the designated group still exists in the workplace. This should be done by comparing employment discrimination of South Africa and that of Canada.

Chapter II of the same Act determines the prohibition of an unfair discrimination[15]. The EEA emanated after a democratic election in 1994 as a result of improving the lives of the previously disadvantaged minority groups including people with disabilities and women.

In South Africa employment equity means a right of every individual to be treated in their employment on the basis of personal merit, ability and suitability for the job whereas in Canada employment discrimination is an on-going planning process used by an employer to identify and eliminate barriers in an organisation's employment procedures and policies, put into place positive policies and practices to ensure the effects of systematic barriers are eliminated and to ensure appropriate representation of designated group members throughout their workplace[16].

Affirmative action is a strategy for achieving employment equity. Affirmative action is a positive, corrective tool to assist people who have been discriminated against in the past to obtain employment and training[17]. Affirmative action is more commonly used in United States. Smith[18] describes affirmative action as a preferential access to social resources for persons who are members of groups which have been previously disadvantaged by adverse discrimination.

Discrimination means the preferential treatment of employees on the basis of gender, race and disability. In Canada discrimination means differential treatment of

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14 Act 55 of 1998.
15 Supra.
16 http://www.hrsdc.gc.ca.
17 Portnoi, L.M. 2003.Implications of the EEA for Higher Education Sector. South African Journal of Higher Education, 1 (2), 79 – 85.
18 1992, p.234.

an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit, or differential treatment of an individual or group on the basis of any characteristic[19].

Unfair discrimination means differential treatment of any person or group in a specific context, on one or more groups, including but not limited to race gender and sexual orientation, pregnancy, marital status, ethnic or social origin. The Constitution of South Africa aims at promoting the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination[20]

Designated groups means African, coloureds and Indians people. Women and people with disabilities. People with disabilities means people who have long-term or recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment.

Direct discrimination arises when the criteria on which the differentiation is based, are in themselves unfair, that is where the employer on the ground of women sex, treats her less favourably than the employer treats or would treat a man. In Canada direct discrimination occurs when an employer adopts a practice to discriminate on a prohibited ground like precluding Catholics, women or black person from employment[21]. The essence of direct discrimination in employment is the making of a rule that generalises about a person's ability to perform a job based on membership in a group sharing common personal attribute like sex, religion, age and etc.[22] whereas indirect discrimination occurs when criteria which are fair in form produce inequitable results.

1.3. LITERATURE REVIEW

EEA establishes a statutory right to equality in the workplace. It does so by prohibiting unfair discrimination and by requiring employers to take positive

[19] S9(1) of the Code.
[20] Act 108 of the 1996 section 9.
[21] *Janzen v Platy Enterprises Ltd*. (1989).
[22] Supra at D/477 (para. 46).

measures to ensure that employees are equitably represented in its workforce. It adopts a conception of equality that promotes substantive rather than formal equality but on a basis that encourages employers to make progress towards targets fixed after consultation with affected employees.

Considering what happened in the case of *Du Preez v Minister of Justice and Constitutional Developments and Others*[23] where the applicant applied for the post of Magistrate in the Port Elizabeth area, the criteria used to shortlist include experience, qualifications, race and gender to which each was afforded a specific weighting. Candidates with highest scores were interviewed by the Magistrate Commission. The applicant who was a white male person did not make it for the shortlisting. He initiated proceedings under the EEA complaining that he had been discriminated against. The formula used gave automatic and absolute preference to black female applicants who met the minimum job requirements irrespective of how you can compare her with other applicant. So, his claim was dismissed.

In the case of *Dundley v City of Cape Town & Another*[24], a black female employee had applied for a position but a white male person was appointed. The employee approached the Labour Court for an order setting aside the appointment of a white male and an order appointing her to the position. The court held that unfair discrimination and affirmative action are two different concepts that should be kept separate and the employers' failure to implement affirmative action does not give an employee a remedy.

Regarding promotion there is a case of *Arries v CCMA and Others*[25], the Labour Court held that an arbitrator when deciding whether or not to interfere with a decision taken by an employer not to promote an employee should only do so if it is demonstrated that the employer's decision was made due to insubstantial reasons or if it was based upon wrong principle or was motivated by bias.

[23] 2006 (8) BLLR 767 (SE).
[24] 2003 (4) BLLR 668 (SE).
[25] 2006 (11) BLLR 1062 (LC).

Department of Justice v CCMA & Others[26], the employee in this case applies for a post in the first category, and the dispute concerning an unfavourable outcome is therefore not a dispute about a promotion..

Many of the decisions consider the question whether a particular policy regarding promotions is fair or unfair and/or whether or not there had been adherence to a policy. It is also clear that arbitrators are willing to accord deference to managerial policies and decisions relating to promotion.

In *Gcaba v Minister for Safety and Security & Others*[27] the court held that failure to promote and appoint Mr Gcaba appears to be a quite essential labour related issue based on the right to fair labour practice and it clearly an unfair labour dismissal. The refusal to reinstate did not amount to administrative action and was not reviewable under PAJA and there was no basis on which the High Court could assume jurisdiction.

Affirmative action measures include measures to eliminate employment barriers to further diversity in the workplace and to ensure equitable representation. In this respects affirmative action involves more than just an defensive postures, but includes pro-activeness and self-activity on the part of the employer. The Act therefore obliges an employer to take measures to eliminate unfair discrimination in the workplace[28].

Affirmative action is a defence at the employers' disposal against a charge of unfair discrimination. Section 187 of the Labour Relations Act provides that dismissal based on discrimination will be unfair. Only inherent requirements of a job as an exception are recognised by the LRA.

With regard to race or language there is a case of *RAWUSA v Schuurman Metal Pressing (Pty) Ltd*[29] where a trade union brought an application in which it sought to restrain the employer from dismissing its employees until it had complied with the provisions of the LRA. The unions' complaint was that the employee's retrenchment

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[26] 2001 (11) BLLR 1229 (LC).
[27] 2009 (12) BLLR 1145.
[28] Jain, 2002. "Employment Equity and Visible Minorities : Have the Federal policies Worked"? CLLJ 145.
[29] 2005 1 BLLR 78 LC.

was *a fait accompli* prior to the commencement of the consultation process. The union also insisted that it was entitled to facilitation within 15 days of issuing of the notice in terms of section 189(3) of the LRA. The Labour Court in its findings indicated that only majority unions have the right to request facilitation under section 189A . The court also stated that mechanism provided for in section 189A in terms of which the applicant could approach the Labour Court on application in respect of procedural irregularities was aimed at enabling employees to compel employers to correct breaches of the LRA

Canadian Human rights one of the most important features is affirmative action programmes[30]. These programmes are legalised by section 15(2) of the Charter[31]. The programmes are there to address the effects of pre and post-employment barriers on race, ancestry, colour, place of origin, national of ethnic origin, nationality or citizenship towards minority groups and women[32]. Therefore affirmative actions aim at correcting the consequences of past and continuing discrimination.

In *Stojce v University of Kwazulu Natal and Another*[33] the applicant was a Bulgarian, failed to be appointed as a lecturer of the University in the faculty of Engineering. The applicant claimed that he had been discriminated on the ground of race and language.

After being shortlisted that applicant was advised that his areas of specialisation were insufficient for the requirements of the job and that he had insufficient tertiary teaching and research experience, and that his communication skills were inadequate. Regarding the race, the applicant contended that the panel that interviewed him was not white and that the University employed more Africans than whites. On the issue of language the court found that the applicant was unable to communicate clearly in English because even the court was unable to understand him. The applicant failed to prove that the University's failure to appoint him amounted to discrimination on any of the grounds alleged. The application was dismissed with costs.

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30 Jain "Employment Equity and Visible Minorities : Have the Federal Policies Worked"? (2002) CLLJ 145.
31 Canadian Charter of Rights and Freedom, 1985.
32 Supra.
33 2006 (27) ILJ 2696 (LC).

In *Sibiya v Arivia.kom (Pty) Ltd (LC)*[34] the applicant claimed she was discriminated against on the ground of race. The applicant made an application for appointment to posts in the marketing development and HR communication departments. The applicant did not get any response or shortlisted in all the posts. She latter heard of the two appointments of two new staff members. She then claimed discrimination on the ground of race. The respondents provided an explanation in relation to the advertised posts which concerned the restructuring of the organisation in order to avoid retrenchments. The court held that there were no evidence that the applicant had been eliminated from consideration through any procedure aimed at her as an individual. The application was therefore dismissed.

With regard to gender it is like beliefs and attitudes of a person and may have legal consequences. Girls are discouraged from science subjects by parents and teachers because of fearing that they won't make it in mathematics. It is culture not brainpower that counts in this regards[35]. According to London Daily Mail of 2007 girls may do fine on tests but only men can be geniuses. There is also a gender difference regarding overrepresentation of men at very top position than women[36].

Age discrimination constitutes unfair discrimination in South Africa and in Canada. In the case *HOSPERSA on behalf of Venter v SA Nursing Council*[37] the applicant (Ms Tersia Venter) was employed as a personal assistant to the Registrar of the SA Nursing Council. In terms of her contract of employment entitled her to retire at an age of 70 years. She was forced to retire at an age of 60 years or else she could elect to retire at the end of the month in which she attained the age of 65, this amendment had been imposed unilaterally.

When she turned 60 she sought permission to continue work until the age of 65 and relied on her contract of employment to support her request. The request for an extension was refused. She then referred the dispute to the CCMA alleging that the employer had discriminated against her on the grounds of her age. The court ordered the employer to compensate Ms Venter two years remuneration and a monthly pension amounting to half her salary that she had received while employed.

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[34] JC 684/06.
[35] www.womensenews.org.
[36] www.ThaMathMom.com.
[37] 2006 (6) BLLR 558 (LC).

In the case of *McKinney v University of Guelph*[38] the court challenged the provision of the Ontario Human Rights Code that prevented complaints about discrimination over the age of 65, the Supreme Court held that this was age discrimination.

In the case of *Evans v Japanese School of Johannesburg*[39] , the employee claim that she had been unfairly discriminated against when the employer wanted her to retire as she had already reached the normal retirement age. The employer in this regard had no policy on retirement. The policy was later instituted fixing the normal retirement age at 60 years. Consultation between employer and the employee did not go well and the employee left the school.

The court held that on the evidence that there were no agreement to fix retirement age at 65 years and that the employee would continue to work until then. The employee was awarded 24 months remuneration for damages under EEA. And another R200 000-00 was awarded to her, had she remained in employment.

In *Botha v Du Toit Very & Partners CC*[40] the applicant was employed as an appraiser. The employer terminated his employment while he was 66 years old and the reason for the termination was that he had already reached his retirement age and that the time had come for him to go.

The applicant claimed that he had been unfairly dismissed for an automatically unfair reason because his dismissal amounted to an act of discrimination on account of age. The applicant suggested that he was entitled to work until he become unable to work or until he decides to retire.

The court noted that there was no contract written indicating the retirement age of the employee. On the basis of no agreement the employer was entitled to determine the applicant's retirement age on the basis of standard or normal retirement age of the appraisers. The court held that the employee was dismissed unfairly because no consultation was held between the employer and the employee; the notice given to the employee by the employer was one month. The applicant was awarded three months' remuneration as compensation.

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38 http://canada.justice.gc.ca/chra/en/frp-c18.html.
39 2006 27 ILJ 2607 (LC).
40 2006 1 BLLR (LC).

In the case of *Ottawa Board of Education and Others*[41], Mr Wrong was discriminated against and harassed on the basis of race, ethnic origin and age. Mr Wrong was a teacher at Ottawa Technical High School for more than two years. He was selected by the Department of Education for retrenchment. The court dismissed the respondent's case with costs.

As far as pregnancy is concerned there is a case of *Wallace v Du Toit*[42] the applicant in this matter was dismissed when she announced to the employer that she is pregnant. She alleged that her dismissal was automatically unfair in terms of s187(1)(e) of the LRA and claimed compensation. She also claimed damaged under section 50(1)(e) of the EEA which award damages in discrimination cases. The court considered that the employee be compensated in the sum of R71 500-00.

