PBR 414
STUDY GUIDE
2012

Part 1
ASPECTS OF THE RIGHT TO EQUALITY
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Part 2
ASPECTS OF THE RIGHT TO FREEDOM OF EXPRESSION
Compiled by: ME Marais
Course Details

COURSE OVERVIEW

Public Law 414 and 424 are advanced courses on constitutional and administrative law. By now, you have all passed an introductory course in public law and should be familiar with the basic concepts and principles of public law. From time to time, we will refresh your memory and repeat some work previously done that we think is essential for your comprehension of the present course.

Essentially, in Public Law 414 and 424 we will be looking at selected topics of public law in greater depth. You may want to know why we have selected some topics and excluded others. We take a pragmatic view and try to accommodate the following considerations: new developments (legislation, important court cases, etc.), socio-political relevance of topics, and complexity (which cannot be adequately addressed at an introductory level).

PBR 414 deals with the following main topics:

PART 1

- Aspects of the right to equality. Important legislation has recently been adopted in this field. Firstly, we will deal with the constitutional right to equality, as interpreted by the Constitutional Court. Then we will study important legislation that has recently been adopted in promotion of the right to equality, namely the Employment Equity Act 55/1998, the Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000, the Preferential Procurement Policy Act, the Broad Based Black Economic Empowerment Act. The emphasis is, however, on the how the legislation gives effect to the Constitution and not the detail of the Acts.

PART 2

- Aspects of the right to freedom of expression. Especially the aspect of “hate speech” is currently a central issue in our society and jurisprudence.

OBJECTIVES OF THIS COURSE

The main objective of the course is to provide an in-depth study of selected topics of public law. It is also the aim to improve the legal reasoning and application skills of students. For this purpose, specific activities are prescribed for class preparation in each learning unit. The specific objectives of each unit are provided in the form of outcomes in each learning unit.

PRESCRIBED READINGS

The main texts you need for this course are:
Part I

- Pretorius, J.L. Capita selecta from public law. Aspects of the right to equality (2007 updated) (class notes)
- Chaskalson *et al Constitutional Law of South Africa* 2nd ed 2004 Chapter 25 and 33

Part II

- Marais M.E. Aspects of the right to freedom of expression (class notes)

In addition, cases and additional literature are prescribed to supplement the course material. They will be specified in the study guide. Relevant recent case law may however be added during the course. Generally, cases and acts are available from Juta or LexisNexis (Butterworths).

**RECOMMENDED READINGS**

The following readings are for enrichment purposes only. Because these readings are not compulsory, they will not be made available to you.

**PART I**

Other books and articles that may be helpful in writing assignments or for further reference include the following:


Du Plessis, L.M. & Corder, H. 1995. *Understanding South Africa's Interim Bill of Rights*. Kenwyn: Juta. (Discusses the interim bill of rights and refers to negotiations and intention behind the sections)


Malan, K. et al. 1996. *Fundamental Rights: Themes and Trends*. Durban: Butterworths. (Very useful on themes such as the Constitution and private law, commercial law, evidence, and criminal procedure)


Rautenbach, I.M. 1995. *General Provisions of the South African Bill of Rights*. Durban: Butterworths. (Discusses aspects such as application and interpretation, using many comparative sources; little on specific human rights; on Interim Constitution)


Sieghart, P. 1984. *The International Law of Human Rights*. Oxford: Clarendon Press. (The classic source in relation to international human rights; per theme, for example, physical integrity or health)

South African Law Commission reports, for example:


Strydom, H.A., Pretorius, J.L. & Klinck, M.E. 1997. *International Human Rights Standards*. Durban: Butterworths. (Discusses aspects such as the use of force by the police, codes of conduct for prosecutors, and juvenile delinquents)


PART II


You should keep an eye on the following journals:

- South African Journal of Human Rights (SAJHR)
- South African Public Law (SAPR/SAPL)
- De Rebus on monitoring of Constitutional Court and other human rights case law

Internet addresses:

- The Constitutional Court: http://www.concourt.gov.za Contains all Constitutional Court judgements, as well as Court documents, which are useful to see exactly what pleadings look like at that level)
- The Southern African Legal Information Institute (SAFLII): http://www.saflii.co.za
- The Supreme Court of Appeal: http://www.uovs.ac.za/Faculties/law/supreme.htm
- Wits Law School: http://www.law.wits.ac.za/
(Contains Constitutional Court cases, Land Claims Court cases, and links to other web sites, such as the SA Law Commission: [http://www.law.wits.ac.za/salc/salc.html](http://www.law.wits.ac.za/salc/salc.html).) SA legislation/bills/policy documents/White Papers from 1994 onwards: [http://www.polity.org.za/pol/home/](http://www.polity.org.za/pol/home/)

(Provides links to government departments, for example, Justice and Health; easy to use: you will only need Acrobat Reader – available free from the Internet – to view and print legislation.)


(The attorney’s journal; short discussions of case law; very handy to get a grip on latest constitutional law issues)

*Juta*: [http://www.juta.co.za](http://www.juta.co.za)

(It has weekly updates on new legislation, and you can order books online.)

Broadcasting Complaints Commission of South Africa [http://bccsanew.co.za/](http://bccsanew.co.za/)

**ASSESSMENT**

You will be assessed by means of two assignments and a two-hour examination according to the general rules in relation to subjects taken through the E-Learning system of online education.

You will find your assignments below. The work you will have to study for the examination is demarcated in the units.

**ASSIGNMENT 1**

Complete the following exercises. **In each of your answers refer to applicable case law:**

(a) Activity 10 on page 20 of the STUDY GUIDE. 

(b) Activity 11 on page 20-21 of the STUDY GUIDE

(c) Activity 2(c) on page 25 of the STUDY GUIDE.

Length: 15-20 typed pages 1 ½ spacing

**ASSIGNMENT 2**

Complete the following exercises. **In each of your answers refer to applicable case law:**

(a) Activity 2 on page 29 of the STUDY GUIDE.

(b) Distinguish between and discuss the regulation of expression which is protected in terms of section 16(1) of the Constitution, and expression which in terms of section 16(2) is excluded from the right to freedom of expression. **Your answer should include a discussion of relevant caselaw.**

Length: 15-20 typed pages 1 ½ spacing.
PART 1

Aspects of the right to equality

UNIT 1

The Constitutional Court’s Interpretation of Equality

INTRODUCTION

In this unit we will study the Constitutional Court’s interpretation of the equality clause of the Constitution (s. 9). This will provide the background for the interpretation and application of the special equality legislation that we will consider later. The Constitutional Court has developed its own unique understanding of the right to equality. As will appear from the lecture notes, it has stressed the importance of a substantive — rather than merely formal — notion of equality. It has also emphasised the link between unfair discrimination and the impairment of dignity. On the basis of that understanding of equality, the court has sought to develop practical tests for equal protection and unfair discrimination.

LEARNING OUTCOMES

After completing Unit 1, you should be able to do the following:

- Explain the difference between formal and substantive equality.
- Differentiate between mere differentiation and discrimination, and clarify what the importance of the difference is.
- Know what the constitutional requirements for valid differentiation are, as well as the most important cases concerning this, and be able to apply the requirements to practical problems.
- Know and be able to practically apply the factors that must be taken into account in order to determine whether discrimination is unfair, as well as the leading judgements of the Constitutional Court in this regard.
- Understand, explain and apply (with knowledge of applicable case law) what the principle of proportionality is and what factors must be taken into consideration to determine whether a discriminatory measure disproportionately limits the right of equal treatment of the complainant.
1. Section 9 of the Constitution


2. Formal and substantive notions of equality

➢ Pretorius (2007: 7-9)

This is a basic distinction that you should already have come across in your introductory study of constitutional law. Note that the Constitutional Court has come out strongly in favour of a substantive approach. As you will see later, this has had a marked influence on the way the Court deals with the issue of addressing the effects of past discrimination. It is, therefore, rather important that you have a clear understanding of the meaning and implications of these concepts.
Activity 1

1. Explain how the Constitutional Court’s notion of substantive equality has influenced its decision in the following cases:
   - City Council of Pretoria v Walker 1998 (2) SA 363 (CC)
   - President of the RSA v Hugo 1997 (4) SA 1 (CC)

2. Which of the majority or minority (Kriegler J) judgments in the case of President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) do you think is the most successful application of the idea of substantive equality?

