



UNIVERSITY *of the*
WESTERN CAPE

An evaluation of South African legislation to determine its adequacy in protecting employees discriminated against on the ground of sexual orientation.

A MINI-THESIS SUBMITTED IN PARTIAL FUFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF LL.M: LABOUR LAW IN THE DEPARTMENT OF
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DECLARATION

I, Vonschell Adams, declare that '*An evaluation of South African legislation to determine its adequacy in protecting employees discriminated against on the ground of sexual orientation*' is my work and that it has not been submitted before any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



V. A.

Signed: Vonschell Adams

Date: 15 October 2021

A handwritten signature in black ink, appearing to be 'J van De Rheede'.

Signed: J van De Rheede

Date: 15 October 2021

ABBREVIATIONS

BoRA: Bill of Rights Act, 1990

CCMA: Commission for Conciliation, Mediation and Arbitration

EEA: Employment Equity Act 55 of 1998

EEO: Equal Employment Opportunity

ERA: Employment Relations Act, 2000

HRA: Human Rights Act, 1993

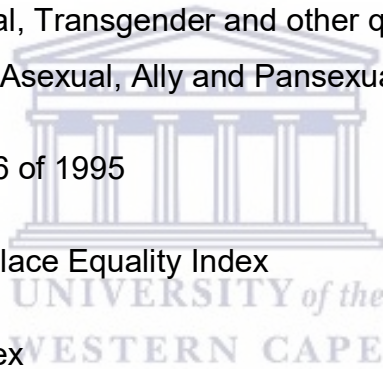
LC: Labour Court

LGBT: Lesbian, Gay, Bisexual, Transgender and other queer individuals (Intersex, Queer/Questioning, Intersex, Asexual, Ally and Pansexual)

LRA: Labour Relations Act 66 of 1995

SAWEI: South African Workplace Equality Index

WEI: Workplace Equality Index



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ABSTRACT

Unfair discrimination on the ground of sexual orientation, has become an area of concern for some employees. The Employment Equity Act 55 of 1998 (EEA), which was enacted to give effect to section 9(4) of the Constitution, prohibits unfair discrimination on various grounds, which includes the ground of sexual orientation. LGBT is an acronym which consists of lesbian, gay, bisexual, transgender and queer individuals. These terms are used to describe the sexual orientation or gender identity of an individual. Section 6(1) of the EEA provides that no person may unfairly discriminate, either directly or indirectly against an employee on grounds which includes, *inter alia*, the ground of sexual orientation. Despite the contents of section 6(1) of the EEA, research shows that some employees who form part of the LGBT are discriminated against unfairly. The objective of this study is to analyse the relevant provisions of the EEA and its Regulations. The South African anti-discrimination provisions on the ground of sexual orientation will be discussed and will be compared to the legislation governing unfair discrimination on the ground of sexual orientation in Canada and New Zealand. This study will determine the extent to which the South African legislative framework which governs unfair discrimination on the ground of sexual orientation protects employees against such discrimination and whether the South African legislative framework should be amended and/or supplemented. This will be done by considering literature, case law and journal articles where interviews have been conducted with employees as far as their experiences of unfair discrimination on the ground of sexual orientation is concerned.

KEY WORDS: Canada; Equality; LGBT; New Zealand; Sexual orientation; South Africa; Unfair discrimination; Workplace.

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

Homosexuality was considered subversive during apartheid and this led to doctors and chaplains screening conscript ranks for homosexuals.¹ Harsh punishments were imposed by the South African Defence Force's psychiatrists.² Homosexuals were frequently subjected to narcoanalysis, which bore a chilling resemblance to Soviet-era mental re-education, while others were medically castrated with large quantities of hormones.³ Homosexuals were incarcerated alongside drug addicts, the politically untrustworthy, and the very mentally ill in a psychiatric hospital.⁴ The Constitution⁵ plays an important role in changing South Africa which was plagued by apartheid into one celebrating democracy and freedom.⁶ A Bill of Rights is a central component of the modern constitutional order and the recognition of these rights is central to the reform that the Constitution is supposed to bring about.⁷ Indeed, the revolutionary aims are most thoroughly articulated in the Bill of Rights, which describes a vision of the kind of community that South Africa aspires to be when seeking to resolve the main injustices of the past.⁸

It was held in the case of *President of the Republic of South Africa v Hugo*⁹ that there is a need for actions to address the disadvantage that has resulted from past discrimination.¹⁰ Apartheid represented a regime of state imposed racial discrimination.¹¹ The aim of the apartheid regime was to enforce a racial hierarchy in order to benefit white South Africans at a considerable cost to the rest of South

¹ Kaplan RM 'Treatment of homosexuality during apartheid.' (2004) 329 *BMJ* 1415.

² Kaplan RM 'Treatment of homosexuality during apartheid.' (2004) 329 *BMJ* 1415.

³ Kaplan RM 'Treatment of homosexuality during apartheid.' (2004) 329 *BMJ* 1415.

⁴ Kaplan RM 'Treatment of homosexuality during apartheid.' (2004) 329 *BMJ* 1415.

⁵ The Constitution of the Republic of South Africa, 1996.

⁶ Booyesen S 'Twenty Years of South African Democracy: Citizen Views of Human Rights, Governance and the Political System.' (2014) 1-2.

⁷ Bilchitz D & Du Toit L 'Assessing the Performance of South Africa's Constitution.' (2016) *Institute for Democracy and Electoral Assistance* 2.

⁸ Bilchitz D & Du Toit L 'Assessing the Performance of South Africa's Constitution.' (2016) *Institute for Democracy and Electoral Assistance* 2.

⁹ *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC).

¹⁰ *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) para 41.

¹¹ Bilchitz D & Du Toit L 'Assessing the Performance of South Africa's Constitution.' (2016) *Institute for Democracy and Electoral Assistance* 3.

Africa.¹² One of the founding provisions of the Constitution of South Africa is that the state is focused on the achievement of equality and on the promotion of human rights and freedoms.¹³ In addition, the Constitution seeks to create a non-racial, non-sexist democratic society.¹⁴

South Africa was one of the first countries in the world to provide constitutional protection to individuals who are subjected to unfair discrimination on the ground of sexual orientation.¹⁵ Section 9 of the Constitution¹⁶ which governs the right to equality makes provision for freedom from unfair discrimination; the provision for measures of affirmative action; the prohibition of unfair discrimination and the enactment of national legislation which aims to prohibit unfair discrimination.¹⁷ Broadly put, in *Prinsloo v Van der Linde and Another*,¹⁸ it was held that the equality provision provides that no individual should for any reason be above or beneath the law; everyone should be subject to the same law and that no individual should be denied protection of the law.¹⁹ The Constitution specifically recognises equal protection and benefit of the law for all, regardless of their sexual orientation.²⁰

Discrimination on the ground of sexual orientation consists of differential treatment of individuals who classify themselves as lesbian²¹, gay²², bisexual²³, transgender²⁴,



¹² Bilchitz D & Du Toit L 'Assessing the Performance of South Africa's Constitution.' (2016) *Institute for Democracy and Electoral Assistance* 3.

¹³ Section 1(a) of the Constitution of South Africa, 1996.

¹⁴ Bilchitz D & Du Toit L 'Assessing the Performance of South Africa's Constitution.' (2016) *Institute for Democracy and Electoral Assistance* 4.

¹⁵ Van Zyl M 'Working the margins: Belonging and the workplace for LGBTI in post-apartheid South Africa', in Colgans F & Rumens N (eds), 'Orientation at Work: Contemporary Issues and Perspectives.' (2015) 137.

¹⁶ Section 9 of the Constitution of South Africa, 1996.

¹⁷ Section 9 of the Constitution of South Africa, 1996.

¹⁸ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC).

¹⁹ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 22.

²⁰ McConnachie C 'Equality and Unfair Discrimination in Education', in Veriava F, Thom A & Hodgson TF 'Basic Education Rights Handbook: Education Rights in South Africa.' (2016) 93.

²¹ Lesbian: A woman who is emotionally, romantically, or sexually attracted to other women.

²² Gay: A person who is emotionally, romantically, or sexually attracted to members of the same gender.

²³ Bisexual: A person emotionally, romantically, or sexually attracted to more than one sex, gender or gender identity though not necessarily simultaneously, in the same way or to the same degree.

²⁴ Transgender: An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.

transsexual²⁵, queer²⁶, questioning²⁷, intersex²⁸, asexual²⁹, ally³⁰ and pansexual,³¹ where such treatment has the potential to impair the human dignity of such individuals as human beings.³²

An individual may be discriminated against on more than one ground such as on the grounds of sex, gender, sexual orientation and gender identities.³³ Although these grounds³⁴ may be considered to be closely related, it is important that the particular difficulties and perspectives³⁵ of the LGBT community be understood.³⁶ Focus should be placed on patterns of responses across sexual orientation identity³⁷ and a range of gender identities³⁸ to fully capture the diversity of LGBT experiences.³⁹ In the instance of heterosexuals, individuals will be attracted to those of the opposite sex and in the case of gays and lesbians, individuals will be attracted to those of the same sex.⁴⁰ This implies that a homosexual can be anyone who is erotically attracted to members of their own sex.⁴¹ According to Giddens A, sexual orientation

²⁵ Transsexual: Denoting or relating to a transgender person, especially one whose bodily characteristics have been altered through surgery or hormone treatment to bring them into alignment with their gender identity

²⁶ Queer: A term people often use to express a spectrum of identities and orientations that are counter to the mainstream.

²⁷ Questioning: A term used to describe people who are in the process of exploring their sexual orientation or gender identity.