In *Uys v Imperial Car Rental (Pty) Ltd*[43] the applicant claimed that she had been dismissed on account of her pregnancy. The court found that the applicant's dismissal was not associated with her pregnancy. Her dismissal was therefore not automatically unfair.

In Canada the court ruled in the case of *Gould v Yukon Order of Pioneers*[44] that a refusal of female membership in a men's organisation was not a discriminatory denial of service contrary to the Yukon Human Rights Act. In Canadian pregnancy cases, the tribunal have for example required employers to accommodate pregnant employee by transferring her from night shift to day shift in case the employee's health is affected[45]

As far as religion is concern, in *Dlamini and Others v Greenforce Security*[46] the applicants who were all security guards claimed that they had been unfairly dismissed for refusing to shave or trim their beards. They alleged that their religious did not allow them to do so and that their dismissal was automatically unfair based on religious ground.

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41 Unreported Divisional court case of Ottawa.
42 2006 (8) BLLR 757 (LC).
43 2006 (27) ILJ 2702 (LC).
44 1996 (25) C.H.R.R D/87 (SCC).
45 Brown v MNR. Customs and Exercise (1993) 19 C.H.R.R. D/39.
46 2006 (11) BLLR 1074 (LC).

The applicants had to prove trimming their beards would be a violation of an essential tenet of their faith. The court noted comparing SAPS and Durban Metro Police that the standard of neatness observed in security services is high, neatness is the rationale for regulating beards and that the company's rule was neither arbitrary nor irrational. On this basis the clean shaven rule was found to be an inherent requirement of the job. The claim for unfair dismissal was therefore dismissed.

In *Bhinder v Canadian National Railway*[47] the Supreme Court held that the broad aim and purpose of the Act covering adverse effect discrimination was violated by an employment rule that required all employees to wear hard-hats for safety reasons, this rule discriminated against Sikh employees whose religious background forbid any head-covering but a turban.

SAGWAWTU obo Brooks v CAN t/a Edcon (Pty) Ltd[48] is the arbitration concerning dismissal for misconduct, one of the issues that the commissioner had to decide related to an allegation that the store manager had engaged in a discriminatory practice during an interview with a prospective employee. The interview had been terminated after the manager referred to the headscarf that the applicant who was a Muslim was wearing.

The company had a policy stating that the company will at all times accommodate employees in terms of their respective religion and cultures. However in instances where it affects normal operation of the business, in terms of customer services, an employee may be requested to refrain from wearing obstructive garments.

The commissioner was unable to find on the evidence that the applicant had engaged in discriminatory practices in conducting an interview in the way she did, although it might have been more prudent to her to have consulted the human resources department in whether what the interviewee was wearing conformed with the uniform policy.

[47] Supra at not 28.
[48] 2007 (28) ILJ 1179 (CCMA).

Regarding HIV status there is a case of *Bootes v Eagle Ink System KwaZulu-Natal (Pty) Ltd (LC)*[49] the applicant Brian Bootes was dismissed by the respondent company. He alleged that the true reason for dismissal was his HIV status. But the company indicated that he had been dismissed for misconduct after a disciplinary enquiry.

The court found that the employer had sought to camouflage discrimination under the umbrella of misconduct and that it had failed to prove that misconduct was the real reason for dismissing the employee. The employee was awarded compensation in an amount equivalent to 16 months' remuneration.

In *Irvin & Johnson Ltd v Trawler & Line Fishing Union and Others*[50] employer approached the Labour Court for an order permitting it to conduct voluntary and anonymous HIV testing of its employees. Where employees are tested voluntarily and anonymously an employer is unable to identify which employees are suffering from HIV, the discrimination risk based on medical condition is not present.

Canadian approach to HIV testing is stringent in that employers cannot test employees with the aim of dismissing them.[51]

1.4. AIMS AND OBJECTIVES OF THE STUDY

The aim of the study is to address the effects of employment discrimination in the workplace focussing on designated groups, by comparing South Africa and Canada. Employment discrimination is one of the pillars of social policy in Canada. Canada is one of the few countries that have addressed the employment barriers of target groups with one encompassing piece of legislation.

Grogan indicated that EEA of 1998 aims at correcting the demographic imbalance in the nation's workforce by compelling employers to remove barriers to advance blacks, coloureds, Indians, women and disabled and also to advance them in categories of employment by affirmative action[52]. The aims of EEA is to achieve

[49] D781/05.
[50] 2003 (4) BLLR 379 (LC).
[51] Ontario Human Rights Code – Policy on HIV/AIDS related discrimination information sheet, 2003.
[52] Grogan, J. Workplace law, 2004. 10th Ed. Cape Town. Juta & Co. Publishers.

equity in workplace by promoting equal opportunity and fair treatment in employment through elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups (blacks, women and people with disabilities). In South Africa and Canada employment discrimination exists, this implies that the employment discrimination between two countries could be comparable[53].

Canada's Federal EEA and South Africa's EEA of 1998 requires employer, employee and unions to conduct a workforce analysis in order to identify the underrepresentation of disadvantaged groups and review any employment systems, policies and practices in order to identify employment barriers facing the disadvantaged groups in relation to recruitment, job classification, remuneration, employment benefits, terms and conditions, promotion, retention and dismissal. Laws and policies obliged the employers to prepare short and long term plans with measures to remove employment barriers[54].

Therefore this means that critical look will focus on the employment systems, policies and practices at workplaces and also identify employment barriers facing designated groups in relation to recruitment, job classification, remuneration, employment benefits, conditions of services, promotion, retention and dismissal.

The designated groups of people will benefit from the study in that lot of challenges facing employment discrimination at the workplace will be discussed. Labour law students and employees will benefit from this research in that issues facing employment discrimination will be discussed.

Employment equity is viewed as an organisational change strategy designed to prevent the discrimination of the disadvantaged by identifying and removing barriers in employment policies and practices[55]. It is therefore important to conduct this study in that since the advent of the EEA in 1999 with the aim of eliminating unfair

[53] Grogan, J. Workplace Law, 2004. 10th Ed, Cape Town. Juta & Co Publishers.
[54] Grogan, J. Workplace Law, 2004. 10th Ed, Cape Town. Juta & Co Publishers.
[55] Thomas, A. Employment Equity at elected Companies in South Africa. South African Journal of Labour Law Relations, 2009. Spring/Summer, 6 – 40.

discrimination and promoting affirmative action in the workplace, implementation has been less than satisfactory[56].

The apartheid system and discrimination in labour market against black people, women and disabled have resulted in great inequalities in income distribution and jobs distribution. These inequalities in labour market discrimination take place in the form of occupational segregation, discrimination in recruitment, promotion, selection for training, transfer and retrenchments of employees, pay inequalities and benefits and lack of access to training and development opportunities[57].

1.5. RESEARCH METHODOLOGY

Basically, the research methodology to be adopted in this study is qualitative. Consequently, a combination of legal comparative and legal historical methods, based on jurisprudential analysis, is employed. Legal comparative method will be applied to find solutions, especially for the interpretation of equity laws and unfair discrimination.

The purpose of historical research method on the other hand, will be to establish the development of legal rules, the interaction between law and social justice, and also to propose solutions or amendments to the existing law or constitutional arrangement, based on practical or empirical and historical facts. Concepts will be analysed, arguments based on discourse analysis, developed. A literature and case law survey of the constitutional prescriptions and interpretation of statute will be made.

This research is library based and reliance is made of library materials like textbooks, reports, legislations, regulations, case laws, articles and papers presented on the subject in conferences.

[56] Journal of Public Administration Vol. 45 No.1.1. June 2010.
[57] http://www.southafrica.info/services/rights.

1.6. DIVISION OF CHAPTERS

The mini-dissertation will consist of five inter-related chapters. Chapter one is the introductory chapter laying down the foundation. Chapter two will focus on the comparative study of employment equity: South Africa and Canada while chapter three will deal with employment discrimination: South Africa and Canada. Chapter four will deal with remedies for employment equity. Chapter five is a summary of the conclusions drawn from the whole study and makes some recommendations.

CHAPTER TWO: A COMPARATIVE STUDY OF EMPLOYMENT DISCRIMINATION: SOUTH AFRICA AND CANADA

2.1. INTRODUCTION

Canadian discrimination is more or less not too different from the South African one. There has been discrimination against minority groups and women which raised both social and political concerns. In 1982, Human Rights statutes were introduced in Canada in an attempt to ensure equal employment opportunities and practices. Canadian Constitutional Act[58]was amended to introduce equality rights, Canadian Charter of Rights and Freedoms[59]introduced the equality clause in order to strengthen the culture of non-discriminatory society and workplace. This leads to the promulgation of the Canadian Human Rights Act and EEA of 1995 to ensure that unjustified workplace discrimination is prohibited[60]

In this chapter a comparative study of employment discrimination in South Africa and Canada will be discussed. In this chapter the study will focus more on `effects of discrimination in the workplace, family responsibility shortcomings of EEA, equal pay for equal work, equal pay for work of equal value and proactive pay equity.

South Africa's ethnic diversity with Canada is the same. There are lot of black peoples (African, Indians and Coloureds) and whites. Blacks coupled with women and people with disabilities are categorised as designated groups[61], whereas in Canada designated groups commonly known consists of women, Aboriginal peoples, persons with disabilities and members of visible minorities[62].

Designated groups from both countries have been subjected to discrimination whether fair or unfair. Both South Africa and Canadian constitutions denounce unfair discrimination. In the case of *Brink v Kitshof NO*[63], O' Reagan J had to grapple with the equality clause as it is based in the interim Constitution, whereas in Canada the

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58 Canadian Constitutional Act of 1982.
59 Schedule B of the Constitutional Act, 1982 (79).
60 Canadian EEA of 1995.
61 EEA 55 of 1998.
62 S3 of the Canadian EEA of 1995.
63 1996 (4) SA 197 (CC).

first case to deal with equality as espoused in the Constitution was that of *Andrews v Law Society of British Columbia*[64].

The reason for comparing Canada and South Africa is that South Africa's labour law is based on foreign aspects dealing with labour issues resulting in a reasonably coherent jurisprudence[65].

2.2. EFFECTS OF DISCRIMINATION IN THE WORKPLACE

Discrimination in the workplace negatively affects businesses in that discriminatory policies can hurt a company's reputation. A business self-limits itself when it restricts advancement to certain groups or types of employees. Talking negatively about a former employee can be damaging for a potential client. There is also a direct correlation between loyalty, retention and discrimination. Employees look for new jobs when they felt they have been wronged. According to a report on discrimination at the workplace by the International Labour Organization (ILO), workplace discrimination remains a persistent global problem with more subtle forms emerging[66].

Wrong signals sent potential clients can also cause conflict because customers can sense when employees are not enthusiastic or do not believe in their company. This is important for a job applicant to observe the attitudes of people they wished to work with. Sending positive signals to employees attracts future potential employees. Inequalities suffered by discriminated groups spreads. Because of affirmative action policies, new middle class has been created that consists of formerly discriminated people in some countries but in others, people who are from discriminated groups are involved in the worst jobs, denied benefits, capital, land, social protection, training or credit. Discrimination at a workplace can lead to poverty. Discrimination creates a web of poverty, forced and child labour and social exclusion, seeking to eliminate discrimination is indispensable to any strategy for poverty reduction and sustainable economic development[67].

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64 1989 (1) C.H.R.R. D/5719, 1989.
65 South African Labour Bulletin 49.
66 ILO: Workplace discrimination, a picture of hope and concern. (http://www.ilo.org/global/About the ILO/Media and public information/Feature stories/lang... en/WCMS_075613/index.htm).
67 http://www.ilo.org/global/About the ILO/Media and public information/Feature stories/lang... en/WCMS_075613/index.htm.