3. Explain how the Constitutional Court linked substantive equality and affirmative action in Minister of Finance v Van Heerden 2004 (6) SA 121 (CC).

4. Do you think that the Court’s understanding and application of the idea of substantive equality in the case of Botha v Mthiyane 2002 (4) BCLR 389 (W) is acceptable?

Activity 2

Consider the following summary of the facts in the arbitration case of Durban City Council (Physical Environment Service Unit) v Durban Municipal Employees Society (1995) ARB 6.9.14 (http://www.irnetwork.co.za) facts. If you had to adjudicate this case, what would your decision be if you followed a substantive equality approach?

The complainant is a black man who unsuccessfully applied for a position as an artisan motor mechanic. The advertised requirements for the job included that the successful candidate must have served an apprenticeship as a motor mechanic, must be in possession of the relevant apprenticeship papers, and must be able to carry out repairs and maintenance on certain equipment. The complainant completed the required apprenticeship and acquired the papers in 1987. He was employed as an artisan motor mechanic for only one year before he suffered the bad luck of being retrenched. Thereafter, in spite of his sustained efforts, he was unsuccessful in securing the same kind of work. He was employed mainly as a truck driver. In the practical test and interview conducted to select the successful candidate, the complainant acquired a total score of 395, which was well below the score of the successful candidate, a white male, of 1 031. The department substantiated its preference for the successful white candidate mainly with reference to his superior experience and the cost implications involved if someone with the complainant’s level of experience were to be appointed. At the time of the appointment, there were six artisans, four white, one Asian, and one coloured.
Equality and dignity

➢ Read: National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (CC) (the judgment of Sachs J).

Another important feature of the Constitutional Court’s interpretation of equality is that it has stressed the link between equality and dignity. Discrimination is seen as a form of violation of a person’s dignity.

Activity 3

How did the Constitutional Court link equality and dignity?

3. The Constitutional Court’s tests for unequal treatment (section 9(1)) and unfair discrimination (section 9(3) and (4))


➢ Harksen v Lane 1997 (11) BCLR 1489 (CC)

Against the background of the above, the Court has developed two practical tests to determine when specific conduct violates

➢ the prohibition against unequal treatment (section 9(1)) and
➢ the prohibition against unfair discrimination (section 9(3) and (4)). (Discrimination can be direct or indirect)

The Court has drawn a distinction between different forms of differential treatment, that is, differential treatment that amounts to

➢ “mere differentiation” or
➢ “discrimination”.

Section 9(1) deals with the former and section 9(3) and (4) with the latter.

The relevance of the distinction is that different requirements apply to each. Mere differentiation must only be “rational”, while discrimination needs to be “fair” as well.
Activity 4

Can you explain whether the following distinctions amount to a mere differentiation or discrimination?

- Mr Hoffmann reveals to his employer that he is HIV-positive. He is employed as a flight attendant for SAA on its overseas flights. He is dismissed because the employer believes that he constitutes a safety or health risk to himself and other passengers.
- Boland Bank believes that it is losing the commercial edge against its bigger competitors. It decides to embark on a marketing campaign involving the assignment or appointment of female employees who are young and attractive to do front-line duties. This causes some older or less attractive female employees to be reassigned to other duties and some female applicants not to be considered for openings.
- Mr X is a property developer. He has recently acquired a building (A) in an area zoned for light industrial purposes. He also owns a building (B) in an adjacent area demarcated for general business and office purposes in terms of the local town-planning scheme. He is refused permission to add another three stories to building A on grounds of fire hazards, but allowed to do so in the case of building B.
- Withering Heights is a large apartment building. Tenants occupying bachelor flats are not allowed to keep pets, while occupants of two-bedroom and bigger flats are allowed to do so.

3.1 What does the rationality test involve?


3.2 What does the fairness test involve?

- Pretorius (2007: 15-21)
  - City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)
  - Harksen v Lane 1997 (11) BCLR 1489 (CC)
  - Moseneke v Master of the High Court 2001 (2) BCLR 103 (CC)
  - National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (CC)
  - President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)
  - MEC for Education: KwaZulu-Natal v Pillay 2008 (2) BCLR 99 (CC)
**Activity 5**

Ben (since deceased), was a lecturer at the University of Cape Town (UCT). He had a longstanding stable relationship with his girlfriend, Rebecca. Ben and Rebecca had lived together for ten years. They contributed jointly to the purchase of the house they lived in. The house was registered in their joint names. They each completed last wills in each other’s favour. Each partner listed the other as the sole beneficiary in insurance and investment policies. Rebecca was listed as Ben’s dependant in the UCT medical aid scheme.

Ben’s employment with UCT was, *inter alia*, governed by the Lecturers’ Remuneration and Conditions of Employment Regulations of 1990 (the Regulations). Regulation 6 of the Regulations states that:

> "The surviving spouse of a lecturer who died while performing service shall be paid until his or her death with effect from the first day of the month immediately succeeding the month in which the lecturer dies, a monthly amount equal to two thirds of the amount to which the lecturer would have been entitled."

Ben died six months ago after a short illness. Rebecca has lodged a claim with the university to claim the pension benefit stated in Regulation 6. UCT has denied her claim on the ground that the word “spouse” in Regulation 6 does not include an unmarried partner.

Discuss:

(a) Whether the provisions of Regulation 6 amount to “discrimination” against Rebecca;

(b) The factors that the court will take into account in determining whether Clause 6 of the Regulation constitutes unfair discrimination.

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**3.3 What does the test for the justification of unfair discrimination involve (that is, the proportionality test)?**

- Pretorius (2007: 22-26)

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**Activity 6**

Does s 36 of the Constitution (the limitation clause) have any meaningful role to play in a discrimination complaint in the light of the CC’s test for unfair discrimination? Read in this respect Pretorius/Klinck/Ngwena *Employment Equity Law* 2-41 to 2-43.
UNIT 2

General Principles of Employment Discrimination Law

INTRODUCTION

In this unit, we will begin our investigation of the first important special equality law, namely the Employment Equity Act 55 of 1998. Firstly, we will be dealing with the general aspects of employment discrimination law, namely the elements of direct and indirect discrimination. This part concerns the elements that need to be proved by the complainant to make out a prima facie case of discrimination. Secondly, once the complainant has succeeded in doing this, the onus shifts to the respondent employer to prove that the discrimination is fair. The latter aspect deals with the important issue of the possible defences that the employer may raise to justify (prima facie) discrimination.

LEARNING OUTCOMES

After completing Unit 2, you should be able to do the following:

- Differentiate, by means of correct definitions, between direct and indirect discrimination.
- Describe, explain, and apply the elements of direct discrimination.
- Explain the origin of the recognition of indirect discrimination in the case of Griggs and its link to substantive equality.
- Describe, explain, and apply the elements of indirect discrimination.
- Explain the origin of the recognition of indirect discrimination in the case of Griggs and its link to substantive equality.
- Describe, explain, and apply the elements of indirect discrimination.
- Explain the origin of the recognition of indirect discrimination in the case of Griggs and its link to substantive equality.
- Know which grounds of justification of discrimination are recognised by the Employment Equity Act.
- Define the three main types of employer defences.
- Explain what an “inherent” job requirement is and whether the surrounding circumstances under which the necessary work obligations or tasks must be executed are included.
- Explain the application of the inherent job requirement defence to the following: health and security; costs and profitability; third-party preferences; and privacy/morality.
- Explain what an operational ground of justification (or defence) is.
- Fully apply the operational grounds of justification to the following: economic grounds of justification; administrative inconvenience; maintenance of stable labour relations; market forces; and optimal use of labour.
- Explain what public interest defences are.
- Apply the principles applicable to defences to practical problems.
- Know applicable case law.
1. Direct and indirect employment discrimination

The difference between direct and indirect discrimination is explained in Pretorius (2007: 29).