²⁸ Intersex: Intersex people are born with a variety of differences in their sex traits and reproductive anatomy.

²⁹ Asexual: Often called “ace” for short, asexual refers to a complete or partial lack of sexual attraction or lack of interest in sexual activity with others.

³⁰ Ally: A term used to describe someone who is actively supportive of LGBTQ+ people.

³¹ Pansexual: Describes someone who has the potential for emotional, romantic, or sexual attraction to people of any gender though not necessarily simultaneously, in the same way or to the same degree.

³² Mubangizi JC & Twinomugisha BK. *‘Protecting the Right to Freedom of Sexual Orientation: What can Uganda Learn from South Africa?’* vol. 22 (2011) p. 332.

³³ South African Human Rights Commission (SAHRC) *‘National Hearing on Unfair Discrimination in The Workplace.’* (2016) 43.

³⁴ The ‘grounds’ refer to discrimination based on the grounds of sex, gender, sexual orientation and gender identities as mentioned above.

³⁵ These ‘particular difficulties and perspectives’ include being physically beaten, mentally tortured and workplace harassment (to mention a few) which changes one’s perspective on how you view and trust people and around you and those in charge who simply just stand by.

³⁶ South African Human Rights Commission (SAHRC) *‘National Hearing on Unfair Discrimination in The Workplace.’* (2016) 43.

³⁷ Such as lesbian, gay, bisexual, pansexual, fluid, queer, asexual, etc.

³⁸ Such as cisgender, transgender, trans woman, trans man, genderqueer, etc.

³⁹ Cubrich M *‘Understanding the Work Experiences of Gender and Sexual Minorities: Advances, Issues, and New Direction in Research’* (2019) 2 *Psychology from the Margins* 3.

⁴⁰ Cameron E *‘Sexual Orientation and the Constitution: A Test case for Human Rights’* (1993) *South African Law Journal* 452.

⁴¹ Cameron E *‘Sexual Orientation and the Constitution: A Test case for Human Rights’* (1993) *South African Law Journal* 452.

is geared towards an individual's sexual or romantic attraction.⁴² He claims that a complex interplay of biological and social factors, which are not yet fully understood, results in sexual orientation in all cultures.⁴³

1.2 WHO FALLS UNDER THE CATEGORY OF THE LGBT COMMUNITY?

While the acronym 'LGBT' is widely used, it does not convey the numerous ways in which the citizens of South Africa understand sexual orientation, gender identity and gender expression.⁴⁴ The broad interpretation of LGBT is often used as an umbrella term to refer to individuals whose sexual orientation and gender do not adhere to their society's cultural norms and this interpretation includes individuals who identify as lesbian, gay, bisexual, transgender, transsexual, queer, questioning, intersex, asexual, ally and pansexual (hereafter referred to as LGBT).⁴⁵ It is important to note that new sexualities and gender identifications are constantly being introduced and as such a new taxonomy of gender and sexuality, which actively challenges authorised and institutional knowledge on identity and social practices is emerging.⁴⁶ The narrow interpretation of LGBT is that it is a term specifically used to refer to lesbian, gay bisexual and/or transgender individuals.⁴⁷

In the lives of sexual minority individuals, coming out is a dynamic phenomenon.⁴⁸ Coming out refers to the process by which some individuals of the LGBT community inform themselves, their families, friends, and society about their sexual orientation or gender identity.⁴⁹ Coming out is a complicated process that requires questions such as whether the person should come out, when the person will come out, where the person will come out, how the person will come out and to whom the person will come out to.⁵⁰ Sexual identity concealment has been shown to take a toll on

⁴² Giddens A & Sutton PW 'Sociology' 6 ed (2009) 581.

⁴³ Giddens A & Sutton PW 'Sociology' 6 ed (2009) 581.

⁴⁴ Nyeck SN & Shepherd D 'The Economic Cost of LGBT Stigma and Discrimination South Africa.' (2019) 18.

⁴⁵ Park A 'How to use the term LGBT in a paper, proposal or presentation.' (2019) 2.

⁴⁶ Cover R 'Emergent Identities: New Sexualities, Genders and Relationships in a Digital Era.' (2018) 12.

⁴⁷ Park A 'How to use the term LGBT in a paper, proposal or presentation.' (2019) 2.

⁴⁸ Ali S 'The Coming Out Journey: A Phenomenological Investigation of a Lifelong Process.' (2015) VISTAS 1.

⁴⁹ Dawgert S 'The Process of Coming Out: Sexual Violence & Individuals Who Identify as LGBTQ.' (2012) National Sexual Violence Resource Center 1.

⁵⁰ Ozeren E 'Sexual Orientation Discrimination in the Workplace: A systematic Review of Literature.' (2014) 1206.

cognitive resources, hinder identity expression and interfere with close relationship maintenance and development.⁵¹ The risks and benefits of coming out in a specific context should be carefully assessed by each LGBT employee.⁵² A few benefits of being out in the workplace include improved recruitment and increasing employment productivity.⁵³ One of the biggest risks include being dismissed.⁵⁴ While the beneficial effects were revealed by previous studies, the many uncertainties linked to the decision to come out must be addressed.⁵⁵ Several authors noted that LGBT employees who identified as 'out' in the workplace had greater organisational affective involvement and greater job satisfaction, as well as fewer work and home conflicts, and less uncertainty and tension in the position.⁵⁶

The Human Rights Campaign found that LGBT employees allowed to be open and supported at work will be 20 to 30 percent more productive.⁵⁷ Participants who worked with openly gay partners were found to do better on both cognitive and sensory-motor tests than people who were unsure about the sexual orientation of their working partners.⁵⁸ However, when their cognition is undermined, LGBT workers may underperform because their cognitive energy may be spent on suppressing or concealing their true sexual orientation.⁵⁹ It can also be argued that coming out can promote success in some situations and circumstances, such as better work performance, and on the other hand, non-disclosure of sexual orientation can have a detrimental effect on their work performance, due to the stress and anxiety associated with the decision to come out and the potential unfair

⁵¹ Ryan WS, Legate N & Weinstein N 'Coming Out as Lesbian, Gay, or Bisexual: The Lasting Impact of Initial Disclosure Experiences.' (2015) 14 *Self and Identity* 550.

⁵² Ozeren E 'Sexual Orientation Discrimination in the Workplace: A systematic Review of Literature.' (2014) 1206.

⁵³ Badgett MVL, Durso LE, Kastanis A & Mallory C. 'The Business Impact of LGBT-Supportive Workplace Policies.' (2013) *The William Institute Law Review* 5.

⁵⁴ Fidas D & Cooper L 'The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers.' (2014) *Human Rights Campaign Foundation* 2.

⁵⁵ For example, the overall perceptions of individuals revealed that homosexual men were the most likely employees to be fired once identity disclosure occurred. The research stream related to 'coming out' concentrates on the issue of self-disclosure by LGBT employees. Issues addressed include timing, methods, and consequences of coming out in the workplace.

⁵⁶ Day NE & Schoenrade P 'Staying in the closet versus coming out: Relationships between communication and sexual orientation and work attitudes.' (1997) 50 *Personnel Psychology* 147.

⁵⁷ Fidas D & Cooper L 'The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers.' (2014) *Human Rights Campaign Foundation* 6.

⁵⁸ Ozeren E 'Sexual Orientation Discrimination in the Workplace: A systematic Review of Literature.' (2014) 1206.

⁵⁹ Madera JM 'The Cognitive Effects of Hiding One's Homosexuality in the Workplace.' (2010) 3 *Industrial and Organizational Psychology* 88.

discrimination and harassment an employee could face in the workplace as a result thereof.⁶⁰ This contrasts with the common perception that collaborating with LGBT workers openly would harm the results.

1.3 PROBLEM STATEMENT

The consequence of the systematic racial ordering and discrimination under apartheid is that South Africa remains deeply unequal.⁶¹ South Africa continues to battle between upholding its constitutional commitment to protect gay rights and standing in solidarity with South Africans who discriminate against people on the ground of their sexual orientation.⁶²

Research shows that some individuals who form part of the LGBT community are subjected to unfair discrimination.⁶³ This transcends into the workplace since surveys conducted in respect of the LGBT community within the workplace reflect similar results.⁶⁴ LGBT employees face a variety of challenges in the workplace.⁶⁵ LGBT employees' rights have emerged as a primary issue for labour groups, both here in South Africa and globally.⁶⁶ This is due to a growing body of research showing that high levels of marginalisation and abuse are faced by LGBT employees.⁶⁷ Research shows that in certain cases, due to their presumed sexual orientation or gender non-conformity, LGBT job seekers are unable to obtain employment.⁶⁸ Many who manage to secure jobs face numerous types of unfair

⁶⁰ Ozeren E 'Sexual Orientation Discrimination in the Workplace: A systematic Review of Literature.' (2014) 1206

⁶¹ Seekings J 'The continuing salience of race: Discrimination and diversity in South Africa.' (2008) 26 *Journal of Contemporary African Studies* 1.

⁶² Fabricius P 'Just how serious is South Africa about gay rights?' available at <https://www.politicsweb.co.za/news-and-analysis/just-how-serious-is-south-africa-about-gay-rights> (Accessed 10 June 2020).

⁶³ Out, a South African Rights organisation, conducted a survey of more than 2000 individuals who are part of the LGBT community. It was found that 39 percent were verbally assaulted during a two-year timeframe, 20 percent were threatened with physical attacks, 17 percent were "chased or followed," and approximately 10 percent were physically attacked.