2.3. FAMILY RESPONSIBILITY SHORTCOMINGS OF THE EEA

Family responsibilities and care obligations are responsible for placing obstacle on the way of women advancement in the workplace. Constitutional and legislative commitments prohibit family responsibility discrimination and the governmental initiative to facilitate the advancement of women in the economy. But not a single family responsibility discrimination matter has been heard by the labour courts in the ten years since the enactment of the EEA[68]. The only case that was heard ironically was that of *Co-Operative Workers Association v Petroleum Oil & Gas Co-Operative of SA*[69], this case involved a claim of unfair discrimination lodged by employees without dependants, aggrieved by employer's provision of increased medical aid benefits to employees with dependents. The court held that special measures must apply to workers with family responsibilities to adjust for the hardships of such responsibilities. The absence of legal precedent and failure of the EEA to address family responsibility discrimination signify that either employees are satisfied with the current working arrangements or that the EEA does not make provision for an adequate vehicle to address their needs.

Societal practices and cultural norms is the role of women as primary caregivers and good parenting. The first priority of our society is paid work over the unpaid work of cares and this prejudice employees that attempt to juggle the two social ideals[70]. In *Bogle v Metropolitan Health Service Board*[71]an employee who held a supervisory position claimed to have been indirectly discriminated due to her employer's refusal to allow her to return to work on part-time basis after taking maternity leave. The tribunal concluded that the employer's refusal was a knee-jerk reaction. It was therefore concluded that the employer's opposition to allowing flexibility was based on entrenched belief systems and attitudes instead of objective criteria. There is no generic working arrangement that suits all employees in need of a better working life balance. Most disadvantaged groups in our society have been granted a right against discrimination but left to enforce it alone[72]. In *Fry's Metals (Pty) Ltd v*

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68 Lewis 2006 *Journal of Comparative Policy Analysis* 106.
69 2007 (28) ILJ 627.
70 2003 Harvard Women's Law Journal 77 – 80.
71 2000 (93-069) EOC 74, 200.
72 Smith 2006 Sydney Law Review 714.

NUMSA[73] the court confirmed the employer's right to retrench in order to implement changes to terms and conditions of employment where the purpose of dismissal was to employer to replace the employees permanently with employees that are prepared to work under the terms and conditions that meet the employer's requirements[74].

Section 50 of the EEA makes provisions for the labour courts with powers to remedy unfair discrimination including an award of compensation and damages and also orders the employer to take steps to prevent such discrimination in the future. The remedial nature of this power deprives the courts of the ability to order systematic change and powers to monitor and enforcement[75].

In Canada the needs of working family caregivers, workplace flexibility consistently emerges as a measure caregivers believe would enhance their ability to balance employment and caregiving responsibilities. The legal recourse is a human rights argument characterizing the employer's lack of flexibility as a form of discrimination. Mostly workers benefited from a degree of workplace flexibility. The Statistics Canada Workplace and Employee Survey indicated that "flexitime", include control over time when work starts and stops so long as the full complement of hours in maintained, is available to over one third of Canadian employees[76].

The British Columbia Human Rights Code prohibits an employer from discriminating against an employee regarding any term or condition of employment based on a protected ground, unless the term is a legitimate occupational requirement for the position in question. Family status is a protected ground in British Columbia and so an employer may not discriminate against an employee on the basis of family status[77].

The Supreme Court of Canada has characterised discrimination in employment on the ground of family status. In *B v Ontario*[78], the Supreme Court of Canada refers favourably to the following description of Justice Abella of employment discrimination on the basis of marital and family status contained in her decision of the lower court

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73 Supra.
74 2003(24) ILJ 373 (LAC).
75 Smith 2006 Sydney Law Review 714.
76 Derrick Comfort, Karen Johnson & David Wallace, "Part-time Work and Family-friendly practices in Canadian Workplace" (Ottawa : Human Resources Development Canada, 2003) Catalogue No. 71 – 584 – MIE, at 32 and 33.
77 Human Rights Code, R.S.B.C. 1996, c. 210, s.13.
78 2000 (O.J. No. 4275 (O.C.A.) at para 54.

practices or attitudes that have the effect of limiting the conditions of employment or the employment opportunities available to employees on the basis of a characteristic relating to their marriage (or non-marriage) or family. A review of reported human rights decisions indicates that courts and tribunals have found that employment arrangements that prevent an employee from performing family caregiving responsibilities may be a form of discrimination on the ground of family status

The leading authority on discrimination in employment on the ground of family status in British Columbia is the British Columbia Court of Appeal decision in *Campbell River*[79]. This case involved a mother of a school-aged child with severe behavioural problems. The mother, a unionized employee, worked a shift that ended in the early afternoon so she could care for her son after school. Due to a reorganization of the workplace, the employer changed the employee's shift hours to end at 6:00 pm instead of 3:00 pm, thereby conflicting with her care for her son. The employee claimed that this change in shift discriminated against her on the ground of family status as it effectively prevented her from either continuing in the position or maintaining both employment and the care of her child. In Canada, including British Columbia, prior case law had established that the discrimination argument is composed of two parts. Person alleging discrimination must make out what is called a *prima facie* case of discrimination based on a ground enumerated in the Code. Then the burden shifted to the respondent to establish a defence[80].

In the decision of *Campbell River*'s case the British Columbia Appeals Court established a new test for adjudicating discrimination on the basis of family status in the employment context - ostensibly amending the first part of the duty to accommodate test, for instances, where the family status ground and employment intersect. The test to determine if there is *prima facie* discrimination is whether a change in a term, or condition of employment imposed by the employer results in serious interference with a substantial parental or other family duty. The Court referred the union grievance back to the original arbitrator to deal with the accommodation of the employee. Therefore the judge noted that the threshold set

[79] 127 L.A.C 4th (1) (B.C.C.A).
[80] Health Employers Association of BC.

by the test would be quite difficult to meet and that has proven to be the case in British Columbia[81].

The existence of court decisions dealing with family responsibilities accommodation in Canada, and all of them dealt with the care of young children. There are no cases that deal with the issue of how businesses and employees can manage the requirements for long-term, routine caregiving while addressing workplace demands. Aged parents have always been, and will continue to be, a responsibility and concern for everybody, including people in the workforce[82].

In *Evans v University of British Columbia*[83] the judge stated with respect to a woman who had not been able to find suitable childcare at the time of her return to work. The tribunal concluded that an employee on maternity or parental leave knows of the responsibility to make suitable childcare arrangements by the date of return to work as a result, there was nothing extraordinary about the petitioner's situation.

In *British Columbia Public School Employers' Assn. v B.C.T.F. (Sutherland Grievance)*[84]the arbitrator expressed concern that finding discrimination on the facts of the case would create an entitlement for part-time work for every full-time employee ending maternity leave, barring undue hardship, implying that this would be a problematic outcome.

The 2007 decision in *Johnstone* involved an employee returning from a maternity leave who was unable to find a childcare provider that matched her or her husband's availability based on their differing shift schedules. Johnstone requested accommodation in the form of three fixed 12-hour shifts per week so that she could arrange for childcare while she was at work. The employer's accommodation policy required Johnstone to accept part-time employment in exchange for fixed shifts. Johnstone filled a complaint with the Canadian Human Rights Commission arguing that the employer's accommodation policy discriminated against her on the basis of family status[85]. In its findings the Federal Court remitted the decision back to the Canadian Human Rights Commission in part because they used serious interference

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81 Supra note above.
82 Canadian Staff Union v Canadian Union of Public Employees (2006) C.L.A.D. No. 452 (N.S.Arb.Bd) at 143.
83 2008 BCSC 1026 at para 42 [2008] B.C.J. No. 1453.
84 2006, 155 L.A.C. 4th 411, [2007] B.C.W.L.D. 3277 at para 39.
85 Ibid at para 120.

language that appeared to be taken from *Campbell River*[86]. The judge found *Hoyt*'s critique of *Campbell River* valid, and noted that *Campbell River* was unduly restrictive due to the fact that "the operative change typically arises within the family and not in the workplace[87]." The Federal Court thus supported the *Hoyt* analysis of *Campbell River* up to the point of actually endorsing it, although its comments that requiring "serious interference" ran counter to jurisprudence indicates what line of cases the court prefers.

The employer in *Johnstone* appealed the Federal Court decision. In its dismissal the Federal Court of Appeal refused to provide an opinion on whether the *Hoyt* or *Campbell River* standard is correct leaving the state of the law somewhat unclear[88].

In *Nova Scotia*[89] an employee applied for job within his organization, and had the highest seniority out of the qualified candidates. The job the employee was applying for was located in Halifax, but the employee requested that he perform the job out of St John's and travel to Halifax occasionally as required. He did so due to the fact that he wanted to remain close to his elderly mother, and his children who resided with his ex-wife. Furthermore, his current partner had custody of her children from a previous relationship, and was concerned that a move to Halifax might create a custody dispute. The Nova Scotia arbitrator noted that he was afraid of opening the floodgates in terms of finding family status discrimination[90]. He followed *Campbell River*,[91] and stated that in his opinion it was consistent with the Supreme Court of Canada's jurisprudence. He did, however, agree with the contention that *Campbell River* conflates the first and second parts of *Meiorin* in the test[92].

The Canadian system of human rights, which is governed by broad legislation that sets out protected grounds, may not lend itself to such a particularized response to family responsibilities discrimination. Aside from the Ontarians with Disabilities Act, broad human rights codes and judicial interpretation of these laws are the source of human rights in Canada. The Human Rights Code approach would makes the right to flexibility more universally available whereas the Code applies to all employment

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86 Ibid at para 29.
87 Ibid.
88 *Johnstone v Canada* 2008 (F.C.J. No. 427.
89 Reynolds, supra note 132.
90 Ibid.
91 Ibid.
92 Ibid.

relationships in British Columbia, a significant number of workers are not covered by the Employment Standards Act. In British Columbia the employment standards framework will provide protection to only a sub-class of workers. Employment legislation may supplement, but cannot remove, human rights. In this respect it may be important to amend human rights legislation to clarify the family caregiving responsibilities that may trigger a human rights violation and the caregiving relationships that ought to be granted human rights protection in British Columbia[93]. The complete absence of clear legislative support for workplace accommodation of employee family responsibilities highlights the need for law reform in that area.

2.4. EQUAL PAY FOR EQUAL WORK

Equal pay for equal work is the concept that individuals doing the same work should receive same remuneration. Most employers do the opposite of the definition and it is an unfair discrimination by an employer to an employee[94].

In *Mangena& Others v Fila South Africa (Pty) Ltd& Others* [95]the Labour Court accepted that claims for equal pay for equal work are justiciable under the EEA. However the Court held that such claims cannot be pursued in the alternative, the claimant must choose the basis for the action. Whichever claim is pursued, claimants must prove that the work performed is the same or similar or, if different, that it is of equal value to the work performed by the chosen comparator. Having granted the employer absolution from the instance in respect of the employees' claims that the wage differentials of which they complained arose from birth or union affiliation, the Court found that the applicants had failed to prove the requirements of the remaining claim based on alleged race discrimination, that is, that their work was similar or of equal value to that of the chosen comparator or that the wage differentials of which they complained were causally linked to race. The application was therefore dismissed.

Free market supporters believe that any legislation supporting equal pay for equal work does in fact harm the very groups the legislation aims to protect. It is believed that free market forces discriminative employers to pay for their prejudice where as

93 Employment Standards Regulation, B.C. Reg. 423/2008, s31.
94 http://en.wikipedia.org/wiki.
95 2008 (7) BLLR 1011(SCA).

an equal pay for equal work legislation would simply allow those same employers to have no consequence for their prejudice. An employer who holds an unfair prejudice against women will always hire man given the requirement to pay both equally. If women offers to be compensated slightly less than the man despite having equal talents, the employer will have to pay for his prejudice if he still hires the man. In this case, a competitor now has access to an employee who is both equally skilled and willing to work for less, which will thus put the discriminative employer at a competitive disadvantage[96].

Free market supporters believe that government actions to correct gender pay disparity serve to interfere with the system of voluntary exchange. They see the fundamental issue as that the employer is the owner of the job, not the government or the employee. The employer negotiates the job and pays according to performance, not according to job duties. A private business would not want to lose its best performers by compensating them less and can ill afford paying its lower performers higher because the overall productivity will decline[97].