Activity 1

Does the following constitute a differentiation or discrimination, and if the latter, is it direct or indirect?

(a) The governing body of the Voorwaarts School decides to appoint only teachers who have completed their qualifications during the last three years.

(b) The Department of Internal Affairs decides to allow only people in possession of the new bar coded ID document to vote in the general election.
2. Direct employment discrimination

In this section, we want to focus on the elements that need to be alleged and proved by a complainant in order to establish a prima facie case of direct employment discrimination. Note that intention to discriminate is irrelevant.

We can distinguish the following elements:

- The discrimination must be based on **one or more** prohibited grounds.
- Comparability
- Disadvantage

Pretorius (2007: 30-33).

- *Heynsen v Armstrong Hydraulics* [2000] 12 BLLR 1444 (LC)
- *Mahlanyana v Cadbury (Pty) Ltd* [2001] 11 BLLR 1306 (LC)
- *Ntai v SA Breweries* (2001) 22 ILJ 214
- *POPCRU and Others v Department of Correctional Services and Another* 2010 (9) BCLR 921 (LC).
- *TGWU v Bayete Holdings* [1999] 4 BLLR 401 (LC)

**Activity 2**

Test yourself:

1. What is the difference between “grounds” and “reasons/motives/aims” for discrimination, and why is the distinction important?
2. Why is it important that discrimination can be “on one or more” prohibited grounds?
3. What makes two situations comparable? And why must they be comparable in order to constitute prima facie proof of discrimination?
4. Is disadvantage a requirement for a prima facie case of discrimination in all circumstances?

**Activity 3**

*Do you agree with the following judgment?*

In *Re Headley and Public Service Commission Appeal Board*, the applicant unsuccessfully applied for a position as a receptionist in the Canadian immigration service, because she did not possess proficiency in

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any of the required foreign languages for new incumbents in that position. It was not expected from previously appointed receptionists, who continued to be employed in that capacity, to meet the language requirement. The Federal Court of Appeal unanimously rejected the applicant’s contention that her equality rights were violated. Two of the tree members of the court held that the applicant was not similarly situated to the incumbents and all three concluded that no discrimination had been involved. In reaching this conclusion, the court referred to factors relating to the reasonableness of the employer’s decision. MacGuigan JA accepted the contention that if management could demonstrate some rational basis for the difference in treatment, no discrimination took place. Because the language requirement served the objective of a more effective and efficient service to clients, the complainant failed to make a prima facie case of discrimination.

3. Indirect discrimination

- Pretorius (2007: 33-38)

- Kadiaka v Amalgamated Beverage Industries (1999) 20 ILJ 373 (LC)
- Mias v Minister of Justice [2001] 1 BLLR 1 (LAC)
- POPCRU and Others v Department of Correctional Services and Another 2010 (9) BCLR 921 (LC).

Activity 4

In what sense is the recognition of indirect discrimination a natural result of the idea of substantive equality? Read in this respect the reasoning in the Griggs case carefully and consult the sources mentioned in the list of recommended literature.

3.1 Definition

- Pretorius (2007): 33

3.2 Origin

- Indirect discrimination was first recognised by a court in the famous case of Griggs v Duke Power Co.
- Pretorius (2007: 33-34)
3.3 Elements

- Neutral employment policy or practice
- Causality
- Disproportional impact
- Detriment/disadvantage

Pretorius (2007): 34

Activity 5

Grolier Groceries is a supermarket with business hours from 09h00 to 21h30 daily, except during weekends. The complainant is a cashier who was dismissed by the employer when she refused to work the late shift from 17h00 to 21h30. All employees are required to work at least two late shifts per week, but they can voluntarily exchange shifts among one another. The hourly rate of pay for the late shift is 1½ times that of the normal shift. Apart from the complainant, there are five cashiers. Three are young unmarried women, two of whom attend evening classes in financial management at the local technikon. One is a married woman with children at school, but whose husband is a retired pensioner. One is a married man with children of pre-school age. About two weeks before her dismissal, the complainant approached the employer with the request to be excused from the night shift, the reason being that she has to take care of her mother, a quadriplegic due to a recent car accident. She is unmarried and lives alone with her mother. She explained that she could not afford to hire a caretaker for her mother on her salary of R1 000.00 per month and her mother’s disability allowance. An unemployed neighbour takes care of her mother during the day, without any pay, but cannot do so after 17h00 because of her own family responsibilities. The complainant also pointed out that the late night bus transfer is restricted to a bus that leaves at 22h00, which means that she arrives home only at 23h00. At that time of night, taxi transport is more expensive and unpredictable.

If the complainant wants to make out a prima facie case of indirect discrimination, will she be able to prove that the employer’s policy to require all employees to work the late shift, has a more detrimental effect on a protected group than on other groups?

Activity 6

The University of the Free State has advertised for the position of Professor and Head of Department in Actuarial Sciences. The advertisement, inter alia, states that:

"The successful candidate must have obtained his or her first degree at a South African university."

Rachael is an Associate Professor in Actuarial Science. She is employed by the University of the Free State. She was born and educated in Uganda. She is now a naturalised citizen of South Africa. She has applied for the position, but has not been short listed on the ground that she did not obtain her first degree at a South African university.

Discuss, with reference to applicable case law, whether the requirement stated in the advertisement constitutes prima facie indirect discrimination in terms of the Employment Equity Act.
Activity 7

John, a Black man, applies for a job as sales manager with Tipsy Cola (TC), a soft drink company. He was previously employed at Cipsy Tola (CT), the chief competitor of TC, as senior sales person. The relationship between the two companies has been strained, due to vehement competition, sometimes characterised by action not in line with accepted norms of business ethics. Consequently, a lot of mutual suspicion existed between the two companies. John is informed by TC that his application failed because he was a former employee of CT and that it is TC’s policy not to consider any application of current or former employees of CT. The majority (80%) of CT’s employees are black.

If John wants to establish a prima facie case of indirect discrimination, will he be able to prove that TC’s policy has a more detrimental impact on a protected group than on other comparable groups?

3.4 Justification of employment discrimination/employer defences


3.4.1 What defences qualify as legitimate defences against an employment discrimination claim?

➢ Pretorius (2007: 39)

3.4.2 The defence of inherent job requirements

➢ Pretorius (2007): 40-45

- *Imatu v City of Cape Town* (2005) 10 BLLR 1084 (LC)
- *Stojce v University of KZN (Natal) & another* [2007] 3 BLLR 246 (LC)
- *Swart v Mr Video* 1997 (2) BLLR 249 (CCMA)

3.4.3 Operational requirements

➢ Pretorius (2007): 35-51

- *Atlantis Foundries v NUMSA* [2000] 12 BALR 1441 (IMSA)
- *East Rand Proprietary Mines v UPUSA* [1997] 1 BLLR 10 (LAC)
3.4.4 Public interest justifications


Activity 8

Universitas is a large state hospital in Bloemfontein and has a staff of 600. Over and above providing patient care, Universitas is also a teaching hospital for the purposes of training doctors and nurses. It has the wide variety of departments that one usually finds in a teaching hospital. amateur and professional tournaments.

Against this backdrop, consider the following scenarios:

Rose is a registered nurse who has been employed by Universitas. Until six months ago, Rose worked in the Accident and Emergency Unit (A&E Unit). However, Rose is recovering from injuries she sustained from a bomb blast whilst on a holiday abroad. Although Rose escaped alive, the bomb blast left her with a severe hearing impairment and a pronounced limp in one of her legs. The doctors treating her say that with the help of a hearing aid, Rose will be able to hear, but not very well. To understand what a person is saying she will have, in addition, to lip-read. Rose has submitted a report of her prognosis to the management of Universitas. The management is of the view that since Rose will not recover her full hearing; they will have to dismiss her as she will not be able to readily hear what her colleagues and patients are saying in the A&E Unit.

Will the proposed dismissal constitute prima facie discrimination in terms of the Employment Equity Act?