⁶⁴ Benjamin N & Reygan F 'PRIDE at Work: A study on discrimination at work on the Basis of Sexual Orientation and Gender Identity in South Africa.' (2016) iii.

⁶⁵ Ozeren E 'Sexual Orientation Discrimination in the Workplace: A systematic Review of Literature.' (2014) 1204.

⁶⁶ Benjamin N, Twala N & Reygan F 'Are Our Workplaces Safe and Supportive? Real-life Experiences of Lesbian, Bisexual and Nonconforming Women.' (2015) 5.

⁶⁷ Benjamin N, Twala N & Reygan F 'Are Our Workplaces Safe and Supportive? Real-life Experiences of Lesbian, Bisexual and Nonconforming Women.' (2015) 5.

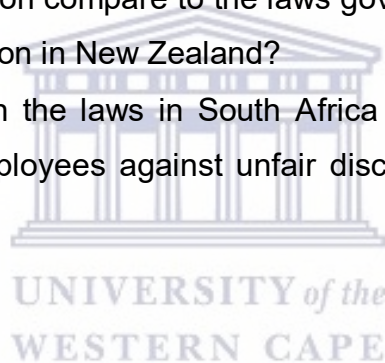
⁶⁸ Benjamin N, Twala N & Reygan F 'Are Our Workplaces Safe and Supportive? Real-life Experiences of Lesbian, Bisexual and Nonconforming Women.' (2015) 5.

discrimination, including restriction of job duties and, among others, being passed over for promotion.⁶⁹

1.4 RESEARCH QUESTION

This study examines a central research question: To what extent does the South African legislative framework which governs unfair discrimination protect employees against discrimination on the ground of sexual orientation? This study answers the sub-questions below:

- How does the South African legislative framework governing unfair discrimination on the ground of sexual orientation compare to the laws governing unfair discrimination on the ground of sexual orientation in Canada?
- How does the South African legislative framework governing unfair discrimination on the ground of sexual orientation compare to the laws governing sexual orientation on the ground of sexual orientation in New Zealand?
- Are there any ways in which the laws in South Africa should be amended and/or supplemented to protect employees against unfair discrimination on the ground of sexual orientation?



1.5 AIMS OF THE STUDY

The aim of this study is to determine the extent to which the South African law governing unfair discrimination protects employees against unfair discrimination on the ground of sexual orientation. In making this determination, South Africa's legislative framework governing unfair discrimination on the ground of sexual orientation will be discussed.

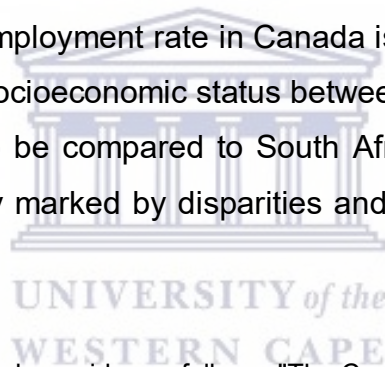
This study compares the South African legislative framework governing unfair discrimination on the ground of sexual orientation to the legislative frameworks in Canada and New Zealand. Canada's jurisdiction has been chosen due to the similarities between Canada and South Africa.⁷⁰ As in South Africa, all legislation in

⁶⁹ Other examples include animosity from co-workers and supervisors; name-calling; verbal and physical intimidation; blackmail; limited productivity and career progression; and physical and sexual violence.

⁷⁰ Fredman S 'Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India' (2012) 7.

Canada should be consistent with their Constitution.⁷¹ Like South Africa,⁷² the power of Canada's government is also divided into three branches: the legislative, executive and the judicial branches.⁷³ South Africa consists of nine provinces with a central government enacting national legislation which applies to the entire country.⁷⁴ Canada is a federal country established by the British North America Act 1867⁷⁵ which was amended by the Constitution Act 1982,⁷⁶ the supreme law of Canada.⁷⁷

There are ten provinces and three territories in the Federation, each governed separately by legislative authority to enact legislation binding on that specific jurisdiction.⁷⁸ There is a noticeable difference between the socioeconomic status in Canada and South Africa and this is seen in certain aspects such as life expectancy and the unemployment rate. In South Africa, the life expectancy of a male is 62 years and that of a female is 67 years.⁷⁹ In Canada, the life expectancy of a male is 79 years and that of a female is 84 years.⁸⁰ The unemployment rate in South Africa is 34.5%,⁸¹ whereas the unemployment rate in Canada is 5.5%.⁸² Even though there is a difference between the socioeconomic status between South Africa and Canada, Canada has been chosen to be compared to South Africa because both countries have emerged from a history marked by disparities and segregationist policies.⁸³ In



⁷¹ Constitution Act 1982 s 52(1) which provides as follows: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

⁷² S8(1) of the Constitution of the Republic of South Africa, 1996.

⁷³ Sheehy B & Feaver D 'Re-Thinking Executive Control of and Accountability for the Agency.' (2016) *SSRN Electronic Journal* 177.

⁷⁴ Van Vuuren JPJ *A Legal Comparison Between South African, Canadian and Australian Workmen's Compensation Law* (unpublished LLM thesis, University of South Africa, 2013) 15.

⁷⁵ British North America Act of 1867.

⁷⁶ Constitution Act of 1982.

⁷⁷ Van Vuuren JPJ *A Legal Comparison Between South African, Canadian and Australian Workmen's Compensation Law* (unpublished LLM thesis, University of South Africa, 2013) 33.

⁷⁸ Van Vuuren JPJ *A Legal Comparison Between South African, Canadian and Australian Workmen's Compensation Law* (unpublished LLM thesis, University of South Africa, 2013) 34.

⁷⁹ Dorrington R, Bradshaw D, Laubscher R & Nannan N 'Rapid Mortality Surveillance Report 2019 & 2020.' (2021) ii.

⁸⁰ Bushnik T, Tjepkema M & Martel L 'Health-adjusted life expectancy in Canada.' (2018) 17-18.

⁸¹ Mahlakoana T 'Unemployment Ticks Down in Q1 of 2022 – Stats SA Data.' available at <https://ewn.co.za/2022/05/31/unemployment-ticks-down-in-q1-of-2022-stats-sa-data> (Accessed 11 June 2022).

⁸² Statistics Canada 'Labour Force Survey, February 2022.' available at <https://www150.statcan.gc.ca/n1/en/daily-quotidien/220311/dq220311a-eng.pdf?st=xEFH0Nbh> (Accessed 11 June 2022).

⁸³ Dlamini DV *A Comparative Study of Employment Discrimination in South Africa and Canada*. (unpublished LLM thesis, University of Port Elizabeth, 2004) iii.

both countries, such inequities have acted as an epitome of discrimination in society and the workplace.⁸⁴

Due to Canadian provinces being governed separately by their respective legislative authorities, for the purpose of this research, Ontario and British Columbia are the two chosen provinces which will be examined with Canada's federal law. Ontario is the most populated province, accounting for more than one-third of the country's total population.⁸⁵ Ontario is both the economic pacemaker and a powerful political force in Canada.⁸⁶ Therefore, Ontario has been chosen to be examined as one of the provinces in Canada. British Columbia emerged in the second half of the 20th century as one of Canada's most populous, prosperous and growing provinces.⁸⁷ British Columbia is one of the more British of the provinces in Canada, however, it is also one of its most ethnically diverse.⁸⁸ Therefore, British Columbia has been chosen to be examined as one of the provinces in Canada. Similar to the EEA in South Africa, unfair discrimination of employees on the ground of sexual orientation is prohibited in Canada by the Ontario Human Rights Code⁸⁹ and in British Columbia by the British Columbia's Human Rights Code (hereafter referred to as the Human Rights Code).⁹⁰

The socioeconomic position of New Zealand and South Africa differs substantially, as evidenced by various factors such as life expectancy and unemployment rates. In South Africa, a male has a life expectancy of 62 years, and a female has a life expectancy of 67 years.⁹¹ In New Zealand, a male has an average life expectancy of 86 years and a female has an average life expectancy of 89 years.⁹² South Africa has a 34.5% unemployment rate, whereas New Zealand has a 3.2% unemployment

⁸⁴ Dlamini DV *A Comparative Study of Employment Discrimination in South Africa and Canada* (unpublished LLM thesis, University of Port Elizabeth, 2004) iii.

⁸⁵ Wise SF 'Ontario province, Canada.' available at <https://www.britannica.com/place/Ontario-province> (accessed 17 September 2021).

⁸⁶ Wise SF 'Ontario province, Canada.' available at <https://www.britannica.com/place/Ontario-province> (accessed 17 September 2021).

⁸⁷ Johnston HJ 'British Columbia province, Canada.' available at <https://www.britannica.com/place/British-Columbia> (accessed 22 September 2021).

⁸⁸ Johnston HJ 'British Columbia province, Canada.' available at <https://www.britannica.com/place/British-Columbia> (accessed 22 September 2021).

⁸⁹ Ontario Human Rights Code, 1962.

⁹⁰ British Columbia's Human Rights Code, 1996.

⁹¹ Dorrington R, Bradshaw D, Laubscher R & Nannan N 'Rapid Mortality Surveillance Report 2019 & 2020.' (2021) ii.