There are also specific affirmative defenses to the criticism above that government is forcing employers to pay less qualified workers the same as superior workers. The EPA's four affirmative defenses allows unequal pay for equal work when the wages are set pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or any other factor other than sex. If an employer can prove that a pay differential exists because of one of these factors, there is no liability[98].

The public hearings were considering amendments to the Basic Conditions of Employment Act, the EEA, the Labour Relations Act and the Employment Services Bill. Proposal of a new clause to deal with unfair discrimination by employers in respect of employees doing the same work, similar work or work of equal value were made by the Director of Employment Equity Ntsoaki Mamashela[99].

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96 http://en.wikipedia.org/wiki.
97 http://en.wikipedia.org/wiki.
98 http://en.wikipedia.org/wiki.
99 http://forum.org.za.

Differences in pay and conditions of work between employees performing the same work will amount to unfair labour practice, unless the employer can justify the rationale thereof relating to experience, skill, responsibility and qualification. The proposed changes were aimed at ensuring the department complied with the ILO's standards. She further proposed to give effect to human rights element that is being promoted by the country's Constitution and close gaps in labour legislation. Another amendment proposed was to provide for lower-paid employees who needed to refer a dispute concerning discrimination, including equal pay claims, to the CCMA for arbitration, instead of to the labour court[100].

In Canadian usage, the terms pay equity and pay equality are used differently than in other countries. The two terms refer to distinctly separate legal concepts. Equal pay for equal work, refers to the requirement that men and women be paid the same if performing the same job in the same organization. For example, a female electrician must be paid the same as a male electrician in the same organization. Reasonable differences are permitted if due to seniority or merit.

Pay equality is required by law in each of Canada's 14 legislative jurisdictions (ten provinces, three territories, and the federal government)[101]. Note that federal legislation applies only to those employers in certain federally-regulated industries such as banks, broadcasters, and airlines, to name a few. For federally-regulated employers, pay equality is guaranteed under the Canadian Human Rights Act[102]. In Ontario, pay equality is required under the Ontario Employment Standards Act of 1995. Every Canadian jurisdiction has similar legislation, although the name of the law may vary. In contrast, pay equity, in the Canadian context, male-dominated occupations and female-dominated occupations of comparable value must be paid the same if within the same employer. The Canadian term pay equity is referred to as "comparable worth" in the US. If an organization's nurses and electricians are deemed to have jobs of equal importance, they must be paid the same. Pay equality addresses the rights of women employees as individuals, whereas pay equity addresses the rights of female-dominated occupations as groups. Certain Canadian jurisdictions have pay equity legislation while others do not, hence the necessity of distinguishing between pay equity and pay equality in Canadian usage. For example,

[100] http://totaljobs.com.
[101] Women's rights in Canada.
[102] Canadian Human Rights Act of 1995.

in Ontario, pay equality is guaranteed through the Ontario Employment Standards Act of 1995 while pay equity is guaranteed through the Ontario Pay Equity Act. Three westernmost provinces (British Columbia, Alberta, and Saskatchewan) have pay equality legislation but no pay equity legislation. Some provinces have legislation that requires pay equity for public sector employers but not for private sector employers; meanwhile, pay equality legislation applies to everyone[103].

In Canada it is illegal to pay you less because of your race, religion, or gender. But if you're a part-time or temp worker, employers can get away with just about anything. The Universal Declaration of Human Rights provides that everyone, without any discrimination, has the right to equal pay for equal work[104].

2.5. EQUAL PAY FOR WORK OF EQUAL VALUE

This concept simply indicates that if a woman is employed in a traditionally female working environment, her work has the same value as that of men working in a male environment. It also includes cases where a woman and a man are doing different jobs in the same environment but these jobs have the same value[105].

Criteria to be used in equal pay for work of equal value are skills, effort and responsibility which are of equal value to those of the comparator employed by the employer[106]. In *Fouche and Eastern Metropolitan Local Council*[107] the employee claimed that he was discriminated against by not being paid a higher salary and that he was entitled to a higher salary by virtue of a report on executive positions that had been adopted by the bargaining council. The arbitrator found that qualifications and skills used by the employer should be related to the complexity of the job. Salary level of the employee should be based on job requirements and not on performance of an individual.

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103 Canadian Human Rights Act of 1995.
104 www.equalpay.ca.
105 en.wikipedia.org/wiki.
106 Mentjies Van der Walt (note 253) 26.
107 1999 (8) ARB 6.12.1.

Direct and indirect discrimination is forbidden by the Constitution of South Africa[108] and EEA and afford equal treatment of men and women. In case discrimination is unfair the Constitution provides for the limitation clause in terms of section 36.

In *Larbi-Odam v MEC for Education (North-West Province*)[109] the Constitutional Court found that a provincial regulation which prevented all non-citizens from being appointed on permanent teaching positions was unfair discrimination. Citizenship is not one of the grounds of unfair discrimination but it impair the fundamental human dignity of a non-citizen person. The court found that discrimination was justified by section 36 of the limitation clause.

International Labour Organisation Community Review note that women's incomes are lower than those of men, the average income for African men is less than that of white women. Problem of pay inequality is further compounded by the fact that white women and Africans are concentrated in occupations at the lower end of the remuneration spectrum[110].

According to section 5 of the EEA every employer should take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment practice. In *Ntai and Others v South African Breweries Ltd*[111] the court held that discrimination on the grounds that are not listed can be discriminatory if it is based on attributes and characteristics which have the potential to impair the fundamental human dignity.

[108] Section 9(4) of the Constitution.
[109] 1998 (1) SA 745 (CC).
[110] Meintjies-Van der Walt 23.
[111] 2002 (2) BLLR 186 (LC) para 72.

CHAPTER THREE: EMPLOYMENT DISCRIMINATION IN SOUTH AFRICA AND IN CANADA

3.1. INTRODUCTION

The Canadian Human Rights Act prohibits discrimination based on a person's race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for which a pardon has been granted.

Canadian citizens landed immigrants and visitors are protected from discrimination by federally regulated organizations. These organizations include federal government departments, agencies and corporations, banks, inter-provincial transportation companies and telecommunications service provider[112].

The Commission administers and the Canadian Human Rights Act ensures that the principles of equal opportunity and non-discrimination are followed in all areas of federal jurisdiction. The Canadian Human Rights Commission provides dispute resolution services in cases of discrimination by employers, unions and service providers. Allegations are screened to ensure they fall within the jurisdiction of the commission and the enquiries are referred to grievance processes. If the dispute falls within the jurisdiction of the commission the parties are assisted to resolve the matter without filing the complaint. If the matter cannot be resolved the mediator or investigator will be assigned to deal with the matter. Then from there the Canadian Human Rights Tribunal may hear the matter. The parties are encouraged to look for solutions through participating in alternative dispute resolution.

[112] Canadian Human Rights Act.

3.2. GROUNDS OF DISCRIMINATIONS IN SOUTH AFRICA

Section 6(1) of the EEA provides that

> "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 or birth".

3.2.1. Age discrimination

The Age Discrimination in Employment Act of 1967 (ADEA) protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment[113].

Section 187(1)(f) provides that a dismissal is automatically unfair if the reason for dismissal is that the employer discriminated against an employee including age.

In *Schmahmann v Concept Communications Natal (Pty) Ltd*[114] it was held that the termination of the services of an employee who has reached the normal or agreed retirement age is not a dismissal and therefore, cannot be automatically unfair. In *Schweitzer v Waco Distributors*[115], Zondo J accepted that termination of services of an employee who had passed the normal retirement age amounted to dismissal but found that such dismissal was not automatically unfair. The same principle was applied in *Ruberstein v Price's Daelite (Pty) Ltd*[116], where the court added that an employer's permission for an employee to work beyond normal retirement age did not constitute a waiver of the right to compel an employee to retire.

In *Rubin Sportswear v SACTWU & Others*[117] the Labour Appeal Court had to consider a situation where a retirement age that had been unilaterally imposed by their employer led to the dismissal of employees who reached such age. As the

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113 Equal Employment Opportunity Commission.
114 1997 (8) BLLR 1092.
115 1999 (2) BLLR 188 (LC).
116 2002 (5) BLLR 472 (LC).
117 2004 BLLR 986 (LAC).

employer had no normal or agreed retirement age, it could not raise the defence provided for in section 187(2)(b) and it should have embarked on a process to establish same rather than unilaterally implementing a retirement age.

3.2.2. Inherent Requirement of the job

Inherent requirement of the job might not constitute discrimination if it is reasonable. An inherent requirement implies that the job should have an indispensable attribute that relates in an inescapable way to the performance of the job required[118]. In *Whitehead v Woolworths*[119] the employer argued that it was justified to discriminate against a pregnant woman due to the fact that it was an inherent requirement of the job that the employee should serve uninterrupted period of at least twelve months.

The requirement must be so essential in that without the employee job would not be done. If the ability to sing is an inherent requirement job requirement then a deaf or a dumb applicant will not qualify.

In *CWIU v Johnson & Johnson (Pty) Ltd*[120] female employees were selected for retrenchment solely on the basis that the retained jobs were deemed to be more suitable for men. This was found to be prima facie discriminatory and therefore automatically unfair, unless it could be proven that such jobs could be done only by men. The employer in this matter invited applications from females for the retained jobs but none were forthcoming. On this basis it was held that the dismissal were not discriminatory.

In the case of *Dothard v Rawlison*[121] an American court held that Ms Rawlison had been unfairly indirectly discriminated against in that the employer required that the applicants for the position of Prison Guard must be at least 5 feet 2 inches tall and 120 pounds in weight. Ms Rawlison who studies correctional psychology, failed to meet the weight requirement. Evidence presented to court indicated that a combination of the height and weight requirements would exclude 41.13% of the

[118] Van Jaarsveld and Van Eck Principles of Labour Law (2002) 361.
[119] 1998 (8) BLLR 862 (LC).
[120] 1997 (9) BLLLR 1186 (LC).
[121] 433 US 321 1977.

female population but only 1% of the male population. More women were excluded from applying for the position than men.

The other case is that of *Griggs v Duke*[122], the US Supreme Court held that a requirement relating to the high school certificate and passing scores on the general aptitude tests constituted indirect discrimination.

In the case of *Andriaanse v Swartklip Product*[123], the CCMA has held that an employer who required a Standard 8 qualification for appointment indirectly discriminated against the applicant because the requirement was not necessary.

In Canada it is referred to as indirect discrimination which occurs when an employer applies a criterion that is, on the fact of it, neutral to all employees. The application of this criterion has the effect of discriminating between certain groups of employees. An example will be that of the requirement that a prison guard comply with certain physical attributes such as height and weight, these attributes may be indirectly discriminatory against women even though the employer may rely on the inherent requirements of a job defence[124].

3.2.3. Pregnancy discrimination

Pregnancy discrimination involves treating a woman employee unfavourably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment[125].

In *De Beer v SA Export Connection CC*[126] the employee was dismissed after she gave birth to twins. The employee was employed as a permanent employee for two weeks in a small company. She told her employer of her pregnancy. The employer's sister was also pregnant and had agreed with the employer of the terms in which she

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122 442 F 2nd 385 1971.
123 1999 6 BALR 649 (CCMA).
124 See *Griggs v Duke Power Company* 401 (US) 424 (1971).
125 www.eeoc.gov.za.
126 2008 (1) BLLR 36 (LC).

would take maternity leave. The applicant indicated that she would come back after a months of giving birth (which is against the Basic Conditions of Employment Act that entitles an employee maternity leave of four months). In terms of the agreement made she was supposed to return at work on 1 November 2005. The twins suffered from colic and the applicant requested for extension of a month's maternity leave. The employer refused but offered two weeks. The employee refused to accept the arrangement and the employer terminate the applicant's employment with effect from 31 October 2005.

The court held that protection granted by s187(1)(e) extended not only to dismissals on account of pregnancy but also to a situation when a woman is dismissed for reasons connected with the exercise of her rights in respect of maternity leave. The employee's dismissal was held to be automatically unfair and she was awarded twenty month s' remuneration in compensation for her unfair dismissal.