On the assumption that it does, is the reason given by the management of the hospital a valid justification for the termination of Rose’s services in terms of the Employment Equity Act?

Activity 9

South African Airways (SAA) has a long-standing retirement policy that prohibits the employment of pilots and co-pilots over the age of 60. The complainant is a flight engineer, who has been in the employment of SAA for 30 years. After reaching the age of 60, he was informed by SAA that his services would be terminated since the airline has decided that all flight deck personnel, which includes the pilot, co-pilot, and flight engineer, should be subject to the same retirement policy. The duties of a flight engineer are performed at a separate instrument panel in the flight deck and include the monitoring and adjustment of various systems necessary for the operation of the aircraft, such as the electrical and hydraulic systems. The flight engineer is not in charge of the actual flight controls, which are the sole responsibility of the pilot and co-pilot. Since pilots and co-pilots have to serve as flight engineers for a period before becoming pilots, they are both qualified to take over the responsibilities of the flight engineer in an emergency. Can SAA argue that the retirement of flight engineers at age 60 is justified with reference to the inherent requirements of the job, in the same way that the retirement of pilots and co-pilots is?
Activity 10

Medicare Clinic (Clinic) is a private hospital in Bloemfontein. It has placed an advertisement to recruit new doctors in the light of increasing demand for treatment.

The advertisement reads, inter alia, that:

“The successful candidate must be able to speak Afrikaans, English and Sotho. The Clinic will also only appoint doctors who are HIV-negative.”

X is a medical doctor from Zimbabwe. She is permanently resident in South Africa and registered to practice in the country. She is HIV-positive. She specializes in dermatology (diseases of the skin). She has been living with HIV for five years and is apparently healthy on account of good nutrition and antiretroviral therapy. She speaks Ndebele and English. According to scientific evidence, there is a possibility that X might transmit HIV to a patient during treatment but that possibility is a remote one.

Her application has been rejected. The reasons given by the Clinic for rejecting her application are the following:

(i) That close to 30% of the patients that are treated at the Clinic can only speak either Afrikaans or Sotho, and that it would cost the Clinic R100 000-00 per year to secure the services of an interpreter;
(ii) That there is a possibility that X might transmit HIV to a patient during treatment; and
(iii) That a substantial number of patients would not want to be treated by a doctor who is HIV-positive and the Clinic fears that it would lose patients if it became known that it was employing a doctor who is HIV-positive. Evidence shows that people with AIDS are still stigmatized by society.

a) Does each of the two requirements that are stated in the advertisement constitute prima facie (direct or indirect) discrimination or “mere differentiation”? Answer with reference to the relevant definitions and the elements of (prima facie) discrimination in terms of the Constitution and the Employment Equity Act.
b) Are the reasons given by the Clinic valid justifications for discrimination under the Employment Equity Act? Discuss each of them fully.

Activity 11

(a) Mangaung City Council (MCC) has a statutory obligation to provide fire-fighting services in the City of Bloemfontein. In order to enhance its fire fighting capacity, MCC decides to recruit a further 10 fire fighters. In the advertisement for the entry-level position of trainee fire fighter, it is stated that, inter alia,

“...the successful applicants must be able to complete a fitness test which involves completing a five-kilometre shuttle run and pump carrying/hose dragging exercise within half an hour.”

It appears from expert evidence that although women can do the five-kilometre shuttle run and pump carrying/hose-dragging exercise, only 35% of women can complete the exercise in half an hour. The rest (65%) take on average thirty-five minutes to complete. On the other hand, it is accepted that 65% to 70% of men would be able to complete the exercise in half an hour on account of their biological advantage over women in terms of physical strength.
Discuss whether the requirement set by the MCC in its advertisement amount to *prima facie* discrimination in terms of the Employment Equity Act. What, if any, valid justification can MCC advance for the requirement? Make use of applicable cases in your answer.

(b) South African Airways (SAA), an airline company, recently conducted recruitment for trainee flight cabin attendants through a newspaper advertisement. In the advertisement SAA stated, inter alia, that the successful applicant must meet the following requirement:

“For reasons of assuring the safety of the public, complying with customer preference and international obligations, and ensuring a return on investment, the successful candidate must be below 35 years."

Jane, a female who is aged 55 years and enjoying good health, applied for the position of trainee flight cabin attendant. She was not short listed.

Jane wishes to challenge the rejection. SAA has written to Jane rejecting her application. In the letter SAA gives reasons. They are the following:

- That older flight cabin attendants may constitute a danger to the safety of passengers as they might possibly be physically unable to perform procedures such as evacuation of passengers in an emergency.
- That SAA’s male customers, who constitute 75% of SAA’s business, recently indicated in a market survey that they will not fly with airlines that are serviced by female flight cabin attendants who do not look young and that SAA will lose a substantial part of its business if they recruit the applicant.
- That SAA requires its staff to fly on international routes whose destinations include two countries that do not accord landing rights to an aircraft that is serviced by flight cabin attendants that are above fifty years and that SAA requires all flight cabin attendants to travel to all international destinations.
- That it costs SAA R300 000 to train a flight cabin attendant and that a trainee flight cabin attendant who is 55 years of age does not ensure SAA a reasonable return on investment given SAA’s compulsory retirement age of 60 years.

With reference to case law, answer the following questions:

(i) Does the requirement stated in the advertisement constitute _prima facie_ discrimination in terms of the provisions of the Employment Equity Act?
(ii) Are the reasons given by SAA valid justifications for discrimination under the Employment Equity Act? Discuss each of them fully.
UNIT 3

The Promotion of Equality and Prevention of Unfair Discrimination Act

INTRODUCTION

The next important special equality law to consider is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This is a comprehensive equality act; it prohibits unfair discrimination in all spheres of life, except those covered by the Employment Equity Act.

LEARNING OUTCOMES

After completing Unit 3, you should be able to do the following:

- Describe the aims of the Promotion of Equality and Prevention of Unfair Discrimination Act.
- Explain the requirements for locus standi in terms of the Act.
- Clarify the application of the Act.
- Explain the most important principles regarding the interpretation of the Act.
- Give an account of the jurisdiction of equality courts under the Act.
- Describe the guiding principles for adjudication for equality courts.
- Give an overview of the procedure of equality claims in equality courts.
- Explain the remedies for discrimination under the Act.
- Explain the elements of discrimination and the proof of unfairness in terms of the Act.

READINGS

- Pretorius 2007: 54-72
- Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another 2005 (1) BCLR 1 (CC)
- Du Preez v Minister of Justice and Constitutional Development 2006 (9) BCLR 1094 (SE)
- George v Minister of Environmental Affairs & Tourism 2005 (6) SA 297 (EqC)
- Manong & Associates (Pty) Ltd v Eastern Cape Department of Roads & Transport & Others [2009] JOL 23617 (SCA)
- MEC for Education: KwaZulu-Natal v Pillay 2008 (2) BCLR 99 (CC)
- Minister, Environmental Affairs & Tourism v George [2006] JOL 17418 (SCA)
- Minister of Education v Syfrets Trust 2006 (4) SA 2005 (C)
- Strydom v NG Gemeente Moreletapark [2008] JOL 2236 (T)
1. Application, standing, jurisdiction, interpretation, procedure, remedies, appeal and review

Pretorius 2007: 54-62

2. Proof of unfair discrimination

Pretorius 2007: 62-72

- Du Preez v Minister of Justice and Constitutional Development 2006 (9) BCLR 1094 (SE)
- George v Minister of Environmental Affairs & Tourism 2005 (6) SA 297 (EqC)
- Minister, Environmental Affairs & Tourism v George [2006] JOL 17418 (SCA)
- MEC for Education: KwaZulu-Natal v Pillay 2008 (2) BCLR 99 (CC)
- Minister of Education v Syfrets Trust 2006 (4) SA 2005 (C)

Activity 1

Rights for All are an NGO that assists people in taking up human rights violations. It is based in Pretoria. It has several complaints against Muddle and Fuddle, an insurance company, which has a registered office in Pretoria and which conducts business throughout South Africa.