⁹² O'Connell A 'By the Retirement Income Interest Group of the New Zealand Society of Actuaries.' (2019) 5.

rate.⁹³ Despite the differences in socioeconomic status between South Africa and New Zealand, New Zealand was chosen to be compared to South Africa because, like South Africans, New Zealanders of diverse genders, sexualities, and sex characteristics have exhibited pride in a variety of ways throughout history.⁹⁴ New Zealand, like South Africa, recognises that the LGBT community continues to experience challenges and therefore continue to strive for a safe and inclusive working environment for individuals of all gender identities and sexual orientations.⁹⁵ New Zealand's Constitution is the sum of laws and principles that define New Zealand's democratic governance.⁹⁶ New Zealand's Constitution is spread across a number of formal documents, with the most important constitutional document being the Constitution Act 1986.⁹⁷ The government in New Zealand, similar to South Africa,⁹⁸ consists of three branches: the executive, the legislative and the judiciary.⁹⁹ Similar to the EEA in South Africa, unfair discrimination of employees on the ground of sexual orientation is prohibited in New Zealand by the Employment Relations Act 2000.¹⁰⁰

For the purpose of this study, the persons who form part of the LGBT community are the following: lesbian, gay, bisexual, transgender, transsexual, queer, questioning, intersex, asexual, ally and pansexual. While unfair discrimination on other grounds, such as race and age exist in South Africa, unfair discrimination of persons who form part of the LGBT community will be the focus of this study when discussing unfair discrimination in the workplace. This research will focus on the experiences of employees on all levels of workplaces who are subjected to unfair discrimination on the ground of sexual orientation.

⁹³ Statistics New Zealand 'Labour market statistics: March 2022 quarter.' available at <https://www.stats.govt.nz/information-releases/labour-market-statistics-march-2022-quarter> (Accessed 11 June 2022).

⁹⁴ Hansen W 'A history of pride in Aotearoa New Zealand.' available at <https://www.tepapa.govt.nz/discover-collections/read-watch-play/history/lgbtqi-histories-aotearoa-new-zealand/history-pride> (Accessed 11 June 2022).

⁹⁵ National Defence Force 'LGBTTIQ+ INCLUSION PLAN: Maintaining and Sustaining LGBTTIQ+ Inclusion.' (2020) 5.

⁹⁶ Geddis A 'Parliamentary government in New Zealand: Lines of continuity and moments of change.' (2016) 14 *International Journal of Constitutional Law* 99.

⁹⁷ Geddis A 'Parliamentary government in New Zealand: Lines of continuity and moments of change.' (2016) 14 *International Journal of Constitutional Law* 99.

⁹⁸ S8(1) of the Constitution of the Republic of South Africa, 1996.

⁹⁹ Glazebrook JS, Baird N & Holden S. 'New Zealand: Country Report on Human Rights.' (2009) 40 *Victoria University of Wellington Law Review* 57.

¹⁰⁰ Employment Relations Act 2000.

1.6 SIGNIFICANCE OF THE STUDY

Some South Africa's organisations continue to remain reluctant in its acceptance of sexual orientation within the workplace, compared to other dimensions of diversity, regardless of the protective laws in place.¹⁰¹ This leads to concerns about the value of protection afforded to these workers against discrimination on the ground of their sexual orientation. The South African Constitution and the EEA prohibits unfair discrimination of employees on the ground of sexual orientation.¹⁰² While widespread and firmly rooted, research shows that unfair discrimination faced by LGBT employees is not a concern that currently sits very high on employers' agendas.¹⁰³ The fact that research shows that some employees are subjected to unfair discrimination on the ground of sexual orientation, while the Constitution and the EEA prohibits such discrimination is concerning. It is important to determine whether the problem stems from the legislative framework in South Africa and if so, whether said provisions should be amended alternatively to protect such employees.

1.7 THE SUGGESTED ANSWER TO THE PROBLEM

The reason for employees being subjected to unfair discrimination on the ground of sexual orientation may be due to additional measures having to be enacted to protect employees who are subjected to unfair discrimination on the ground of sexual orientation.

1.8 LITERATURE REVIEW

Mubangizi JC and Twinomugisha BK provides valuable information on sexual orientation in South Africa and on the rights afforded to members of the LGBT community.¹⁰⁴ The authors conclude that despite constitutional protection and legal reform, cultural prejudices against the LGBT persist.¹⁰⁵ While these authors provide valuable information on discrimination on the ground of sexual orientation

¹⁰¹ Ozeren E 'Sexual Orientation Discrimination in The Workplace: A Systematic Review of Literature.' vol. 109 (2014) 1203.

¹⁰² Section 9 Constitution of the Republic of South Africa, 1996.

¹⁰³ Benjamin N, Twala N & Reygan F 'Are Our Workplaces Safe and Supportive? Real-life Experiences of Lesbian, Bisexual and Gender-nonconforming woman.' (2015) 3.

¹⁰⁴ Mubangizi JC & Twinomugisha BK 'Protecting the Right to Freedom of Sexual Orientation: What can Uganda Learn from South Africa?' vol. 22 (2011) p. 331.

¹⁰⁵ Mubangizi JC & Twinomugisha BK 'Protecting the Right to Freedom of Sexual Orientation: What can Uganda Learn from South Africa?' vol. 22 (2011) p. 338.

experienced by individuals generally, this thesis will be a more focused study concentrating on the experiences of *employees*¹⁰⁶ in the workplace within South Africa.

Benjamin and Reygan highlight the legal provisions which are relevant to the application and enforcement of rights of LGBT employees in the workplace.¹⁰⁷ This article states that in order to decrease unfair discrimination on the ground of sexual orientation in the workplace, laws, policies and practices should be changed.¹⁰⁸ Just like this article, this thesis will evaluate the legislative framework governing unfair discrimination on the ground of sexual orientation in the workplace. While Benjamin and Reygan's article solely focused on discrimination on the ground of sexual orientation in South Africa, this thesis will compare the laws governing unfair discrimination of employees on the ground of sexual orientation in Canada and New Zealand to that in South Africa.

1.9 RESEARCH METHODOLOGY

This thesis adopts a desktop research methodology that consists of a discussion and analysis of primary and secondary sources. The primary sources used include the Constitution, legislation and case law. The Constitution is discussed since legislation should be consistent with the Constitution. Legislation is discussed in order to determine the ways in which LGBT employees are protected at present. Case law is analysed to determine the way in which legislation is applied by the judiciary. Conclusive data contained in legal reports by the South African government included in this thesis aims to illustrate the position at present when it comes to the discrimination which employees are subjected to on the ground of sexual orientation.

Secondary sources such as textbooks and journal articles are used in this thesis. Textbooks and journal articles are important to determine the views of various authors on the law governing discrimination on the ground of sexual orientation in the workplace. While textbooks deal with the content of the law, journal articles will

¹⁰⁶ A person employed for wages or salary, especially at nonexecutive level.

¹⁰⁷ Benjamin N & Reygan F 'PRIDE at Work: 'A study on discrimination at work on the Basis of Sexual Orientation and Gender Identity in South Africa.' (2016) 6-12.

¹⁰⁸ Benjamin N & Reygan F 'PRIDE at Work: 'A study on discrimination at work on the Basis of Sexual Orientation and Gender Identity in South Africa.' (2016) 49.

be utilised to obtain an analysis of the law, which governs unfair discrimination on the ground of sexual orientation in the workplace. Journal articles will also be used where interviews have been conducted with employees as far as their experiences of unfair discrimination on the ground of sexual orientation is concerned in order to examine the outcomes of the interviews.

1.10 CHAPTER OUTLINE

The first chapter contains *inter alia*, the problem statement, the aims of the study, the research question, the literature review, the significance of this study and the research methodology.

The second chapter contains a discussion on the legislative provisions governing unfair discrimination on the ground of sexual orientation in South Africa. It consists of a discussion on discrimination, unfairness and the remedies that are available to employees.

The third chapter consists of a discussion on the legislation governing unfair discrimination of employees on the ground of sexual orientation in Canada. This is done in order to compare the law in Canada governing unfair discrimination on the ground of sexual orientation to the law in South Africa governing unfair discrimination on the ground of sexual orientation. The lessons learned from Canada's legislation will also be discussed in this chapter.

The fourth chapter consists of a discussion on the legislation governing unfair discrimination of employees on the ground of sexual orientation in New Zealand. This is done to compare the law in New Zealand governing unfair discrimination on the ground of sexual orientation to the law in South Africa governing unfair discrimination on the ground of sexual orientation. The lessons learned from New Zealand's legislation will also be discussed in this chapter.

The fifth chapter will contain the conclusion and the recommendations.

CHAPTER 2

THE SOUTH AFRICAN LEGISLATIVE PROVISIONS GOVERNING UNFAIR DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION

2.1 INTRODUCTION

South Africa's 1996 Constitution demonstrated foresight by becoming the world's first Constitution to ban unfair discrimination on the ground of sexual orientation.¹⁰⁹ The EEA¹¹⁰ was enacted to give effect to section 9(4) of the Constitution.¹¹¹ For this reason the EEA has to be relied on by employees who are alleging unfair discrimination, and not the Constitution.¹¹² The EEA aims to promote the constitutional right to equality, eliminate unfair discrimination in employment and ensure the implementation of employment equity to redress the effects of unfair discrimination.¹¹³

Chapter II of the EEA,¹¹⁴ which deals with the prohibition of unfair discrimination applies to all employees as well as to all employers.¹¹⁵ Chapter III of the EEA,¹¹⁶ which governs affirmative action, applies to designated employers and to people from designated groups, except where otherwise provided.¹¹⁷ A 'designated employer' is defined by the EEA as:

- (a) 'A person who employs 50 or more employees;
- (b) A person who employs fewer than 50 employees but has a total annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of the Schedule 4 of this Act;
- (c) a municipality, as referred to in Chapter 7 of the Constitution;
- (d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and

¹⁰⁹ Crehan P, Daly F, Fletcher L and Pichler S 'A Global Examination of LGBT Workplace Equality Indices.' (2020) 5.