In *Lukie v Rural Aliance CC*[127] the applicant requested maternity leave from her employer. Her employer initially informed her that she could take it but later told her that if she took leave, "she need not bother to return". The court found that the dismissal was automatically unfair and the applicant was awarded 80 weeks remuneration as compensation. It was also stated that it is unacceptable that some employers continue to dismiss pregnant employees despite the Constitution and the advancement of women's rights in the workplace.

In *Wardlaw v Supreme Mouldings*[128] the applicant after she returned to work from maternity leave, received a notice to attend a disciplinary inquiry. There she was found guilty of failing to discharge her duties as Group Financial Manager because of the grossly negligent manner in which she performed various accounting tasks which resulted in considerable loss to her employer. She referred a dispute after being summarily dismissed claiming that she was dismissed for reasons that are related to her taking maternity leave, which even if she had been negligent that her dismissal was unfair because she had not been correctively disciplined. She also maintained that she should have received notice and that the dismissal was thus in

[127] 2004 BLLR 769 (LC).
[128] 2004 (6) BLLR 613 (LC).

contravention of the provisions of the BCEA.[129] The court accepted that the key issue was that she was dismissed as a result of her pregnancy. The other claims fell outside the court's jurisdiction. Regarding the first issue the court noted that problems relating to performance had come to the light even before the applicant went on maternity leave. Her earlier neglect had thus placed her employer in an uncomfortable position during her maternity leave of absence. The court adopted the approach that the issue had to be determined on the basis of factual and legal causation, that is, was pregnancy the main or dominant reason for dismissal? As the company had given evidence of the applicant's incompetence the dismissal was not automatically unfair.

In *Mnguni v Gumbi*[130] an employee in an advanced state of pregnancy was dismissed after she complained that she was tired. The court found her dismissal to be automatically unfair. The applicant was a receptionist in the respondent's medical practice. The respondent had told her to go home without indicating when or whether she should return or that she was entitled to maternity leave. The following day he employed another receptionist. In this circumstance the court was satisfied that the employee had been dismissed. The applicant was awarded compensation equivalent to 24 month's remuneration.

In the case of *Woolworths v Whitehead*[131] the applicant applied for a position for a Human Resource Generalist, applicant was offered a position which she accepted. Prior commencing employment, the company notified the applicant that she could not be appointed permanently on the grounds of her pregnancy and was offered a fixed term contract of employment until the date of her expected confinement.

The applicant instituted the proceedings alleging automatically unfair dismissal alternatively, an unfair labour practice on the grounds of discrimination against her as an applicant for employment. The court analysed the definition of employee as contained in section 213 of the LRA. The applicant must be able to satisfy the court that the applicant indeed worked and was entitled to receive remuneration. The court ruled that the applicant was not a Woolworths employee as per the definition and hence Ms Whitehead was not unfairly dismissed.

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[129] Act, 75 of 1997.
[130] 2004 (6) BLLR 558 (LC).
[131] 1999 (20) ILJ 2133 (LC).

3.2.4. Affirmative Action

Many individuals associate affirmative action with mandated quotas, hiring individuals based solely on race or sex, without regard to meritorious qualifications. While others in society associate affirmative action with inequality, where fairness is compromised because of a preferential selection process. Affirmative action decisions must be rationally connected with the purpose of ensuring equitable representation of suitably qualified employees from designated groups in the workplace.

According to the Commission for Employment Equity (CEE) Annual Report[132] 2010 – July 2011 launch on 21 July 2011 designated groups are most under-represented compared to the first four upper occupational levels, that is, top management, senior management, professionally qualified and skilled levels. White women remain dominant and continue to benefit from opportunities more than women of other race groups. Within the black group, Indians have benefited across the five occupational levels, except at unskilled level and disability representation which remained flat[133].

Chairwoman of the CEE, Mpho Nkeli further indicated that employment equity is a must and it is up to senior management to grow black people into top positions. Over 50% of people below senior management are black but employers are not training them to the next level. CEE report shows that an improvement of both white women and Indian people on workforce profile and movements at the top management level, with white women at 12.3%. The level of Indian males is at 5.4% and that of Indian women at 1.4%. White women and Indian people have benefited a lot from employment equity but there is little for blacks and coloured people to celebrate.

In *SA Police Service v Zandberg & Others*[134] the Labour Court set aside an award in which an arbitrator ruled that a divisional commissioner's rejection of a selection panel's recommendation to appoint a white male candidate was declared an unfair labour practice. The Court found that the arbitrator had misconstrued the significance of the advertising of certain positions as designated and others as non-designated. The directive which enabled the SAPS National Commissioner to advertise posts in

132 CEE Annual Report, 2010 -2011, Mail and Guardian, page 4.
133 CEE Annual Report, 2010 -2011, Mail and Guardian, page 4.
134 2008 (11) BLLR 1023 (SCA).

this manner applied only to the advertising of posts, it had no relevance to the subsequent selection process. The Court also held that even in the case of non-designated posts equity considerations remain relevant. Since the selection panel had not applied its collective mind to equity considerations, the Divisional Commissioner was obliged to do so and had done so rationally. Therefore the award was set aside.

It is a statutory defence to a claim of unfair discrimination. Its main aim is to ensure that previously disadvantaged groups are fairly represented in the workforce of a particular employer. Affirmative action is a shield in the hands of the employer and not a sword to be used by individuals[135].

In *IMAWU v Greater Louis Trichardt Transitional Council*[136] the court held that affirmative action can only be used as a defence to justify employers' decisions where members of non-designated groups are affected in relation to one or more of the designated groups. The matter of *Stulweni v SAPS (Western Cape)*[137] demonstrates that affirmative action measures aimed at addressing the representivity of designated groups.

In *Solidarity obo Barnard v SAPS*[138] the Labour Court upheld an unfair discrimination claim brought by a trade union on behalf of a white female captain in the National Inspectorate of the SAPS who complained that she had been denied promotion on two occasions for the reason that she was white. The court rejected the employer's defence that the employee's non-promotion was not unfair discrimination because it was a lawful affirmative action measures. Captain Barnard was seeking promotion within a male dominated profession besides the fact that she is white, as a female she is a member of the designated group. According to statistics, women, regardless of race are under-represented in mid to high level jobs.

In *Reynhardt v University of South Africa*[139] claim for unfair discrimination in circumstances where Employment Equity plan not followed and where section 15(4)

135 *Abbott v Bargaining Council for the Motor Industry* (1999) 20 ILJ 330 (LC).
136 2000 (21) ILJ 1119 (LC).
137 2003 (24) ILJ 883 (LC).
138 2010 (5) BLLR 563 (LC).
139 2004 (3) BLLR 120 (LC).

of the EEA breached. Therefore an employee was awarded compensation for over a million rand.

In the case of *Willemse v Patelia& Others*[140] it was held that an employer using gender representativity as a reason to deny promotion to a white male with disability, who was the best candidate for the position on merit and recommended by the selection committee was unfair discrimination as the employer failed to comply with policy directive on representativity and merit.

The Labour Court in the case of *PSA v Minister of Correctional Services*[141] postulated that affirmative action measures should help to achieve equality, disadvantaged groups should have access to protection and advancement. Such groups should be made beneficiaries of the post-apartheid era.

3.2.5. Race discrimination

Race discrimination is based on the colour of a person skin. Colour, race and nationality have nothing to do with performance of an employee at work. Regardless of your race, your nationality or your skin colour, all employees in South Africa should enjoy equal opportunities within the workplace[142].

In *Harmse v City of Cape Town*[143] an employee claimed that the employer's decision of not shortlisting him in any of the three positions which he had applied for amounted to unfair discrimination based on race, political belief, lack of relevant experience and/or the arbitrary grounds. One of the issues that the Labour Court had to consider was the relationship between unfair discrimination and affirmative action.

In *RAWUSA v Schuurman Metal Pressing (Pty) Ltd*[144] where a trade union brought an application in which it sought to restrain the employer from dismissing its employees until it had complied with the provisions of the LRA, the unions' complaint was that the employee's retrenchment was a *feit accompli* prior to the commencement of the consultation process. The union also insisted that it was

140 2007 (28) ILJ 428 (LC).
141 1997 (18) ILJ (LC).
142 www.gvsa.edu/arbitration.
143 (2001) 3 BLLR 657 (SE).
144 2005 1 BLLR 78 LC.

entitled to facilitation within 15 days of issuing of the notice in terms of section 189(3) of the LRA. The Labour Court in its findings indicated that only majority unions have the right to request facilitation under section 189A. The court also stated that mechanism provided for in section 189A in terms of which the applicant could approach the Labour Court on application in respect of procedural irregularities was aimed at enabling employees to compel employers to correct breaches of the LRA

Many of the decisions consider the question whether a particular policy regarding promotions is fair or unfair and/or whether or not there had been adherence to a policy. It is also clear that arbitrators are willing to accord deference to managerial policies and decisions relating to promotion.

3.2.6. Religion / Culture

Religious discrimination originates from various situations and can involve matters of faith, beliefs and customs or practices. Majority of religious discrimination cases arise in the employment sphere over issues of religious dressing.

In the case of *Strydom v NGK Moreleta Park*[145] the independent contractor's contract of employment to lecture in music at the church's academy was terminated on account of his homosexuality. The contractor instituted proceedings under the Equality Act claiming discrimination on the grounds of sexual orientation. The church relied on the right to freedom of religion to justify the termination of the claimant's contract.

The contractor was awarded R75 000 for the impairment of his dignity and a further amount of R11 970 in respect of loss of earnings. The church was also ordered to apologise unconditionally to the contractor.

3.2.7. HIV Status

For many employees in small workplaces, where about half earn less than R 2 500 per month, HIV-related stigma and discrimination is a reality. This prevents many employees from disclosing their status and/or accessing legal protections and

[145] 26926/05.

prevention, care and treatment services that may be available. The proper implementation of HIV workplace policies can do a lot to decrease stigma, create an environment which encourages disclosure, encourage testing, and assist employees to access proper medical treatment[146].

Bootes v Eagle Ink System KwaZulu-Natal (Pty) Ltd (LC)[147] the applicant was dismissed by the respondent company. He alleged that the true reason for his dismissal was his HIV status. The company contended that he had been dismissed for misconduct after a disciplinary enquiry. The court found that the conduct by the company's management was found to have created a pattern that led the court to conclude that the applicant had been dismissed on account of his HIV status. The employee was therefore awarded compensation in an amount equivalent to 16 months' remuneration.

In *Hoffman v South African Airways*[148]the appeal concerns the constitutionality of South African Airways practice of refusing to employ a cabin attendants people who are living with HIV/AIDS.

Mr Hoffman, the appellant is living with HIV/AIDS and was refused employment as a cabin attendant by SAA because of his HIV positive status. He unsuccessfully challenged the constitutionality of the refusal to employ him in the Witwatersrand High Court on various constitutional grounds. The High Court issued a positive certificate and he was granted leave to appeal.

3.2.8. Mental Health

South Africa does not have any legislation dealing specifically with people with disabilities. Disabled fall under designated groups together with Africans, Coloured, Indians and women.

In *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*[149] the employee was a marketing manager when his wife left him after staying together for 24 years. He

146 www.section 27.org.za.
147 D781/05.
148 2001 (1) SA 1 (LC) SA.
149 2009 (12) BLLR 1181 (LAC).

had a nervous breakdown and hospitalised for a month. The employer made continued employment intolerable after five month of his return to work. The employee resigned and claimed constructive dismissal. On appeal to the Labour Appeal Court the employer admitted that the employee had been constructively dismissed but argued that the reason for dismissal of the employee was not based on a prohibited ground. The LAC dismissed the appeal and awarded 24 months compensation.

In the case of *Standard Bank of South Africa v CCMA & Others*[150], the Labour Court upheld the judgement of the CCMA where the employer unfairly dismissed the employee who worked for it for 15 years on the grounds of disability occasioned by an accident and the employer's failure to accommodate a disabled employee.