- Mr Jock, a white male, aged 22, who drives a red BMW, complains that he is paying a higher insurance premium for comprehensive car insurance than his twin sister, Sharon, who has a white Toyota Corolla.
- Mr Daniels is a single man of 40 who has been refused life insurance. In the application form prepared by Muddle and Fuddle, he was asked to fill in a range of "lifestyle questions", including his marital status and whether he lived alone. He was also asked to undergo an HIV test that was negative.
- Mrs Khumalo is a 60-year-old ex-smoker who wants to buy a private hospitalisation plan. She is granted a policy, but his premiums are 25% higher than the average.
- The final complaint relates to a community of black farm workers composed of 40 adults and 126 children. They live in Boplaas, a small Karoo settlement, surrounded by several big farms owned by white farmers. Some own small houses, and others live in shacks. Each household has one or two cattle and a few chickens. They also undertake small vegetable gardening around their dwellings. All white farmers in the area have insured themselves, members of their families, their homes, equipment, livestock, and agricultural produce. The black community applies for insurance with a similar coverage to that of the white farmers. The insurance company writes back stating that it does not normally provide cover to rural households where the value of their annual income or combined assets is less than R500,000.00. The company also states that it is not in the business of dealing with people who do not have a history of proven creditworthiness that is certified by financial institutions of good standing.

Rights for All bring a public interest challenge in its own name, claiming that all of the above actions amount to unfair discrimination by Muddle and Fuddle.

Rights for All submit and asks for the following:

- The higher premium paid by Jock is unfair discrimination on the basis of sex, gender, and age. It asks that the premium be lowered to the rate that Jock's sister is paying.
- Daniels is unfairly discriminated against on the basis of marital status, sex, gender, age, and sexual orientation. Rights for All asks for an order granting him life cover and a public apology. It also asks for Daniel's name to be removed from the register of names of refused applications that the insurance industry maintains.
Khumalo is unfairly discriminated against on the basis of age and the unlisted ground of "health status". Rights for All asks for an order reducing the premium.

The Boplaas community is unfairly discriminated against on the basis of race and the unlisted ground of socio-economic status. Rights for All asks for an audit of the Insurance practices of Muddle and Fuddle and an order directing Muddle and Fuddle to reconsider the application of the Boplaas community.

A general audit of the policies and practices of Muddle and Fuddle, to be reported back to the Court within six months, at which stage the Court should make whatever order it deems fit.

Further or ancillary relief is requested.

Costs against the respondent.

Evidence is led, which shows the following:

- While red cars are more likely to be in accidents than white cars, owners of white Toyotas are more likely to be hijacked. Men are more likely to be involved in accidents than women, and young people are more likely to have accidents than other age categories (except people over 60). These are statistics that are calculated for the industry as a whole. Evidence shows that the claims profile of the respondent does not support loading of premiums according to age. In addition, Jock has never had an accident and has an advanced driver's certificate.

- The insurance industry has a common set of questions for all life insurance applicants. Marital status is one of these. An internal company document, obtained by the process of discovery, shows that Daniels was refused insurance because he "fits the profile" of a gay man and that the insurance company thus assumes that he might engage in high-risk behaviour for HIV. According to the company, white, gay men are a high-risk group. They support this with UK and US statistics. The evidence of the complainant's experts proves that a 40-year-old white, gay male is at a lower risk than a 40-year-old black, married woman in South Africa.

- Medical evidence shows that ex-smokers who have stopped for seven years or more are not a greater risk than non-smokers. Khumalo stopped smoking in 1992. She is asthmatic. The experts disagree on whether previous smoking and asthma are linked. The insurance company has statistics that show that older people are more likely to be hospitalised and argues that late entry into an insurance plan justifies higher premiums.

- Evidence shows that the Boplaas community is a stable and self-sustaining one. Members of the community have jobs in town, and some work on the surrounding farms as permanent and seasonal workers. In addition, the community produces enough basic food for their own requirements. Furthermore, expert evidence shows that 90% of whites and 30% of blacks are insured in South Africa. The rate of rejection by insurance companies in the last six years is the reverse: 30% of whites and 90% of blacks. Expert evidence is also led about the Grameen Bank in Bangladesh, which has a 98% repayment of small loans.

Activity 2

(a)

The COLONIAL GENTS CLUB is an exclusive private club established in 1910. Its founding constitution expressly provides that it is:

"A special club of cultured liberal gentlemen in which admission is reserved to persons nominated by an existing member and supported by 50% of the total membership. The nominees for membership must be men of outstanding up-bringing and means, preferably with estates valued at no less than 20 million pounds. The total membership of the club may not at any one time exceed 5 000. Ladies and persons of native extraction are not necessarily excluded from membership."

2 Case studies from the training material of the Equality Legislation Education and Training Unit of the Dept of Justice.
A recent report in the Financial Times indicated that of the existing membership of 500 there are 5 women and 3 black men who are honorary members.

The Commission on Gender Equality and the Human Rights Commission have instituted proceedings before the Equality Court, alleging that the club, by its constitution and practice, engages in gender and racial unfair discrimination under sections 6, 7 and 8 of the Equality Act. The two Constitutional Institutions are acting on behalf of one women’s club and a men’s group. Will they succeed in their claim?

(b)

The Association for Disabled People in Gauteng (ADPG), a provincial organization representing disabled people, brings a claim of unfair discrimination against the City Council of Johannesburg, citing the following instances of unfair:

- the City Council has failed to build ramps on the pavements in the city, and to maintain the pavements – as a result of which wheel-chair users are unable to move freely around the city and access key public buildings;
- the City Council has failed to install ramps and/or lifts and suitable toilets that permit access to persons in wheelchairs in the City Centre and other council run public amenities;
- the City Council has denied employment to disable people.

The City Council reports that there are ramps on some of the pavements and that it does not have resources to alter all the city’s pavements to accommodate disabled people. It is also unable to maintain the pavements for financial reasons and because its Roads Section is prioritizing the provision of tarred roads in all residential areas (especially townships where roads were previously poorly maintained). It has wheelchair access in most of its public buildings, although it concedes that this usually often involves entry through a back door that is not normally open to the public.

1. Do these instances amount to unfair discrimination?
2. What remedies would you give in each instance?
3. Would your answer to any of the above questions be different if the respondent was a private corporation?

(c)

A woman is a member of a rural community that lives a customary life. She is a Jehovah’s Witness. Upon the death of her husband she refuses to engage in various customary practices that are perceived necessary by the community to release the spirit of her husband and avoid mischief to the community. As a result of this, the community prevents her from leaving her home and some male members of the community are alleged to have assaulted her. She is unable to work and earn an income for her family. She approaches the Equality court for relief. As she is unable to leave her home she sends her sister to bring the case on her behalf.

What is the ground of discrimination in this example? Does this amount to unfair discrimination? What remedies would you grant in this case?

(d)

A black woman approaches a bank to obtain credit to start a small business. She is turned down as she has no collateral and insufficient income. She is also told by the clerk that assists her that she might be more successful if her husband would agree to sign surety for the loan.

Is the discrimination on a prohibited ground?

Is it unfair? Assume the evidence is led about the practice of banks to turn women down more often than men, to insist on signed sureties for application of women, but not of men. Further evidence is led that demonstrates that
women who obtain small amounts of credit tend to be more reliable than men in paying their installments regularly and timeously.

How would you address the claim that this is unfair discrimination on the basis of socio-economic status?

(e)

A private school refuses to admit a boy who is HIV-positive. The school argues that the boy poses a threat to other children especially as there is a possibility that the boy could infect other boys during play time or during contact sports. The school also says that other parents will withdraw their children from the school and that this will have a detrimental effect on the profitability of the school. They also claim that they will have to provide extra care for the boy and that this will also have adverse effects for the school.

The applicant brings a claim of unfair discrimination on the basis of HIV/AIDS. It is argued that he does not represent a threat to other children or the school as he is capable of attending school, he can care for himself and that he will not take part in rough contact sports.

Will the applicant succeed with a claim of unfair discrimination in terms of HIV/AIDS?