¹¹⁰ The Employment Equity Act 55 of 1998.

¹¹¹ Preamble of Employment Equity Act 55 of 1998.

¹¹² Only if a statute, or the common law, fails to protect a basic right does it become permissible to rely directly on the Constitution.

¹¹³ Preamble of Employment Equity Act 55 of 1998.

¹¹⁴ Chapter II of the Employment Equity Act 55 of 1998.

¹¹⁵ Section 4(1) of the Employment Equity Act 55 of 1998.

¹¹⁶ Chapter III of the Employment Equity Act 55 of 1998.

¹¹⁷ Section 12 of the Employment Equity Act 55 of 1998.

- (e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.¹¹⁸

The EEA provides that 'black people' is a generic term which includes Africans, Coloureds and Indians.¹¹⁹ The Chinese community has been included in the definition of 'black people' following the decision in *Moresport (Pty) Limited v Commissioner for the South African Revenue Service and Others*.¹²⁰ The EEA defines 'designated groups' as black people, women and people with disabilities who-

- (a) are citizens of the Republic of South Africa by birth or descent; or
(b) became citizens of the Republic of South Africa by naturalisation-
- (i) before 27 April 1994; or
 - (ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.¹²¹

This chapter contains a discussion on discrimination, unfairness and the remedies that are available to employees. The legislative provisions governing equal pay for work of equal value and affirmative action are also discussed in this chapter. This is done to determine the extent to which the South African legislative framework governing unfair discrimination protects employees against discrimination on the ground of sexual orientation.

¹¹⁸ Every designated employer must develop and execute an employment equity plan. A designated employer has obligations to appoint a senior employment equity manager, collect data, create employment equity awareness with regard to all employees, appoint an employment equity committee, conduct regular consultations, draft an analysis, draft an employment equity plan in accordance with section 13 of the EEA and submit employment equity reports in accordance with section 2 of the EEA. The Employment Equity Amendment Bill intends to amend the definition of a 'designated employer' by providing that employers who employ fewer than 50 employees, (regardless of their turnover) will no longer fall within the definition of 'designated employer' and will not be required to comply with Chapter III of the Act relating to affirmative action.

¹¹⁹ Section 1 of the Employment Equity Act 55 of 1998.

¹²⁰ *Moresport (Pty) Limited v Commissioner for the South African Revenue Service and Others* 36853/2006 [2008] ZAGPHC 95.

¹²¹ Section 1 of the Employment Equity Act 55 of 1998.

2.2 UNFAIR DISCRIMINATION

Section 5 of the EEA¹²² places an onus on the employer to promote equal opportunity in the workplace and section 6 of the EEA¹²³ governs unfair discrimination in the workplace.¹²⁴ Section 5 of the EEA¹²⁵ provides that:

‘Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.’¹²⁶

Section 6 of the EEA¹²⁷ provides that:

- (1) ‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any arbitrary ground.
- (2) It is not unfair discrimination to—
 - (a) take affirmative action measures consistent with the purpose of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.’¹²⁸

Section 5 of the EEA places the burden on employers to ‘take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice’.¹²⁹ Section 6 of the EEA specifically prohibits unfair discrimination on the ground of sexual orientation.¹³⁰ By protecting employees from direct and indirect unfair discrimination, on numerous grounds, and by placing the burden on employers to take action to achieve equal opportunity by eliminating unfair discrimination in the workplace shows that section 5 and 6 of the EEA assist in protecting employees against unfair discrimination on the ground of sexual orientation.

¹²² Section 5 of the Employment Equity Act 55 of 1998.

¹²³ section 6 of the Employment Equity Act 55 of 1998.

¹²⁴ section 6 of the Employment Equity Act 55 of 1998.

¹²⁵ Section 5 of the Employment Equity Act 55 of 1998.

¹²⁶ Section 5 of the Employment Equity Act 55 of 1998.

¹²⁷ Section 6 of the Employment Equity Act 55 of 1998.

¹²⁸ Section 6 of the Employment Equity Act 55 of 1998.

¹²⁹ Section 5 of the Employment Equity Act 55 of 1998.

¹³⁰ section 6 of the Employment Equity Act 55 of 1998.

The concept of discrimination and unfairness will be discussed below. The remedies that are available to employees that have been unfairly discriminated against on the ground of sexual orientation will be discussed thereafter.

2.2.1 Discrimination

The EEA seeks to give effect to both ILO Discrimination (Employment and Occupation) Convention 111¹³¹ and the Constitution.¹³² The EEA must be interpreted in accordance with Convention 111.¹³³ Article 1 of the Convention¹³⁴ reads as follows:

- (1) 'The term "discrimination" includes—
 - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
 - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and other appropriate bodies.¹³⁵

The term discrimination is not defined in the EEA, but it is defined in Convention 111.¹³⁶ Since the EEA should be interpreted in accordance with the Convention 111,¹³⁷ the definition of discrimination found in Convention 111 is used in this research.¹³⁸ The Constitutional Court interpreted discrimination in the case of *Prinsloo v Van der Linde and Another*¹³⁹ as incorporating a 'pejorative meaning relating to the unequal treatment of people based on attributes or characteristics attaching to them'.¹⁴⁰ The Constitutional Court further held that unfair discrimination on an unspecified ground primarily implies treating individuals differently in a way

¹³¹ Convention 111 of 1958.

¹³² Niekerk A, Smit N, Christianson MA & McGregor M 'Law@work' 4 ed (2018) 123.

¹³³ Convention 111 of 1958.

¹³⁴ Article 1 of Convention 111 of 1958.

¹³⁵ Article 1 of Convention 111 of 1958.

¹³⁶ Convention 111 of 1958.

¹³⁷ Convention 111 of 1958.

¹³⁸ Niekerk A, Smit N, Christianson MA & McGregor M 'Law@work' 4 ed (2018) 123.

¹³⁹ *Prinsloo v Van der Linde and Another* (1997) 3 SA 1012 (CC).

¹⁴⁰ *Prinsloo v Van der Linde and Another* (1997) 3 SA 1012 (CC) para 31.

that impairs or adversely affects their fundamental dignity as human beings in a comparably serious manner.¹⁴¹

Although the inclusion of the phrase 'any arbitrary ground' in an amendment broadens the scope of the provision marginally, an individual relying on an arbitrary ground must still persuade the court that the ground deserves protection under section 6.¹⁴² Only if there is no objective basis for distinguishing the allocation of benefits does relative or actual disadvantage become unjust.¹⁴³ As a result, the distinction can be defined as 'arbitrary'. The term 'arbitrary' denotes that the distinction is made on the basis of some meaningless criteria.¹⁴⁴ Direct and indirect discrimination are discussed below.

2.2.1.1 Direct discrimination

Direct discrimination is an act which causes unfavourable treatment of a person or group as a result of that person or group's actual or presumed feature.¹⁴⁵ It is not necessary to have discriminatory intent.¹⁴⁶ It is the effect of the discriminatory activity that matters.¹⁴⁷ The discriminatory practice must have an adverse effect on the affected person's dignity.¹⁴⁸ When people are denied freedoms or rights that others enjoy, they are discriminated against in the ordinary sense.¹⁴⁹ Employees who can prove that people in similar situations receive benefits that they may not receive, may be considered to be victims of discrimination.¹⁵⁰

A lesbian employee of the South African Police Services attempted to add her partner to her medical aid as a dependent in the case of *Langemaat v. Minister of*

¹⁴¹ *Prinsloo v Van der Linde and Another* (1997) 3 SA 1012 (CC) para 33.

¹⁴² Grogan J 'Workplace Law' 12 ed (2017) 86-87.

¹⁴³ Grogan J 'Workplace Law' 12 ed (2017) 87.

¹⁴⁴ Grogan J 'Workplace Law' 12 ed (2017) 87.

¹⁴⁵ Laki I 'The concept of discrimination nowadays.' (2014) 189.

¹⁴⁶ *Ontario Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536 para 551; *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (IC) para 1089-90.

¹⁴⁷ *Ontario Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536 para 551; *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (IC) para 1089-90.

¹⁴⁸ For example: In *Stojce v University of KwaZulu-Natal & another* (2006) 26 ILJ 2696 (LC), the court pointed out by way of example that smokers, thugs, rapists, hunters of endangered wildlife and millionaires do not qualify for protection as a class.

¹⁴⁹ Grogan J 'Workplace Law' 12 ed (2017) 86.

¹⁵⁰ Grogan J 'Workplace Law' 12 ed (2017) 86.

Safety and Security.¹⁵¹ Her application was denied due to the medical aid system of the Police not making provision for same-sex partners.¹⁵² The High Court ruled in her favour, finding that the fact that she was denied registering her dependent was discriminatory on the ground of sexual orientation.¹⁵³ Case law, such as *Langemaat*,¹⁵⁴ prove that the South African courts take direct discrimination seriously and continue to uphold the law, with regard to direct discrimination in their judgements.