3.2.9. Practice and Procedure

In *SABC Ltd v CCMA and Others*[151]the Labour Appeal Court dealt with procedural issues arising from a review by an employer of the CCMA commissioner's ruling in an unfair discrimination and unfair labour practice dispute. The main issue was whether the CCMA lacked jurisdiction in that the dispute had been referred to it about seven years after the upgrading of certain employees which had given rise to alleged on going unfair labour practice and unfair discrimination(re write this statement). The LAC rejected the employer's argument that the referral to the CCMA was out of time and held that the dispute had been correctly labelled as on going and the employees have not required condonation for a late referral to the CCMA.

Ditsani v Gauteng Share Services Centre[152] a dismissed employee who had previously brought a successful unfair dismissal dispute where he was awarded compensation subsequently brought a claim against his employer for unfair discrimination, rising from the same factual background. The employer raised a point *in limine* that the matter was *res judicata*. It is a common law defence that applied when an earlier decision has been given involving the same subject matter based on the same ground and involving the same parties.

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150 2008 (29) ILJ 1239 (LC).
151 2010 (3) BLLR 251 (LAC).
152 2009 (5) BLLR 456 (LC).

3.2.10. Sexual Harassment

Sexual harassment can either be by a supervisor or one of your co-workers. This distinction is a critical one because the identity of the harasser can determine your legal rights and remedies. Generally, if one of your co-workers is harassing, the complainant has an obligation to report the harassment to someone in authority, typically a manager or someone in your company's human resources department. In many companies, there are policies that spell out what must be done if the employee feels being sexually harassed. If the company does not have a policy, someone in authority has to be told about it. If someone in authority is not told, the employee loses the right to file a claim, no matter how serious the sexual harassment is.

In *Piliso v Old Mutual Life Assurance Company*[153] the applicant was employed at the company's head office. She found a photograph of herself with an offensive and crude note written on it, at her work station. The following day a similar incident occurred. The two incidents were reported to management but the applicant alleged that management was dilatory in responding to the complaint, and that it had failed to display the necessary standard of care towards its employees. The applicant contended that the company was liable in terms of section 60 of the EEA, alternatively that the company was liable to her in delict since it had failed to ensure that the workplace was safe and in also claimed that the company had violated her constitutional rights.

The first two claims was dismissed since the applicant could not establish that the perpetrator of the sexual harassment (not identified) was an employee of the company. The company led evidence to show that it was possible for outsiders to gain access to the applicant's department and to her work station and in these circumstances the company could not be held liable. Section 60 requires an allegation that an employee while at work contravened the provision of the EEA for the employer to be held liable.

Where it is alleged that an employer is vicariously liable for an act committed by an employee in the course and scope of duty, the court held that it must be shown that the defendant company in fact employed the perpetrator.

[153] 2007 (28) ILJ 897 (LC).

The court confirmed that there was no doubt that employers are obliged to provide employees with a safe working environment and that employers are obliged to take steps to eliminate unfair discrimination in any employment practice or policy. If an employee is traumatised by an act of sexual harassment and the perpetrator is not identified an employer will nonetheless be expected to take action to commence a process of investigation to try and find the perpetrator. Steps should be taken to provide employee with support in the counselling form and consultation and establish the psychological impact the incidence might have and deal with it. Employee should be informed of the progress during investigation.

In these facts of the case the company's response was inadequate. The investigation conducted was not that serious. Then the court found that the company had breached the employee's constitutional right to fair labour practices. The court ordered the company to pay an applicant an amount of R45 000 as constitutional damages.

In *Rogers v Global Makana Prime Office*[154] the applicant resigned after claiming that she had been sexually harassed and victimised. She contended that her resignation constituted a constructive dismissal. While the commissioner found that the applicant had failed to establish the basis for a constructive dismissal, a number of observations were made in relation to sexual harassment.

The arbitrator referred to the Code of Practice in handling sexual harassment cases in workplace wherein the employer should create and maintain a working environment in which dignity of employees are respected and sexual harassment complains can be raised without being ignored and without fear.

Sexual harassment in all its form will usually justify dismissal. In *SABC Ltd v Grogan NO & Another*[155] the court upheld an arbitrator's award in terms of section 188A of the Act, in terms of which the employee guilty of sexual harassment was not dismissed; the employee was given a final written warning coupled with a directive that he should undergo counselling on the effects of sexual harassment and on proper relations with female staff.

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[154] 2007 (2) BALR 281 (CCMA).
[155] 2006 (2) BLLR 2007 (LC).

In *Tsabo v Real Security*[156] the Labour Court awarded compensation for a constructive dismissal (an applicant had resigned when the employer failed to respond to repeated complaints of harassment by a supervisor) and damages under the EEA, to be paid by the employer on the basis that it was vicariously liable for the acts of the supervisor. Similar approach happened in *Christian v Colliers Properties*[157], where an employee was dismissed after refusing to submit to sexual demands made by her manager. The employee was awarded both compensation under the LRA for an automatically unfair dismissal and damages under the EEA.

3.3. GROUNDS OF DISCRIMINATIONS IN CANADA

3.3.1. Gender Discrimination

Girls are discouraged from science subjects by parents and teachers because of fearing that they won't make it in mathematics. It is culture not brainpower that counts in this regards[158].

There was a case where Eva was the only daughter in her family, her parents and two brothers. One of her brother was a disabled person. When her parents passes away, a brother just thought it is obvious for Eva to care for the disabled brother. Eva requested her employer to reduce hours of work so that she could care for her disabled brother. The employer approved the request but demote her because work is no longer her top priority. Eva files a human rights complaint on a ground of sex discrimination.

Caregivers are the heart of the ground of family status by women. For example a case of a man, after the wife give birth to the first born child, the father requested permission from supervisor to reduce work week because he is having a baby. The employer responded negatively by indicating that the type of request is for women only but not for men. Employer also indicated that it will be a career limiting mode for men[159].

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156 2003 (24) ILJ 2341 (LC).
157 2005 (5) BLLR 479 (LC).
158 www.womensenews.org.
159 Supra above.

Traditionally, caregivers are women, they are the once that cared for children, aging parents and relatives, ill family members and those with disabilities. This bulk of responsibilities are for women. It contribute a lot to women's on going inequality and their ability to obtain, maintain and advance in employment. Their status to employment, housing and other services are also linked to their roles as caregivers. Men become so disadvantaged if they could engage themselves in the caregiver services like women. The community fails to recognise and accommodate care giving responsibilities to men.

According to London Daily Mail of 2007 girls may do fine on tests but only men can be geniuses. There is also a gender differences regarding overrepresentation of men at very top position than women[160].

In *Ayala-Sepulveda v Municipality of San German*[161] Luis Ayala-Sepulveda worked for several years as an Administrative Assistant for a city in Puerto Rico. He claimed that when he took classes on emergency rescue procedures, he was ridiculed by coworkers due to his sexual orientation. He was told that he could not work as a rescuer because he was homosexual. He contended that over the next couple years, there was a pattern of discrimination and retaliation against him, especially after he had a relationship with another male coworker, Rodriguez. However, Rodriguez claimed there was no relationship and that Ayala made up the story. Ayala claimed that Rodriguez then threatened him with bodily harm. The city Director of Human Resources, afraid that Ayala may in fact suffer harm, suggested that he be transferred to another city department. The mayor supported the job change. Ayala refused. The mayor reassigned him anyway. Ayala filed a complaint for discrimination with the EEOC and then sued the city and the mayor for sex discrimination. Defendants moved to have the case dismissed. Motion granted. Title VII's prohibition against discrimination because of sex does not include claims for hostile environment due to sexual orientation. Hence, Ayala has failed to establish a *prima facie* case of discrimination. Under Puerto Rican law, Ayala does not have a

[160] www.ThaMathMom.com.
[161] ---F.Supp.2d--- (2009 WL 3199861, D. Puerto Rico, 2009).

protected property interest in performing a particular job and preventing a transfer to a different position. His employer has the right to reassign him.

3.3.2. Negative Attitudes and Stereotypes Discrimination

This is discrimination on the basis of the status of the family. For example, female headed lone parent families are stigmatised when they are racialised or in receipt of social assistance. These families find themselves in denied services or subjected to harassment when seeking services[162].

For example, a social service provider tells an Aboriginal lone mother that she is just having babies in order to get money from the system and subjects her to an extra audit of her compliance with the program rules.

Other families have difficulties in obtaining recognition from service providers that they are real foster families. For example is a case of a gay man and a partner who were taking care of his mother for years. When she is on her final stages of the illness she gets admitted at the nearby hospital. Due to hospital rules and regulations her son's partner can only visit her by pretending to be one of his sons[163].

Another discrimination against families is failure to design services in a way that includes them. For example, Law school student's mother was diagnosed with cancer. The school gives a student a short-term leave of absence to care for the mother. When the leave is over and the mother was still ill, the student was forced to drop out of school because there were no provisions for part-timers.

Families of lesbians, gays and bisexuals are not recognised as valid families. These individuals may face negative stereotypes about their capacity to parent. These families may find themselves so harassed and bullied because of their relationship. For example, there was a case of a daughter whose parents were gays. One day she comes from school crying because classmates are teasing her about her parents. After unsuccessful attempts to have the school take steps to deal with the

[162] www.ThaMathMom.com.
[163] www.womensenews.org.

problem, parents help their daughter to file a human rights complaint on the basis of family status.[164]

3.3.3. Disability Discrimination

People with disabilities rely on care giving network that includes extended family by home sharing, supporting each other in decision-making networks and alternative family arrangements. For example, a parent with a disability relied on specialised transit service for transportation. Needing to visit a health care provider, she makes arrangement to drop her child off at a child care centre. The specialised transit does not allow her to travel with her child. She finds herself in a difficult situation of assessing either the childcare service or her healthcare appointment[165].

In *Petzold v Borman's, Inc*[166] Petzold suffers from a rare neurological disorder, Tourette Syndrome, which caused him to engage in involuntary outbursts of obscene words, racial epithets, and other socially unacceptable terms. He worked as a bagger at a grocery store for a year, during which he would, at times, loudly utter obscenities and racial slurs in the presence of customers. Some customers complained to the manager. Petzold's boss told him that such outbursts, while involuntary, could not be tolerated. The outbursts continued and he was fired. He sued for disability discrimination. His employer moved for summary dismissal of the case. The trial judge refused that motion. The employer appealed in that an employee suffering from Tourette Syndrome, which caused involuntary outbursts of obscene words, was disabled. The employer did not violate the law by dismissing the employee since the disability prevented the employee from behaving with respect toward customers and other employees.

Lack of social support makes care giving relationships crucial. Those who are practising care giving faced with challenged and barriers beyond those faced by other caregivers. For an example, a case of a lone mother of a child with disability who use to absent herself from work due to the problem of picking her daughter from school. One day she meets her employer on the way and she finally explains to the

164 Canadian Human Rights Commission.
165 www.archlegalclinic.ca.
166 617 N.W.2d 394 (Ct. App., Mich., 2000).

employer her situation. The employer explores accommodation options and puts an employee into a flexible work hour's arrangement that meets her needs.

Like employers, service providers should take steps to provide accommodation for service recipients who have care giving needs. For example when a student's child falls gravely ill just before the final exams, education provider agrees to defer the examination until the child has recovered[167].

In *EEOC v Heartway Corp.*[168], 2000, Edwards was diagnosed with hepatitis C in the year 2000, a virus transmitted by blood-to-blood contact. The disease is chronic and requires lifetime monitoring. In 2001, she applied for a job in the kitchen at a nursing home. On the application she checked that she was not under a doctor's care, despite the on-going supervision of hepatitis. Later, when she cut herself at work, her sister, who also worked at the nursing home, told the supervisor that Edwards had hepatitis. She was fired. Her doctor said it would be safe for her to work there, but the nursing home would not reinstate her because she lied on her application. She sued for disability discrimination. The EEOC brought suit on her behalf, contending that she was fired because she was regarded as having a disability. A jury awarded her $20,000 compensatory damages and recommended back pay of $30,000, but the trial judge changed that to $1,240. The trial court held that punitive damages would not be appropriate. The EEOC and the nursing home appealed.