UNIT 4

Affirmative Action

INTRODUCTION

Chapter 9(2) of the Constitution provides for the promotion of the achievement of equality by taking measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

Chapter 3 of the Employment Equity Act obliges all so-called “designated employers” (see s. 1 of the Act) to implement affirmative action measures in favour of all designated groups (blacks, women and people with disabilities) in the workplace. For that purpose, all designated employers are required to devise and implement employment equity plans and to report regularly in this regard to the Department of Labour. The Act gives effect to s. 9(2) of the Constitution, which states that “[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

This unit deals with the constitutional requirements for valid affirmative action. In particular, we deal with the issue of affirmative action and discrimination. When will an affirmative action measure violate the equality provisions of the Constitution?
LEARNING OUTCOMES

After completing Unit 4, you should be able to do the following:

- Explain the different points of view regarding the question of whether affirmative action is compatible with the principle of equality.
- Explain the relationship between affirmative action and substantive equality in terms of section 9 of the South African Constitution.
- Fully explain what the constitutional requirements for affirmative action are and be able to apply them to practical problems.
- Critically evaluate the current law of affirmative action.

READINGS


- Dudley v City of Cape Town and Another [2008] 12 BLLR 1155 (LAC)
- Gordon v Department of Health: KwaZulu-Natal [2008] 11 BLLR 1023 (SCA)
- Baxter v National Commissioner, Correctional Services [2006] JOL 17476 (LC)
- Crotz v Worcester Transitional Local Council [2001] 8 BALR 824 (CCMA)
- Du Preez v Minister of Justice and Constitutional Development and Others 2006 (9) BCLR 1094 (SE)
- Forum of Black Journalists v Katopodis 2009 (5) BCLR 510 (SAHRC)
- Independent Municipal and Allied Workers v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC)
- Kimberley Girls’ High School v Head of Department of Education, Northern Cape Province [2005] 1 All SA 360 (NC)
- Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)
- PSA v Minister of Justice [1997] 5 BCLR 577 (T)
- Solidarity obo Bamard v SAPS [2010] 5 BLLR 561 (LC)
- Stoman v Minister of Safety and Security (2002) 23 ILJ 1020
- University of South Africa v Reynhardt [2010] 12 BLLR 1272 (LAC).

1. Affirmative action, equality and discrimination

- Pretorius et al paras 9.2.2, 9.2.3

- Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)

Take a good look at section 9(2) of the Constitution. It makes it clear that affirmative action is seen as a necessary means to bring about substantive equality.
Section 6(2) of the Employment Equity Act states that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the Act. The Act and the way it is applied must comply with the Constitution, however. This means that affirmative action under the Act must meet the Constitution’s requirements for substantive equality.

2. Constitutional requirements for valid affirmative action

2.1 Beneficiaries

Pretorius par 9.3.1.

2.2 Design of the measures

Pretorius par 9.3.2.

2.3 Promotion of equality

Pretorius par 9.3.3.

Activity 1

Study Van Heerden v Minister of Finance. Do you think that the CC’s point of view that affirmative action does not trigger the presumption of unfairness in terms of section 9(5) of the Constitution is correct? What could be the consequences of this approach? What alternative approach can you suggest? Consult in this respect Pretorius/Klinck/Ngwena Employment Equity Law para 9.3.4.
Activity 2

The University of Utopia is a South African university. It has developed an employment equity plan that includes a preferential promotion scheme where the goal is to ultimately achieve 75% representation of black people in the ranks of senior management positions. The university has 10 senior management positions, 30 middle management positions and a total labour force of 500. Currently black people constitute 75% of the labour force of the university as a whole, but only 20% of senior managers and 30% of middle managers are black. Black people constitute 75% of the general population whereas white people constitute 15%. The university has a high turnover of black senior managers. About 30% of black senior managers leave the employment of the university on an annual basis, mainly because of more lucrative positions in the private sector.

The university has taken the following steps to achieve 75% representation of black people in senior management positions:

1. In order to achieve the 75% goal of black representation, the university has placed a moratorium on the promotion of white candidates to senior management posts. It has also decided that if the university decides to recruit externally for suitable candidates, only black candidates will be invited to apply.

2. Secondly, the university has further decided to compulsorily retire white senior managers who are within 5 years of the retirement age (60) so that more positions can be made available for black candidates;

3. In order to attract suitably qualified blacks and to counter the problem of blacks leaving the employment of the university because of higher salaries paid in the private sector, the university has lastly decided to pay a higher salary to black people that are offered senior management positions (than their white counterparts) in order to induce them to take up the appointment and remain in employment.

White middle managers and white senior managers seek your advice as they wish to challenge the university’s employment equity plan on the ground that it constitutes unfair discrimination.

Discuss whether the numerical goal of 75% and the other specific affirmative action measures listed under 1-2 above meet all the requirements for affirmative action in terms of the Constitution and the Employment Equity Act.
**Activity 3**

Mangaung City Council issues a regulation in which it makes known the language policy of the Municipality. Afrikaans, English and Sesotho are recognised as the official languages of the Municipality. Regulation 10 provides as follows:

"Affirmative action and the elevation of the status and extension of the use of Sesotho"

(1) The municipality in association with PANSALB is to develop the previously marginalised languages through appropriate concrete language development programmes.

(2) For the purposes of promotion to or appointment in posts of which-

(a) the all-inclusive salary package amounts to less than R150 000 per annum, the successful candidate must provide proof that he or she is able to use at least two of the municipal languages meaningfully for the purposes of the business of the Municipality;

(b) the all-inclusive salary package amounts R150 000 or more per annum, the successful candidate must provide proof that he or she is able to use all the municipal languages meaningfully for the purposes of the business of the Municipality."

A White English speaking female official, who applied for a post in the last-mentioned category, approaches you for legal advice. She cannot speak Sesotho. Advise her on the constitutionality of the regulation and whether it complies with the requirements of the Constitution and the Employment Equity Act.

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**Activity 4**

Medicare is a private clinic. It provides a variety of health services, including abortion. Medicare has 50 employees, comprising of 5 doctors (all male), 20 nurses and 25 maintenance personnel. All the doctors and nurses are white, while the maintenance personnel are mainly (90%) black. Medicare has recently experienced an increase in demand for services, especially regarding abortions. Management has decided to place an advertisement in the newspaper, with the aim of recruiting an additional 7 doctors and 10 nurses, to meet the higher demand for services. Medicare is looking to use this opportunity to diversify their staff in order to meet the conditions of the Employment Equity Act. The advert reads as follows:

"All posts must preferably be filled by persons from the designated groups, and preference will be given to black candidates. Successful candidates must be willing to perform abortions."

X is a white female doctor with 15 years experience. She applied for a job as gynecologist, but was turned down in favour of a black male gynecologist, with 5 years experience.

Y is a black gynecologist who is also a committed Roman-Catholic. He applied for a post but was turned down, as he stated during his interview that he would only perform abortions for medical reasons and not on account of socio-economic reasons, since he has a constitutional right as a practicing Catholic to have a conscientious objection against abortions.

Z is a qualified black nurse with a hearing disability. She can partially communicate by means of lip-reading. With the help of an advanced hearing aid, she would however be able to communicate almost as well as any person without a hearing disability. She can not afford the hearing aid herself. She applied for a post as nurse, but was turned down on the grounds that she would not be able to function as a nurse due to her hearing disability. Medicare persists in the view that they are not obliged to purchase this modern hearing aid, since it costs approximately R5000.

Discuss whether Medicare’s affirmative action measures are valid in terms of the Constitution and the Employment Equity Act.
UNIT 5

Harassment

INTRODUCTION

Section 6(3) of the Employment Equity Act as well as section 11 of the Promotion of Equality and Prevention of Unfair Discrimination Act prohibit harassment on any prohibited ground as a specific form of discrimination. Apart from sexual harassment, the Acts also, therefore, prohibit harassment on a racial, religious, or ethnic basis, or on the basis of nationality or sexual orientation, etc.