2.2.1.2 Indirect discrimination

Indirect discrimination takes place 'when seemingly objective barriers exclude members of particular groups due to the members of those groups not being able to surmount the barriers'.¹⁵⁵ Indirect discrimination may be intentional or unintentional,¹⁵⁶ and the employee does not need to show that he was prejudiced or that he suffered loss.¹⁵⁷ The case of *Pretoria City Council v Walker*¹⁵⁸ is one of the most well-known examples of indirect discrimination. The respondents argued that the various methods utilised to calculate monthly dues for municipal services¹⁵⁹ were racially biased.¹⁶⁰ Actual consumption and a uniform rate per household were the two methods used.¹⁶¹ The Constitutional Court agreed in favour of the respondents and held that, while the differentiation was not directly or overtly discriminatory, it was indeed unfairly discriminatory, although indirectly.¹⁶²

The concept of indirect discrimination has had a positive effect in the workplace, opposing numerous employers' neutral job criteria or conditions, such as transfers,

¹⁵¹ Louw R 'Langemaat v. Minister of Safety and Security 1998 (3) SA 312 (T): A Gay and Lesbian Victory but a Constitutional Travesty.' (1993) 15 *South African Journal on Human Rights* 393.

¹⁵² Louw R 'Langemaat v. Minister of Safety and Security 1998 (3) SA 312 (T): A Gay and Lesbian Victory but a Constitutional Travesty.' (1993) 15 *South African Journal on Human Rights* 393.

¹⁵³ Louw R 'Langemaat v. Minister of Safety and Security 1998 (3) SA 312 (T): A Gay and Lesbian Victory but a Constitutional Travesty.' (1993) 15 *South African Journal on Human Rights* 393.

¹⁵⁴ *Langemaat v. Minister of Safety and Security* 1998 (3) SA 312 (T).

¹⁵⁵ Grogan J 'Workplace Law' 12 ed (2017) 87-88.

¹⁵⁶ *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 *ILJ* 1048 (IC).

¹⁵⁷ Grogan J 'Workplace Law' 12 ed (2017) 88.

¹⁵⁸ *Pretoria City Council v Walker* 1998 2 SA 363 (CC).

¹⁵⁹ The municipal services referred to would be water and electricity.

¹⁶⁰ *Pretoria City Council v Walker* 1998 2 SA 363 (CC) para 4.

¹⁶¹ *Pretoria City Council v Walker* 1998 2 SA 363 (CC) para 4.

¹⁶² *Pretoria City Council v Walker* 1998 2 SA 363 (CC) para 32.

promotions or other benefits due to employees.¹⁶³ In the case of *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others*,¹⁶⁴ the Labour Court (hereafter referred to as LC) held that ‘indirect discrimination arises when seemingly neutral criteria, conditions, or policies are applied to a disproportionate number of members of a certain group in situations when they are not justified’.¹⁶⁵ This case proves that the seemingly neutral practice of paying employees on a monthly or weekly basis had an indirect discriminatory effect.¹⁶⁶ It was held in *Lagadien v University of Cape Town*¹⁶⁷ that an employer would be found to have discriminated against employees indirectly if the use of a seemingly neutral criterion has a substantially negative effect on a specific category and the criterion is not sufficiently relevant to workplace needs to justify that impact.¹⁶⁸

Section 6 of the EEA provides that an employee has the right not to be unfairly discriminated against, directly or indirectly.¹⁶⁹ Case law such as *Pretoria City Council*¹⁷⁰ and *Leonard Dingler Employee Representative Council & Others*¹⁷¹ show that the South African judiciary takes indirect discrimination seriously and continues to uphold the law, with regard to indirect discrimination in their judgements. Employees are protected against discrimination on the ground of sexual orientation by virtue of the law governing the meanings of direct and indirect discrimination.

2.2.1.3 Wage equality

The EEA now specifically includes ‘a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value’ that is directly or indirectly based on one or more of the prohibited grounds as a form of unfair discrimination.¹⁷²

¹⁶³ Dupper O ‘*Proving Indirect Discrimination in Employment: A South African View.*’ (2000) *Juta* 747.

¹⁶⁴ *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1997) 11 BLLR 1438 (LC).

¹⁶⁵ *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1997) 11 BLLR 1438 (LC).

¹⁶⁶ *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1997) 11 BLLR 1438 (LC).

¹⁶⁷ *Lagadien v University of Cape Town* [2001] 1 BLLR 76 (LC).

¹⁶⁸ *Lagadien v University of Cape Town* [2001] 1 BLLR 76 (LC) para 14.

¹⁶⁹ section 6 of the Employment Equity Act 55 of 1998.

¹⁷⁰ *Pretoria City Council v Walker* 1998 2 SA 363 (CC).

¹⁷¹ *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1997) 11 BLLR 1438 (LC).

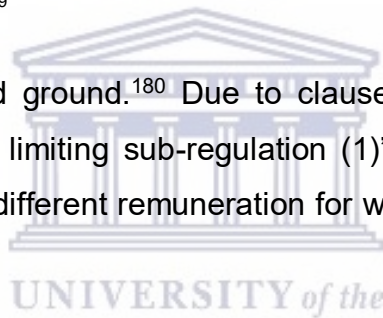
¹⁷² Section 6(4) of the Employment Equity Act 55 of 1998.

Section 6(4) of the EEA¹⁷³ emphasises the requirement of equal pay for work of equal value and prohibits differentiation in terms and conditions of employment.¹⁷⁴

The Employment Equity Regulations of 2014¹⁷⁵ (hereafter referred to as ‘the Regulations’) specify the variables that should be considered when determining if two different jobs are of equal value.¹⁷⁶ It also specifies the methodology to be used in determining an equal pay dispute.¹⁷⁷ Clause 3 of the Regulations¹⁷⁸ provides that:

- (1) ‘An employer must, in order to eliminate unfair discrimination, take steps to eliminate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value if those differences are directly or indirectly based on a listed ground or any arbitrary ground that is prohibited by section 6(1) of the Act.
- (2) Without limiting sub-regulation (1), an employer must ensure that employees are not paid different remuneration for work of equal value based on race, gender or disability.¹⁷⁹

Sexual orientation is a listed ground.¹⁸⁰ Due to clause 3(2) of the Regulations¹⁸¹ including the words ‘Without limiting sub-regulation (1)’, an employer must ensure that employees are not paid different remuneration for work of equal value based on sexual orientation as well.



In terms of clause 4 of the Regulations¹⁸² work is of equal value if it:

- (1) is the same as the work of another employee of the same employer, if their work is identical or interchangeable;
- (2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that

¹⁷³ Section 6(4) of the Employment Equity Act 55 of 1998.

¹⁷⁴ Section 6(4) of the Employment Equity Act 55 of 1998.

¹⁷⁵ Employment Equity Regulations, 2014.

¹⁷⁶ Ebrahim S ‘Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom.’ (2016) 19 *Potchefstroom Electronic Law Journal* 1.

¹⁷⁷ Ebrahim S ‘Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom.’ (2016) 19 *Potchefstroom Electronic Law Journal* 1.

¹⁷⁸ Item 3 of the Employment Equity Regulations, 2014.

¹⁷⁹ Item 3 of the Employment Equity Regulations, 2014.

¹⁸⁰ Item 3(1) of the Employment Equity Regulations, 2014.

¹⁸¹ Item 3(2) of the Employment Equity Regulations, 2014.

¹⁸² Item 4 of the Employment Equity Regulations, 2014.

they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;

- (3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7.¹⁸³

The criteria for determining whether work is of equal value is set out in clause 6 of the Regulations¹⁸⁴ which provides that:

- (1) 'In considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria:
 - (a) the responsibility demanded of the work, including responsibility for people, finances and material;
 - (b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
 - (c) physical, mental and emotional effort required to perform the work; and
 - (d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.
- (2) In addition to the criteria specified in sub-regulation (1) any other factor indicating the value of the work may be taken into account in evaluating work, provided the employer shows that the factor is relevant to assessing the value of the work.
- (3) The assessment undertaken in terms of sub-regulations (1) and (2) must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or any arbitrary ground that is prohibited in terms of section 6(1) of the Act.¹⁸⁵

The grounds to justify differences in remuneration is contained in clause 7 of the Regulations.¹⁸⁶ If the difference in terms and conditions of employment is rational and fair, the employer will be able to differentiate between employees and if it is based on any one or a combination of specified grounds set out in clause 7 of the Regulations.¹⁸⁷ These grounds include seniority and length of service, qualifications, ability, competence or potential, performance, quantity and/or quality of work (provided that employees are subject to the same performance evaluation system

¹⁸³ Item 4 of the Employment Equity Regulations, 2014.

¹⁸⁴ Item 6 of the Employment Equity Regulations, 2014.

¹⁸⁵ Item 6 of the Employment Equity Regulations, 2014.

¹⁸⁶ Item 7 of the Employment Equity Regulations, 2014.

¹⁸⁷ Item 7 of the Employment Equity Regulations, 2014.

which is consistently applied), demotion due to operational requirements, temporary employment for purposes of gaining experience and/or training (internships, learnerships), shortage of relevant skill or the market value in a particular job classification and any other relevant factor that is not discriminatory in terms of section 6(1) of the EEA.¹⁸⁸ In the case of gay men, empirical research has shown that they earn significantly less than their heterosexual counterparts.¹⁸⁹ Research shows that the wage gap is a measure of inequality against socially disadvantaged groups and that LGBT employees earn considerably lower wages than their heterosexual counterparts.¹⁹⁰ The majority of these discrepancies are among gay men, as gay men of the same profession and rank have been found to earn up to 23 percent less than heterosexual men.¹⁹¹ It was concluded that gay men receive between 10 percent and 32 percent less than equally eligible heterosexual men.¹⁹² Research also shows that for lesbians, income disparities are less obvious.¹⁹³ This may be due to varying rates of involvement per job interruptions affecting children in male-dominated fields.¹⁹⁴

Section 6(4) of the EEA¹⁹⁵ states that a difference in terms and conditions of employment between employees doing the same or substantially the same work or work of equal value that is directly or indirectly based on grounds which includes the ground of sexual orientation is unfair discrimination.¹⁹⁶ The Regulations¹⁹⁷ outline the criteria to consider when deciding whether two employees are of equal value, as well

¹⁸⁸ Item 7 of the Employment Equity Regulations, 2014.