For an employee to prevail on a "regarded as" claim of disability, there must be evidence that the employer believed the employee to be significantly restricted as to a class of jobs. It was for the jury to determine if the nursing home regarded Edwards to be disabled with respect to being a cook. If she were discriminated against because she was regarded as having a disability, it is for the jury to determine if the employer acted with malice and, so, punitive damages could be awarded. Appeals court held that a jury could find that an employer dismissed an employee with hepatitis because the employer regarded the employee as disabled and the jury can determine if punitive damages for malicious action by the employer are justified.

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167 Human Rights Canadian Commission.

168 466 F.3d 1156 (10th Cir., 2006).

3.3.4. Age Discrimination

The Code prohibits discrimination in services on the basis of age but only for 18 years or older. In other words service providers are entitled to restrict the services provided by minors, but the Tribunal decision indicated that the Code can be unjustifiable abridgement of equality rights of children[169].

In a British Columbian case, customers with children were not allowed in the restaurant on the basis that children make noise and disturbed other customers. This negative attitude or intolerance towards children leads to discriminatory behaviour towards families. Commission position in this regards violate the Code[170].

In *Kassner v 2nd Avenue Delicatessen, Inc.*[171], Kassner and Reiffe were 79 and 61 years old and had worked as waitresses at 2nd Avenue Deli for decades. They contended they were pressured by the owner, Lebewohl, and several of his subordinates, to retire. Kasser said she was degraded by comments, including “drop dead,” “retire early,” “take off all of that make-up,” and “take off your wig.” When Kassner and Reiffe complained, they claim they suffered retaliation by being given inferior work shifts and work stations and were told “there’s the door.” They sued for age discrimination. The district court dismissed the suit for failure to state a claim upon which relief could be granted. Plaintiffs appealed. Vacated and remanded. The claims by plaintiffs that they were assigned less desirable work stations and work shifts than younger wait-staff states a valid cause of action for age discrimination. To comply with the pleading requirements of the age discrimination in Employment Act, plaintiffs need only provide a short and plain statement of the claim that shows they are entitled to relief and that gives defendants fair notice of plaintiffs’ claims. That standard was met, so the suit should proceed. Further, the degrading remarks made to Kassner also create a cause of action for hostile work environment and retaliation. Appeals court held that two waitresses who claimed they were pressured to retire and given inferior assignments and time schedules, had made a sufficient claim of age discrimination for their suit to proceed.

169 Charter of Rights and Freedom.
170 Ontaris human Rights Commission.
171 496 F.3d 229 (2nd Cir., 2007).

3.3.5. Sexual Harassment Discrimination

In the case of *Reeves v C.H. Robinson Worldwide*[172] Reeves was the only woman who worked in an office. She claimed that during the three years she worked there, there was pervasive sexually explicit language as well as some sexually explicit material. There were persistent sexually offensive language, jokes, songs, comments and remarks. She complained of the language, but nothing changed. She resigned and sued for hostile work environment. The district court held for the employer on the grounds that the alleged harassment was not based on Reeve's sex; it was just male behavior not directed at her. She appealed. Appeals court held that a claim of hostile work environment based on sexual harassment could proceed. While none of the actions or the language involved qualified as "severe" there was evidence that it was pervasive and affected the employee's work performance.

3.3.6. HIV/AIDS Status Discrimination

The Canadian Human Rights Act and the territorial human rights protect people living with HIV/AIDS against unfair discrimination. In Canada HIV status is considered as a disability under the terms of human rights legislation in all jurisdictions of the country[173].

In the case of *Canadian Airline Flight Attendants Association v Pacific Western Airlines*[174] the arbitration board ruled that there was no genuine risk of transmission of HIV/AIDS virus by the flight attendant in the normal course of his duties. The removal amounted to discrimination that was totally unfair and unconstitutional.

In *Re "Alain L"*[175], the Quebec Human Rights Commission received a complaint from a nurse who alleged that a hospital had refused to hire him because he is HIV-positive. The Commission used a preliminary decision in the matter, a step taken to assist parties to a dispute reached a settlement. The Commission was of the view that such conduct by the hospital would amount to discrimination.

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172 525 F.3d 1139 (11th Cir., 2008).
173 Canadian Human Rights Act of 1995.
174 http://www.bccla.org/positions/discrim/89aids.html.
175 File No 8706004809-001-0 COM-327-81.1.14 Quebec Human Rights Commission.

In STE *v Berteslsen*[176], the Board of Inquiry found that firing a musician with AIDS was discrimination contrary to what was then the province's Individual's Rights Protection Act. The Board thereof clarify that HIV could not be transmitted through casual contact and the subjective belief or fear of infection held by others could not justify their discriminatory conduct.

3.3.7. Discrimination because of association

Section 12 provides that the Code is violated where discrimination occurs because of relationship, association or dealing with persons identified by a prohibited ground of discrimination. A person who is denied a service of housing because of his or her relationship with a person who is identified by a code ground can file a complaint of discrimination on the basis of association. This ground covers even the disabled persons[177].

For example a man lives care for a relative with mobility-related disability may require accessibility related upgrades to the apartment. The man files a complaint of discrimination on the basis of an association with disability.

3.3.8. Race and race related discrimination

The code prohibits discrimination on the grounds of race, ethnic origin, and place of origin, colour, ancestry, citizenship and religion. Services, employment and housing are often designed around definition of family that are not inclusive of cultural differences. For example a case of immigrant and refugee families arriving from countries where family size average is larger, may face extreme difficulty locating adequate housing.[178]

For an example, a case where a family of refugee upon arrival in Canada makes attempts to get a rental house. The landlord assumes that they are less likely to pay rent and more likely to be disruptive because they are new in Canada and they are from a racialized community. Therefore the landlord requested for security deposit of three months' rent to be paid in advance.

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176 1989 10 CHRR D/6294.
177 Policy and Guidelines on Discrimination because of Family Status.
178 Policy and Guidelines on Discrimination because of Family Status.

3.3.9. Religious Discrimination

Religious discrimination originates from various situations and can involve matters of faith, beliefs and customs or practices. Majority of religious discrimination cases arise in the employment sphere over issues of religious dress.

In the case of *Taylor v Canada*[179] the issue was a judge's order barring Mr Taylor from wearing a *kufi* which is a Muslim religious head covering in a courtroom. Mr Taylor complaint to the Canadian Human Rights Commission alleging that he was discriminated against with respect to access to a public service because of his religion. The Commission declined to deal with the complaint as he does not have jurisdiction.

In the case of *Massachusetts Bay Transportation Authority v Mass. Comm. Against Discrimination*[180] Marquez is a Seventh-Day Adventist who does not work on the Sabbath of his religion, from sundown Friday to sundown Saturday. He applied for a job with the Massachusetts Bay Transportation Authority (MBTA) and passed an exam to become a streetcar operator. He was given a conditional offer of employment, which was finalized after a drug test and check of his criminal background. After he began training, he told his supervisor that the schedule conflicted with his Sabbath. The main problem was the need for drivers especially on Friday evenings, a high capacity time. He was terminated and sued for discrimination based on religion. After administrative proceedings in his favor, the trial court agreed that MBTA failed to accommodate Marquez and failed to show that a change in schedule would constitute an undue hardship. There was no consideration given to the possibility of swapping schedules. MBTA could not leave shifts uncovered, but made no effort to check on availability of other personnel. He was awarded $50,000, ordered rehired, and his attorney fees were paid by defendant. MBTA appealed.

The MBTA could not be forced to accommodate an employee's religious preferences by leaving his position uncovered, but it failed to show that the use of voluntary schedule swaps could accommodate the employee without undue burden on MBTA operations. Reasonable accommodation must be provided. Voluntary schedule

[179] 1997 34 C.H.R.R. D/66 (F.C.T.D.), aff'd (2000), 37 C.H.R.R. D/368 (F.C.A).
[180] 879 N.E.2d 36 (Sup. Ct., Mass., 2008).

swaps are common and not costly; MBTA had an obligation to check such an alternative rather than just fire Marquez.

Massachusetts high court held that an employer was liable for discrimination when it fired an employee who would not work on his Sabbath. The employer made no effort to provide accommodation by seeing if schedule swaps could handle the matter or not.

3.3.10. *Bona fide* occupational qualification or requirement

In South Africa it is referred to inherent job requirements. In Canada it is an exceptional rule protecting employees against discrimination on prohibited grounds including sex[181]. In Canada it is established to accommodate the needs of an individual(s) affected, and would impose undue hardship on the person who would accommodate those needs[182]. *Bona fide* occupational qualifications discriminate only with regard to specific job.

In the case of *Ontario Human Rights Commission and Others v The Borough of Etobicoke*[183], the court had to consider whether the policy imposing a mandatory retirement age of 60 years on fire-fighters was indeed a bona fide occupational requirement[184].

In *Meiorin*[185] case the Canadian Supreme court established a new three past test for employers in order to successfully defend this discrimination. The employer should show that the standard set is rationally connected to the performance of the job, the standard adopted should be in an honest and good faith belief, that is, it is necessary to the fulfilment of the work-related purpose and lastly that the standard should be reasonably necessary to accomplishment of that purpose.

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181 Supra above.
182 http://www/international.metrpolis.net.
183 1982 (1) SCR 202.
184 Cohen "Justifiable Discrimination – Time to Set the Parameters" (2000) 12 SA Merc LJ.
185 Canadian female women's name who complained about the discrimination.

CHAPTER FOUR: REMEDIES FOR EMPLOYMENT DISCRIMINATION

This chapter deals with remedies of unfair discrimination in South Africa and Canada. Case law and legislative framework will be used. Section 38 of the Republic of South Africa Constitution confirms the right of access to a competent court where a right contained in the Bill of Rights has been infringed[186].

Section 10(2) of the EEA makes provision for any party to a dispute regarding alleged unfair discrimination in an employment practice to refer the dispute in writing to the CCMA within six (6) months. Disputes of this nature cannot be referred to the bargaining council. Copy of referral to the CCMA should be served to the other party. The party referring the dispute should satisfy the Commissioner of the CCMA that reasonable attempt was made to resolve the dispute before referring the matter and the CCMA should attempt to resolve the dispute through conciliation[187]. In case dispute failed to be resolve at the conciliation, certificate should be issued at the CCMA indicating that the unresolved dispute. From there, the matter can either be referred to arbitration or the Labour Court for adjudication[188].

In *SALSTAFF v Spoornet*[189] the applicant, a white woman claimed that the company's failure to consider her promotion to a post filled by black person was unfair labour practice. The arbitrator found that the dispute was related to discrimination on the grounds of race and gender and therefore not falling under his jurisdiction. Council or court should decide whether it has jurisdiction on the dispute.

In *NUMSA v Driveline (Pty) Ltd*[190] the Labour Appeal Court re-emphasized that the forum for dispute proceedings is determined by the dispute as alleged by the employee.

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186 Act 108 of 1996.
187 S10(4) of the EEA.
188 Act No. 55 of 1998.
189 2002 (23) ILJ 1125 (ARB).
190 2000 (1) BLLR 20 (LAC).

Section 28(1) of the Canadian EEA of 1995 facilitates the establishment of tribunal to mediate, conciliate and arbitrate over employment equity disputes arising out of unfair discrimination. The Canadian Human Rights Commission that is founded from section26(1) of the Human Rights Act establishes the Canadian Human Rights Tribunal in terms of section 48(1).

Section 29 of the Canadian EEA provides the tribunal powers to deal with employment discrimination disputes. The tribunal may summon and enforce the attendance of witnesses and compel them to give both oral and written evidence under oath and also provides documents if necessary under review[191].

Hearings are conducted in public but employer may request for that the proceedings be done in camera but with reasonable reasons why it should be conducted in camera[192]. The reasons should be submitted to the board of enquiry. Section 30(2) may allow the tribunal to confirm, vary or rescind its decision. The order of the tribunal is final except for judicial review which is under the Federal Court Act[193] and that it is enforceable as a court order[194].