In this unit, we will confine ourselves to sexual harassment. It is the most developed part of our law on harassment, and the applicable principles can be applied *mutatis mutandis* to other forms of harassment.

LEARNING OUTCOMES

After completing Unit 5, you should be able to do the following:

- Define sexual harassment, and distinguish it from sex-based harassment.
- Identify and explain each of the elements of sexual harassment, and illustrate their application with reference to applicable case law.
- Distinguish and fully explain the two main types of sexual harassment.
- Explain the liability of employers for sexual harassment, with reference to decided cases.

READINGS

- Pretorius (2007: 73-85)
- *Ahmod v Defy Appliances* [2004] 5 BALR 529 (MEIBC)
- *Gregory v Russells (Pty) Ltd* (1999) 20 ILJ 2145 (CCMA)
- *Nehawu obo Zulu v Department of Health* [2004] 5 BALR 618 (PHWSBC)
- *Pick 'n Pay v An Individual* (114) 3 (1) ARB 8.25.136
- *Potgieter v National Commissioner SAPS* (2009) 30 ILJ 1322 (LC)
- *Sonke Gender Justice Network v Malema* (2010) (7) BCLR 729 (EqC)
1. Definition of sexual harassment


2. Types of sexual harassment


3. Elements of sexual harassment

Pretorius (2007: 77-81)

4. Nedlac Code

Pretorius (2007: 81-85)

Activity 1

Make a summary of the shortcomings of the current law regarding sexual harassment. What solutions can you suggest? Consult the article of Zelesne (see readings above).

Activity 2

a. Are the following statements true or false?
1. Telling "blonde jokes" in the workplace could be sex-based harassment.
2. Making fun of a middle-aged man's "pot belly" is not sexual harassment.
3. Conduct must be persistent to qualify as harassment.
4. The victim's provocative clothing is a defence against a harassment claim.
5. The fact that most women in a particular workplace do not mind patting on the backside, and have testified to that effect, is a defence against a harassment claim.

b. Explain whether the following is sexual harassment, and if so, what form (and if applicable), what sub-form:
   - Jacob always addresses his secretary, Jenny, as "my dolly".
   - Mary complains that three of her co-workers who were romantically involved with her supervisor, were appointed ahead of her.
Activity 3

1. Johnny Lock, a rugby player for the Mean Machine Club, complains of sexual harassment, after his coach slapped him on the buttocks as they were running onto the field. Advise the club on the correctness of Johnny’s complaint.

2. Lerato, a waitress at a restaurant, lays a complaint of sexual harassment against Tsepo, her manager. He, on several occasions made indecent sexual suggestions to her. The following appears from the evidence at the hearing:
   a. Prior to her appointment at the restaurant, she worked for five years as a striptease dancer and escort at a local nightclub, which was frequently visited by Tsepo;
   b. At work in the restaurant, she did not immediately tell him that his advances are unwelcome, but jokingly told him “to go and take a cold shower”, and “maybe your wife will be a better prospect”.

Do the above-mentioned facts have any relevance for the question whether Tsepo’s conduct could be considered “unwelcome” or not?

3. Tom and Patsy both work for a firm of auditors. Tom is an administrative manager and Patsy a receptionist. Tom is in charge of all administrative personnel, including Patsy. Patsy is unmarried, but has a long term relationship with Gert.

A week after her appointment she noticed a Hustler (pornographic) magazine in the common toilet. Upon inquiry she was told by a co-worker that the male workers often bring magazines of this sort to work, but that it does not bother her or most other female workers. She asked Patsy whether she has never read one of these magazines before, to which Patsy answered “Yes, once or twice”. A few days afterwards, Patsy found the same magazine lying on her desk. She closed it and put it in the trash bin. Later that morning Tom passed by and asked what she thought of the magazine. Patsy replied that “It is not my favourite kind of reading material”. Tom took the magazine from the trash bin, opened it on a page with photos of naked women and men and put it on her desk. He suggested to her that they should page through the magazine together. She answered that if she had wanted to read such magazines, she would rather do it alone at home. Tom laughed and left, but returned after an hour with the magazine and once again showed her pornographic photos and again suggested that they should look at it together. To this she answered that it does not interest her because she is a lesbian. Tom was undeterred, however, and insisted once more. Just then a client appeared and Tom left to attend to him. She later testified that she had said that she is a lesbian only in an effort to shake Tom off and in the hope that he would loose interest in her and focus his attentions elsewhere. She was also afraid of him because he was her direct superior and she did not know how he would react if she confronted him directly. She was still new at the job and did not want to give offence. That evening, she discussed the issue with her boyfriend, who convinced her to lay a complaint of sexual harassment against Tom with her employer.

Does Tom’s conduct amount to sexual harassment?

Activity 4

Is this sexual harassment? If so, what type?

- Female workers in a factory persistently mock a middle-aged man because of his “pot-belly”.
- Mr. X, a bi-sexual supervisor, constantly suggests to both his male and female subordinates that if they do not provide him with sexual favours, they will never be promoted.
- Mr. X decides to promote a subordinate with whom he is in a consensual romantic relationship, passing over Mrs. Z, who clearly is the better-qualified candidate.
Mr. X refuses to excuse Mrs. Z from unpopular cleaning duties in the office, but does excuse Mrs. Y, who has submitted to his constant requests for sexual favours. He has never requested Mrs. Z herself for sexual favours, because he finds her unattractive. All other female subordinates whom he felt attracted to, have been subjected to his sexual advances.

Mr. X constantly tells “blonde jokes” at tea-time at the office.

Activity 5

Mrs. Beauty Tshabalala is employed by the Blue Den night-club in Johannesburg as a torch singer. The club employs 14 employees, including singers, waiters, an accountant and a manager. The manager is Mr. Naidoo. The club is owned by Mr. van Tonder, who is there some but not all nights.

Mr. Jan Plaatjies, a stand-up comedian, performs at the club from time to time for a fee. Soon after Mrs. Tshabalala started her job at the club, he pulled her onto his lap and tried to kiss her when they were having a drink at the club after the show one night. She did not resist him as she was afraid of losing her job. A similar incident occurred the following week, on a Friday night, when the comedian was again at the club, this time as a patron. She then told him to leave her alone. When she complained to Mr. Naidoo the next night, he told her not to be a “stupid black cow”, and threatened to fire her unless she was nice to the other performers and the patrons. He then patted her on her bottom and told her to go and “chat up” the customers. Mr. van Tonder was not there that night. He was there the next night and Mrs. Tshabalala then reported the incidents concerning Mr. Plaatjies and Mr. Naidoo to Mr. van Tonder. Mr. van Tonder then admonished Mr. Naidoo by saying, ‘Ag man, you mustn’t touch the merchandise!’

Mrs. Tshabalala approaches the Equality Court for relief. She brings the following claims:

- Against Mr. Plaatjies for sexual harassment.
- Against Mr. Naidoo for sexual harassment and hate speech.
- Against the Club for sexual harassment and hate speech.

Consider whether the complainant should succeed on any of the claims.
UNIT 6

Reasonable Accommodation

INTRODUCTION

This unit considers the scope and parameters of the employer’s duty to provide reasonable accommodation in the workplace. Broadly stated, the duty of reasonable accommodation comprises of positive measures that ought to be taken by an employer to meet the special needs of job applicants or employees, who, by reason of a characteristic that is protected against unfair discrimination in terms of the Employment Equity Act, cannot adequately be protected by arrangements that are suitable for people who do not share those characteristics. The duty to reasonably accommodate employees is therefore a general duty, which should be extended to all employees who may experience burdens in the workplace due to their protected group status, for example, because of disability, pregnancy, language problems, social origin, nationality, etc. Once again, we will restrict ourselves to one aspect only, namely, the reasonable accommodation of people with disabilities in the workplace.

LEARNING OUTCOMES

After completing Unit 6, you should be able to do the following:

- Explain the constitutional foundations of the duty of reasonable accommodation of people with disabilities.
- Identify and explain the three elements of the definition of people with disabilities.
- Explain what the content and scope of an employer’s duty of reasonable accommodation of people with disabilities entail.