¹⁸⁹ Ozeren E 'Sexual Orientation Discrimination in the Workplace: A systematic Review of Literature.' (2014) 1207.

¹⁹⁰ King EB & Cortina JM 'The Social and Economic Imperative of Lesbian, Gay, Bisexual, and Transgendered Supportive Organizational Policies.' (2010) 3 *Society for Industrial and Organisational Psychology* 70.

¹⁹¹ King EB & Cortina JM 'The Social and Economic Imperative of Lesbian, Gay, Bisexual, and Transgendered Supportive Organizational Policies.' (2010) 3 *Society for Industrial and Organisational Psychology* 70.

¹⁹² Badgett MVL, Lau H, Sears B & Ho D 'Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination.' (2007) *The William Institute Law Review* 13.

¹⁹³ The combined data yields an initial sample of 7,182 working people between the ages of 18 and 64. The total number of observations is reduced to 5,998 when the dataset is reduced to those respondents for whom complete information on required sexual behaviour and marital status is available. There are 3,039 males and 2,959 women among them. There are 78 male respondents and 61 female respondents in the primary group of interest-workers who identify as lesbians, gays, and bisexuals openly.

¹⁹⁴ Blanford JM 'The Nexus of Sexual Orientation and Gender in the Discrimination of Earnings.' (2003) 56 *ILR Review* 623.

¹⁹⁵ Section 6(4) of the Employment Equity Act 55 of 1998.

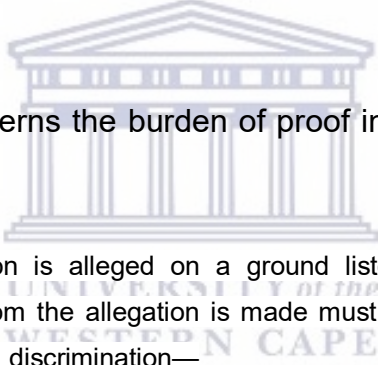
¹⁹⁶ Section 6(4) of the Employment Equity Act 55 of 1998.

¹⁹⁷ Employment Equity Regulations, 2014.

as the methodology to be used in resolving an equal pay conflict and the factors that would explain a pay disparity. Clause 3 of the Regulations places the burden on employers to actively take steps in ensuring that employees are not unfairly discriminated against in terms and conditions of employment.¹⁹⁸ Clause 4 of the Regulations governs the meaning of work of equal value and the criteria for determining whether work is of equal value is governed by item 6 of the Regulations.¹⁹⁹ Section 6(4) of the EEA²⁰⁰ and clauses 3-7 of the Regulations assist in protecting employees who are discriminated against on the ground of sexual orientation. The Regulations²⁰¹ provides protection to LGBT employees in South Africa. However, LGBT employees are still earning less than heterosexual employees.²⁰² The reasons for the inequality may be due to some employers still being uncomfortable with working with LGBT employees and has nothing to do with the legislation discussed.

2.2.2 Unfairness

Section 11 of the EEA²⁰³ governs the burden of proof in unfair discrimination cases which provides that:

- 
- (1) 'If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—
 - (a) did not take place as alleged; or
 - (b) is rational and not unfair, or is otherwise justifiable.
 - (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that—
 - (a) the conduct complained of is not rational;
 - (b) the conduct complained of amounts to discrimination; and the discrimination is unfair.'²⁰⁴

¹⁹⁸ Item 3 of the Employment Equity Regulations, 2014.

¹⁹⁹ Item 6 of the Employment Equity Regulations, 2014.

²⁰⁰ Section 6(4) of the Employment Equity Act 55 of 1998.

²⁰¹ Employment Equity Regulations, 2014.

²⁰² Badgett MVL, Lau H, Sears B & Ho D 'Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination.' (2007) *The William Institute Law Review* 13.

²⁰³ Employment Equity Act 55 of 1998.

²⁰⁴ Section 11 of the Employment Equity Act 55 of 1998.

Sexual orientation is a listed ground in terms of section 6(1) of the EEA.²⁰⁵ Due to sexual orientation being one of the listed grounds, in instances where unfair discrimination on the ground of sexual orientation is alleged, the employer should prove, on a balance of probabilities, that either the alleged discrimination did not take place²⁰⁶ or that the discrimination was rational and not unfair or was justifiable.²⁰⁷

In *Sasol Chemical Operations (Pty) Ltd v CCMA and others*,²⁰⁸ the LC examined the evidentiary burden placed on employees who provide that they have been unfairly discriminated against during their employment.²⁰⁹ The employee filed a dispute with the Commission for Conciliation, Mediation and Arbitration (CCMA), alleging that he was paid a Grade 2 salary²¹⁰ when he had to be paid a Grade 1 salary.²¹¹ The case was appealed and the LC was required to answer the question whether an employee's mere claim of unfair discrimination led to the employer's onus to establish a defence, or whether the employee had to present a *prima facie* case of discrimination.²¹² The LC held that merely alleging unfair discrimination is insufficient to discharge the burden, and that the burden should not pass to the employer.²¹³ In this case, the employee failed to create any relation between the disparity in pay and his race which led to the case of discrimination based on race being dismissed.²¹⁴ The CCMA award was set aside and replaced with one claiming that Sasol did not discriminate against the employee unfairly.²¹⁵ Employees are expected to express and substantiate more than a mere claim in order to discharge the burden of proof.²¹⁶ It is evident that CCMA Commissioners should be wary of taking an

²⁰⁵ Section 6(1) of the Employment Equity Act 55 of 1998.

²⁰⁶ Section 11(1)(a) of the Employment Equity Amendment Act 47 of 2013.

²⁰⁷ Section 11(1)(b) of the Employment Equity Amendment Act 47 of 2013.

²⁰⁸ *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2018) ZALCJHB 2680/16.

²⁰⁹ *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2018) ZALCJHB 2680/16 para 10.

²¹⁰ A Grade 2 salary is less than that of a Grade 1 salary. A Grade 1 salary refers to a salary bracket which is greater than that of Grade 2.

²¹¹ *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2018) ZALCJHB 2680/16.

²¹² *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2018) ZALCJHB 2680/16 para 14.

²¹³ *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2019) 40 ILJ 436 (LC) para 15.

²¹⁴ *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2019) 40 ILJ 436 (LC) para 29.

²¹⁵ *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2019) 40 ILJ 436 (LC) para 29.

²¹⁶ Mulligan T 'Unfair Discrimination – What is the Burden of Proof?' available at <https://www.chmlegal.co.za/unfair-discrimination-what-is-the-burden-of-proof/> (accessed 29 March 2021).

interventionist stance excessively in order to substantiate a bare allegation, as this may suggest a reasonable apprehension of bias.²¹⁷

Section 11 of the EEA protects employees in cases of discrimination on the ground of sexual orientation by placing the burden on the employer to prove that discrimination did not take place or that it was rational and not unfair or was otherwise justifiable.²¹⁸ The burden is on the employer if the discrimination is alleged on a listed ground.

2.2.3 Remedies

Remedies available to employees who are successful with unfair discrimination claims are important as it shows that the EEA seeks to redress the problems caused by unfair discrimination.²¹⁹ The EEA provides legal recourse for disputes concerning unfair discrimination, including discrimination on the ground of sexual orientation. Within six months of the act or omission that allegedly constitutes unfair discrimination, the dispute must be referred to the CCMA.²²⁰ If a dispute remains unresolved after conciliation, any of the parties may refer the matter to the LC for adjudication, according to section 133(2) of the LRA.²²¹ However, all parties may agree to arbitrate, in which case arbitration will take place.²²² The LC/CCMA may issue an appropriate order/arbitration award if the CCMA or the LC determines that an employee has been unfairly discriminated against.²²³ This could include the employer paying 'compensation to that employee; the employer paying damages to that employee or an order/award directing the employer to take necessary steps to prevent unfair discrimination or a similar practice from happening to other employees

²¹⁷ Mulligan T 'Unfair Discrimination – What is the Burden of Proof? available at <https://www.chmlegal.co.za/unfair-discrimination-what-is-the-burden-of-proof/> (accessed 29 March 2021).

²¹⁸ Section 11 of the Employment Equity Act 55 of 1998.

²¹⁹ The fact that discrimination legislation has laws relating to remedies is an indicator that South African legislation is trying to redress the problems caused by discrimination in the workplace. The fact that an order can be made (for compensation, damages, directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees and/or directing an employer, other than a designated employer, to comply with Chapter III of the EEA as if it were a designated employer) to an employee with a successful discrimination claim shows that the legislation is moving in the right direction with regard to providing employees who have been discriminated against with adequate protection.

²²⁰ Section 10(2) of the Employment Equity Act 55 of 1998.

²²¹ Section 133 (2) of the Labour Relations Act 66 of 1995.

²²² Section 133(2)(b) of the Labour Relations Act 66 of 1995.