The Canadian Constitution has federal courts that are *inter alia* tasked to conduct judicial reviews on Human Rights Tribunals under both Human Rights Act and EEA. Federal courts in Canada cover all federal provinces and territories[195] whereas the jurisdiction of Labour Court in South Africa covers nine provinces[196]. South African Labour Court and Canadian Federal Courts systems are therefore concurrent and comparable due to the fact that they deal with human rights litigations especially complaints of alleged unfair discrimination. This means therefore that these courts are for trial[197].

The jurisdiction of the Labour Court in South Africa are concurrent with the High Court. Both courts deal with any allegation of any fundamental rights entrenched in

191 S29(1)(a).
192 S29(4).
193 R.S., 1985, c. F-7, s52, 1990, c.8, s17.
194 S31(1).
195 S24 of the Federal Court Act.
196 S156 of the LRA.
197 Thomas, A. and Jain, H.C. 2004. Employment Equity in Canada and South Africa : Progress and Propositions. International Journal of Human Resources Management, 15(1) : 36 – 55.

Chapter 2 of the South African Constitution. Therefore both unfair labour practice and unfair discrimination disputes fall within the jurisdiction of both courts[198].

Sec 158 of the LRA empowers the Labour Court to make an award of compensation, award damages in any circumstances contemplated by the Act, revert the matter back to the CCMA to be heard de novo, institute an order for costs and to make an arbitration award or settlement agreement an order of the court[199].

Federal Court also grant relief if satisfied that the federal board, commission or the tribunal acted without jurisdiction, acted beyond its jurisdiction, failed to observe a principle of natural justice *audialterumpartem* rule, procedural fairness or other procedure that was required by law to observe and erred in law in making an order whether or not the error appears on the face of the record based its decisions on the wrong findings of fact that is made in a perverse manner or without regarding for the material before it[200].

Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court regarding matters within its jurisdiction[201]. In Canada Federal Court of Appeal deals with appeals from the Federal Court. The difference between the two courts is that the Labour Court of Appeal acts like the Supreme Court of Appeal on all matters that fall within its jurisdiction[202] whereas the Federal court's decisions are reviewed by Supreme Court of Canada[203]

The Supreme Court of Canada has discretionary jurisdiction to deal with appeal from all other provincial appellate courts in respect of the interpretation of the Constitution and all legislation. In Carter et al appeals from Canadian courts including Quebec may be taken to the Supreme Court of Canada which has discretionary jurisdiction to entertain the appeal[204]. Therefore the Supreme Court of Canada has a final work in all common or civil law. It operates at a federal level and Canada and South Africa are comparable in that their duties are similar.

198 S6 of the EEA.
199 Act 66 of 1995.
200 S18.1(1)(4)(a)-(d).
201 S167(2).
202 Act 108 of 1996.
203 S35 of the Canadian Supreme Court Act, R.S. 1985, c.S-26.
204 Supra.

According to *Pitawanakwat v Canada*[205] an employee claimed that she was harassed and experienced discrimination because of her Aboriginal ancestry received an amount for lost wages and benefits, letter of apology and a promise of a job comparable to the one she lost. The Federal Court ordered that she be awarded compensation for her hurt feelings.

The Canadian Courts and Tribunals provided recourse for an unfair discrimination in the case of *Brown v M.N.R Customs and Excise*[206] where the Tribunal ordered the employer to accommodate a pregnant employee whose health was affected by night shift by transferring an employee from night shift to day shift.

In the case of *Brooks v Canada Safeway Ltd*[207] an employer was ordered to immediately correct the discrepancy regarding discriminating a pregnant woman on the basis of organizational benefits.

In both *Botha v SA Import International CC*[208] and *Sheridan v The Original Mary Anne at the Colony (Pty) Ltd*[209] cases the Labour Court found that direct unfair discrimination took place and ordered maximum compensation to be paid.

In *Mashava v Cuzyn & Woods Attorneys*[210] the court ordered that the applicant be awarded five months remuneration for non-patrimonial los and the equivalent of nine months remuneration for patrimonial loss for automatically unfair dismissal on the basis of pregnancy.

In conclusion South Africa and Canada are countries that one can compare, in that both have legislations which support their courts while dealing with unfair discrimination cases.

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205 19 C.H.R.R.D/110.
206 1993 (19) C.H.R.R.D/39.
207 1989 (1) S.C.R. 1219.
208 1999 (20) ILJ 2580 (LC).
209 1999 (20) ILJ 2952.
210 2000 (21) ILJ 402 (LC).

CHAPTER FIVE : CONCLUSION AND RECOMMENDATIONS

5.1. CONCLUSION

Employment equity in South Africa was meant to achieve an equitable and diverse workforce which is free from unfair discrimination. For one reason or another employees are reluctant to take employers to the Labour Court for failure to comply with the Labour Equity Act. This appears to be the case even where, according to Gender Commission, they apply for jobs in vain[211].

Even though, according to Van Dyk *et al*[212], South Africa has a poor skills profile due to poor quality education available to the majority of South Africans and the pool of previously disadvantaged persons who are able to fill high-level positions is small. There is evidence that the same small pool is further diminished by acts of discrimination during recruitment.

According to Thomas and Robertshaw[213], employment equity and affirmative action programmes are seen as recruitment issue to fill targets and not as induction into and development of the person in the organisational context and culture. Section 20 of the EEA provides that organisations are evaluated in terms of how well they meet their employment equity targets. Focusing on numbers without considering skills and development aspects is not going to achieve the transformation that is needed[214].

Diversity possess barriers to workplace communication due to cultural differences on issues like language, terms of reference and value judgments. South Africa has eleven official languages, that really challenges the development of a common understanding of terminology, roles and responsibilities[215].

Blacks find it difficult to fit in with historically white corporate cultures and as a result they often feel alienated from the organisational culture. The organisational culture could prevent and obstruct chances of individuals or certain groups achieving

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211 Mpho Nkeli chairwoman of the CEE.

212 Van Dyk, PS, Nel, PS, van Zyl, Loedolff, P & Haasbroek, GD. Training management: a multidisciplinary. 2001. approach to human resources development in Southern Africa. 3rd edition. Cape Town: Oxford University Press.

213 Thomas, A and Robertshaw , D. Achieving Employment Equity – A Guide to Effective Strategies, 1999. International Journal of Human Resources Management, 15(1) : 36 – 55.

214 Kalien Selby and Margie Sutherland. 2006. South African Journal of Labour Relations, Vol.30. No 2.

215 Werner, A (Ed). 2007. Organisational Behaviour. 2nd Ed. Pretoria: Van Schaik.

success in the organisation. The focus of apartheid was black exclusion and not black incompetence. Blacks must realise that there is nothing wrong with them if they are not yet able to meet the requirements of a certain job[216].

According to Thomas[217] the reason why organisations do not achieve the business benefits of a more diverse workforce is the leader's paradigm for managing diversity. Leaders of organisations do not regard employment equity and affirmative action programmes as a strategic business issue, as a result there is lack of management commitment to the process[218].

One of the main issues concerning the implementation of affirmative action measures in the context of employment equity is that previously advantaged groups viewed it as a form of reverse discrimination. People who were not part of the apartheid regime, for example, young white males, are now bearing the brunt of the new legislation and it is not clear whether all blacks and women were in fact previously disadvantaged and need to be affirmed or not. With regard to gender equity, men and women are treated equally and not unfairly discriminated against, on the basis of their gender, in promotion or remuneration. This aspect is related to the dimension of fair employment practices[219].

Employees and companies should be able to deal with problems themselves, they should know and understand the process to be followed while lodging a grievance, they should support each other in order to reach the solution together because disputes in the workplace cost time and money. Employment discrimination in the workplace can affect morale, reduce productivity and also undermine economic growth.

Implement applicable and fair measures for the recognition, feedback and reward of performance. Benchmark the organisation's remuneration policy against those of similar organisations. Adapt the remuneration structure if necessary. Employer

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216 Claassen, NCW. 1997. Cultural Differences, Politics and Test Bias in South Africa. *European Review of Applied Psychology* 47(4):297-307.

217 Thomas, A. Beyond Affirmative Action : Managing Diversity for Competitive Advantage in South Africa. 1996 Randburg. Knowledge Resources Pty (Ltd).

218 Thomas, A. and Jain, H.C. Employment Equity in Canada and South Africa : Progress and Propositions. 2004. International Journal of Human Resources Management, 15(1) : 36 – 55.

219 Coetzee, 2005, Human, 1993, Thomas and Twala, 2004. Affirmative Action 1994–2004: A viable solution to redress labour imbalances or just a flat spare tyre? Journal for Contemporary History29(3):128-147.

should focus on the needs of blacks and non-management levels. Review the human resources practices in the organisation which are mostly perceived as unfair, especially by non-management levels, blacks. Focus especially on the procedures for recruitment, promotions, development and remuneration. Ensure that they do not unfairly prevent blacks from being promoted and ensure that they improve perceptions of procedural justice[220].

Suspicion and criticism of EE employees still prevail[221]. These employees are often not given appropriate support. This leads to under-performance even if they really have the necessary abilities and skills. People from designated groups still need training and development to comply with job requirements and may have unrealistic expectations of their own abilities that will increase conflict in companies. Members of designated groups expect secured positions regardless of whether they meet the job requirements or not and may adopt a culture of entitlement that undermines their initiative and self-confidence[222].

Lastly, transformation is driven by employers of the companies. Boards of companies are the ones that decide to appoint or not appoint managing directors and chief executives that are either white or blacks[223]. Black and coloured women were the worst off in terms of transformation in the workplace. Slow pace of transformation in terms of race were also given for the lack of gender transformation. Companies were saying they could not find suitable qualified women. According to the Commission for Employment Equity, senior management level African women represented 5.6% followed by coloured women at 2.4%.

5.2. RECOMMENDATIONS

South African employment laws are in par and in some instances exceed the general internationally acceptable standards. It is at the implementation stage where it is seen to lack behind. It is in the lights of this that the following are recommended:

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220 Uys, I. 2003. Diversity Management: Reasons and Challenges. *Politeia*22(3):30-48.

221 Coetzee, M. The Fairness of Affirmative Action : An Organisational Justice Perspective. 2005. Doctoral Thesis : University of Pretoria.

222 Walbrugh, A & Roodt, G. Different Age Groups' Response to Employment Equity Practices. South African Journal of Human Resources Management. 2003. 1(2):28-39.

223 Vavi, Z. Employment Equity Paramount for SA. 13 July 2004. *Sowetan*.

Section 6(1) of the EEA and the Constitution of the Republic of South Africa should be amended to add “those who do not comply with the section should be given a fine or a harsher sentence”.

The government should introduce an incentive in a form of a deductible tax levy for recording employers with less cases of discrimination at the workplace reported per tax cycle and also rewarding employers for number of discrimination cases resolved within the working environment. The government should introduce, in collaboration with unions and workplace forums, compliance monitoring mechanisms.

With the compliance monitoring system in place as recommended above, it is further recommended that the employers specifically the Human Resources should ensure that they are transparent and free of unfair discrimination by giving reasons without their requisition for failure or success of an employee at recruitment.

Because the victims of workplace discrimination are more often than not potential members and members of the union and or workplace forums, it is strongly recommended that unions and or workplace forums should actively participate in the recruitment and assessment employees by sitting in during such recruitment and assessment.

On the other hand it should be a punishable transgression for an employee to fail to report any acts of discrimination they might be exposed to in a workplace. Specialised non-discrimination training should be provided to judges and labour inspectors. Lawyers and human rights activists should also be trained in order to enable them to fight discrimination in the courts.

It is also recommended that the Commission of Gender Equality should keep a database of all employers. This database should be used to monitor the performance of companies when it comes to issues of gender based discrimination within the workplace. Employers that are found to be in compliance should be awarded points and those who are not should be blacklisted and such information publicised.

Lastly, discrimination in the workplace still exists, government, Labour Court, employers and employees should fight it until there is a fair and free working environment for the betterment of all in the Republic of South Africa and other countries.

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