READINGS

- Pretorius et al. Employment Equity Law (2001; Revision Service 10 (2011)) Chapter 7 (pp: 7-3 – 7-8; 7-26(1) – 7-44)
- IMATU v City of Cape Town[2005] 10 BLLR 1084 (LC)
- MEC for Education: KwaZulu-Natal v Pillay 2008 (2) BCLR 99 (CC)
- Standard Bank of SA v CCMA & others [2008] JOL 21221 (LC)
1. **Constitutional basis for the duty of reasonable accommodation**

   - Par. 7.2 in Pretorius *et al.* (2001; Service Issue 6, 2006)

2. **Defining people with disabilities**

   Par. 7.6 in Pretorius *et al.*

3. **What does the duty of reasonable accommodation entail?**

   Par. 7.7 – 7.10 in Pretorius *et al.*

   - *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC)
   - *IMATU v City of Cape Town* [2005] 10 BLLR 1084 (LC)
   - *Standard Bank of SA v CCMA & others* [2008] JOL 21221 (LC)

**Activity 1**

Why is the following correct/incorrect?

1. An obese man with an eating disorder is/is not a person with a disability in terms of the Employment Equity Act.
2. An alcoholic may qualify as a person with a disability in terms of the Employment Equity Act.
3. A wheelchair-bound employee may never demand that an employer install a lift in the workplace. “Yes” or “No”? Why?
Activity 2

The Association for Disabled People in Gauteng (ADPG), a provincial organisation representing disabled people, brings a claim of unfair discrimination against the City Council of Johannesburg, citing the following instances of unfair:

- the City Council has failed to build ramps on the pavements in the city, and to maintain the pavements – as a result of which wheel-chair users are unable to move freely around the city and access key public buildings;

- the City Council has failed to install ramps and/or lifts and suitable toilets that permit access to persons in wheelchairs in the City Centre and other council run public amenities;

The City Council reports that there are ramps on some of the pavements and that it does not have resources to alter all the city’s pavements to accommodate disabled people. It is also unable to maintain the pavements for financial reasons and because its Roads Section is prioritising the provision of tarred roads in all residential areas (especially townships where roads were previously poorly maintained). It has wheelchair access in most of its public buildings, although it concedes that his usually often involves entry through a back door that is not normally open to the public.

Do these instances amount to unfair discrimination? Would you answer to any of the above questions be different if the respondent was a private corporation?

Activity 3

UNIT 7

Preferential Procurement and Black Economic Empowerment

INTRODUCTION

In this section we will take a look at further legislation adopted in order to give effect to the objectives of section 9 of the Constitution, read in conjunction with section 217. It deals with the Preferential Procurement Policy Framework Act (PPFA) 5 of 2000 and the Broad Based Black Economic Empowerment Act (BEEA) 53 of 2004.

LEARNING OUTCOMES

After you have completed Unit 7, you should be able to do the following:

- Understand and explain the broad constitutional context for and basic principles regarding public procurement
- To give an account, in broad outline, of the system of preferential treatment of designated groups in public procurement in terms of the Constitution and the PPFA
- Give an account of in broad outline of the constitutional basis for and broad objectives of and the system of black economic empowerment in terms of the BEEA
- Constitutionally evaluate and explain in broad terms the provisions of relevant Codes of Good Practice in respect of black economic empowerment regarding (a) ownership and (b) management and control.

READINGS

Penfold & Reyburn “Public Procurement” in Chaskalson et al Constitutional Law of South Africa 2nd ed 2003 Chapter 25

- Preferential Procurement Policy Framework Act (PPFA) 5 of 2000
- Broad Based Black Economic Empowerment Act (BEEA) 53 OF 2004.
- Codes of Good Practice on Broad Based Black Economic Empowerment
1. Preferential Procurement

1.1 The constitutional context for public procurement
   ➢ Penfold & Reyburn 25-1 to 25-8

1.2 Constitutional principles for public procurement
   ➢ Penfold & Reyburn 25-8 to 25-12

1.3 Preferential procurement
   ➢ Penfold & Reyburn 25-12 to 25-23

2. Black Economic Empowerment

   ➢ Broad Based Black Economic Empowerment Act (BEEA) 53 OF 2004.
   ➢ Codes of Good Practice on Broad Based Black Economic Empowerment
PART 2

Freedom of expression

INTRODUCTION

In this part we will study the right to freedom of expression which is protected in terms of section 16 of the Constitution. We will interpret relevant concepts, and will consider lawful restrictions of the right. In this regard we will specifically discuss the implications and ambit of the exclusion from constitutional protection of the categories of expression enumerated in section 16(2).

LEARNING OUTCOMES

- After completing PART 2, you should be able to:
  - define the concept expression,
  - explain the theories underlying the protection of freedom of expression, namely the discovery and the advancement of truth theory, the democracy theory and the human dignity theory,
  - explain the lawful restriction of freedom of expression with reference to the objectives to protect against imminent lawless action, to maintain state security and to protect and promote the Constitutional rights and values of human dignity and equality, privacy and the right to a fair trial,
  - discuss freedom of the press and other media,
  - discuss the relevant considerations regarding the disclosure of journalistic sources and the current legal position in this regard in South Africa,
  - explain the freedom to receive and impart ideas,
  - explain freedom of artistic creativity,
  - explain academic freedom and freedom of scientific research,
  - explain the regulation of freedom of expression in the context of section 16 of the Constitution, and the legal effect of section 16(2) in this regard,
  - define the concept propaganda for war,
  - define the concept incitement of imminent violence,
  - define the concept “hate speech” and explain its definitional elements,
  - know the regulation of expression in terms of the Films and Publications Act,
  - know the South African Press Code,
- know the relevant broadcasting legislation and codes,
- know the code of the Advertising Standards Authority of South Africa,
- know and explain the Protection of Information Bill (2009),
- explain the prohibition of the dissemination of racist propaganda in terms of subsection 7(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),
- explain the prohibition of hate speech and discriminatory speech in terms of sections 10 and 12 of the PEPUDA,
- know and explain the test for whether a statement is defamatory,
- know and explain the requirements to succeed in a defamation action,
- know and explain the grounds of justification in a defamation action,
- explain the liability of the press in a defamation action, as distinguished from general liability.

**READINGS**

- Albertyn et al: 89-98.
- *Afriforum and Another v Malema* [2010] JOL 25566 (GNP)
- *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others CCT20/95, CCT21/95* [1996] ZACC 7; 1996 (3) SA 61.
- *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC)
- *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC)
- *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC).
- *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294;
- *Johncom Media Investments Limited v M and Others* (CCT 08/08) [2009] ZACC 5; 2009 (4) SA 7 (CC)
- *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 CC
- *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC)
- *NM and Others v Smith and Others* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC).
- *S v Mamabolo* (E TV, Business Day and the Freedom of Expression Institute Intervening) [2001] ZACC 17; 2001 (5) BCLR 449 (CC); 2001 (3) SA 409(CC)
- *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC)
- *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* (CCT58/06) [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC)

ACTIVITIES

You will be tasked during the course of the lectures to consider, compare and discuss the following judgments of the BCCSA. (http://www.bccsa.co.za)

CHILD PORNOGRAPHY, COMEDY, ART.

Gay and Lesbian Alliance v Electronic Media Network. Case 57/2005
J Barreira v 94.7 Highveld Stereo. Case 16/2010

HATE SPEECH

T Labuschagne v YFM. Case 21/2003
Y Farham v SABC 3. Case 05/2009
J Darne v SAFM. Case 06/2010
J Coetzee v YFM. Case 25/A/ 2010 and Appeal Case 12-2010

HATE SPEECH: RELIGION

S van Loggerenberg and 33 others v 94.7 Highveld Stereo. Case 26/2003
J Schutte v Multichoice Channel. Case 10/2010
Dr K Naidoo and others v East Coast Radio. Case 22/2010

Discuss ‘dignity’ with reference to the approach of the BCCSA enunciated in the chairperson’s Annual Reports 2007-2008 par 5 and 2008-2009 par 5.