²²³ Section 50 of the Employment Equity Act 55 of 1998.

in the future'.²²⁴ Section 50(1) of the EEA²²⁵ provides the court with the power to make any suitable order, including one for damages and compensation in any situations contemplated by the EEA.²²⁶

Section 50(2)(c) of the EEA²²⁷ is of utmost importance as it aims to ensure that the unfair discrimination which the affected employee has suffered will not take place in the future.²²⁸ Since the employee's dignity has been negatively affected by the unfair discrimination, it may be of value for an apology to be issued by the employer to the employee concerned as an additional remedy that should be included in the EEA which will serve the purpose of remedying the harm suffered by a complainant.²²⁹ However, the provisions governing the remedies available to employees who have been unfairly discriminated against do assist in protecting LGBT employees against discrimination on the ground of sexual orientation within the workplace.

2.3 AFFIRMATIVE ACTION

Equal employment opportunities and a workforce that represents South Africa's diversity are the goals of affirmative action initiatives in the workplace.²³⁰ Section 15(1) of the EEA²³¹ provides that:

'Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.'²³²

Affirmative action is a means to an end or a measure to achieve employment equity.²³³ Section 15(2) of the EEA²³⁴ provides that:

'Affirmative action measures implemented by a designated employer must include-

²²⁴ Section 50(2) of the Employment Equity Act 55 of 1998.

²²⁵ Section 50(1) of the Employment Equity Act 55 of 1998.

²²⁶ Section 50(1) of the Employment Equity Act 55 of 1998.

²²⁷ Section 50(2)(c) of the Employment Equity Act 55 of 1998.

²²⁸ Section 50(2)(c) of the Employment Equity Act 55 of 1998.

²²⁹ Carroll RO 'Apologies as a Legal Remedy.' (2013) 35 *Sydney Law Review* 338.

²³⁰ Section 13(1) of the Employment Equity Act 55 of 1998.

²³¹ Section 15(1) of the Employment Equity Act 55 of 1998.

²³² Section 15(1) of the Employment Equity Act 55 of 1998.

²³³ *George v Liberty Life Association of Africa Ltd* (1996) 17 *ILJ* 571.

²³⁴ Section 15(2) of the Employment Equity Act 55 of 1998.

- (a) measures to identify and eliminate employment barriers including unfair discrimination, which adversely affect people from designated groups;
- (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
- (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
- (d) subject to subsection (3), measures to-
 - (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
 - (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.²³⁵

Each type of affirmative action measure is discussed below.

2.3.1 Measures to identify and eliminate employment barriers

Historical inequity established significant and long-lasting barriers to achieving the goals which the EEA aims to achieve.²³⁶ To make matters worse, these barriers, though similar in nature, can vary greatly from one employer to the next, as well as from one sector to the next.²³⁷ Item 5.3.2.4 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices²³⁸ provides that:

‘A barrier exists where a policy and practice, which also includes procedures, guidelines or rules, or an aspect of it that limits the opportunities of employees.’²³⁹

The best way to determine whether there are barriers to employment equity in the workplace is to conduct a well-planned and systematic review of policies and

²³⁵ Section 15(2) of the Employment Equity Act 55 of 1998.

²³⁶ Labour Net ‘Understanding the definition of Barriers towards Employment Equity.’ available at <https://www.labournetblog.com/post/2019/10/16/understanding-the-definition-of-barriers-towards-employment-equity> (accessed 8 April 2021).

²³⁷ Labour Net ‘Understanding the definition of Barriers towards Employment Equity.’ available at <https://www.labournetblog.com/post/2019/10/16/understanding-the-definition-of-barriers-towards-employment-equity> (accessed 8 April 2021).

²³⁸ Item 5.3.2.4 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices Notice 1358 of 2005.

²³⁹ Item 5.3.2.4 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices Notice 1358 of 2005.

practices.²⁴⁰ The compilation of information, listing what is applicable, and determining whether any actions represents direct or indirect unfair discrimination or barriers that are either directly or indirectly connected with any of the specified grounds as described by the EEA can be accomplished through the review of policies and practices as well as other written documentation.²⁴¹ Research shows that based on employees experience, employees perceive affirmative action as correcting a wrong and, in some ways, restoring society's harmony.²⁴² However, affirmative action measures are intended to guarantee that only suitably qualified individuals from designated groups have equal employment opportunities.²⁴³ Section 1 of the EEA²⁴⁴ provides that black people, women and people with disabilities are the only groups that form part of 'people from designated groups'.²⁴⁵ This means that LGBT employees are not protected by this type of affirmative action measure unless they fall within the meaning of 'people from designated groups'. This shows that this affirmative action measure does not assist in protecting all LGBT employees. The definition of 'designated groups' found in section 1 of the EEA should be amended to include the entire LGBT community. This will ensure that all LGBT employees will be protected by this type of affirmative action.

2.3.2 Measures designated to further diversity in the workplace

This type of affirmative action includes measures 'designed to further diversity in the workplace based on equal dignity and respect of all people'.²⁴⁶ The South African Workplace Equality Index (SAWEI) is a nationwide study that fills a void by assisting businesses to assess their success in ensuring that their work environment is free from unfair discrimination and harassment and determines whether, in the absence

²⁴⁰ Labour Net 'Understanding the definition of Barriers towards Employment Equity.' available at <https://www.labournetblog.com/post/2019/10/16/understanding-the-definition-of-barriers-towards-employment-equity> (accessed 8 April 2021).

²⁴¹ Labour Net 'Understanding the definition of Barriers towards Employment Equity.' available at <https://www.labournetblog.com/post/2019/10/16/understanding-the-definition-of-barriers-towards-employment-equity> (accessed 8 April 2021).

²⁴² Petrus RC 'Employee Experience and Perceptions of Affirmative Action in a South African Organization: A Qualitative Study.' (unpublished MSocSc, University of Kwa-Zulu Natal, 2011) 69.

²⁴³ Section 15(1) of the Employment Equity Act 55 of 1998.

²⁴⁴ Section 1 of the Employment Equity Act 55 of 1998.

²⁴⁵ Section 1 of the Employment Equity Act 55 of 1998.

²⁴⁶ Section 15(2)(b) of the Employment Equity Act, 1998.

of any challenging steps for LGBT inclusion as provided by legislation, they are actively developing a more inclusive and LGBT-friendly working environment.²⁴⁷

SAWEI is based on a six-dimensional framework.²⁴⁸ The SAWEI approach does not yet provide an employee survey and thus does not provide clear insight into the perceptions of the employees.²⁴⁹ The findings obtained by SAWEI are expressed in a complete report²⁵⁰ that provides guidelines that can be considered by participating businesses and other workplaces to strengthen their policies to become more inclusive of LGBT employees.²⁵¹ Hopefully, within the next few years, research that will examine the trend within businesses and whether past scores have informed them to achieve greater workplace equality for LGBT employees will be conducted.²⁵²

Research concerning employees' experiences on affirmative action shows that the some of the participants do not have positive perceptions of affirmative action.²⁵³ One employee held that efforts to promote diversity include hiring only Africans and displacing all other races.²⁵⁴ In an article which provides the outcomes of interviews conducted with employees regarding this type of affirmative action, it was found that white males were the least supportive of this type of affirmative action measure.²⁵⁵

LGBT employees are protected by this type of affirmative action measure in circumstances where they fall within the meaning of people from designated groups, however in circumstances where they do not, they will not be protected. The legislation governing this type of affirmative action does not assist in protecting all

²⁴⁷ Crehan P, Daly F, Fletcher L, Pichler S 'A Global Examination of LGBT Workplace Equality Indices.' (2020) 18.

²⁴⁸ Three dimensions that consider an organisation's structures and three dimensions that represent an organisation's activities that underlie certain top-down initiatives.

²⁴⁹ Crehan P, Daly F, Fletcher L, Pichler S 'A Global Examination of LGBT Workplace Equality Indices.' (2020) 18.

²⁵⁰ The South African Workplace Equality Index 2018 Full Results Report available at https://www.bizcommunity.com/f/1809/20180911_The_Forum_SAWEI_Main_Report.pdf.

²⁵¹ The South African Workplace Equality Index 2018 Full Results Report available at https://www.bizcommunity.com/f/1809/20180911_The_Forum_SAWEI_Main_Report.pdf.

²⁵² Crehan P, Daly F, Fletcher L, Pichler S 'A Global Examination of LGBT Workplace Equality Indices.' (2020) 20.

²⁵³ Petrus RC 'Employee Experience and Perceptions of Affirmative Action in a South African Organization: A Qualitative Study.' (unpublished MSocSc, University of Kwa-Zulu Natal, 2011) 71.

²⁵⁴ Petrus RC 'Employee Experience and Perceptions of Affirmative Action in a South African Organization: A Qualitative Study.' (unpublished MSocSc, University of Kwa-Zulu Natal, 2011) 71.

²⁵⁵ This was due to them being seen at the bottom of the food chain, so to speak, in the eyes of Affirmative action.

LGBT employees. LGBT employees will be afforded protection by this type of affirmative action in the event of the definition of 'designated groups'²⁵⁶ being amended to include the entire LGBT community.

2.3.3 Making reasonable accommodation for people from designated groups in order to ensure equal opportunities in the workplace

In terms of section 1 of the EEA, reasonable accommodation is defined as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'.²⁵⁷ The concept of 'reasonable accommodation', according to the Constitutional Court, is based on the idea that the community, whether it is the State or an employer, should take positive efforts and potentially suffer more hardship or expense in order for all employees to participate and enjoy all of their rights equally.²⁵⁸ Employers should make reasonable accommodation for employees from designated groups when it is reasonably practicable to do so in order to provide equal opportunities in the workplace.²⁵⁹ The reasonable accommodation that should be provided by an employer is dependent on the facts of each case and the nature of the interests at stake.²⁶⁰ It is apparent that reasonable accommodation, as well as the amount to which the accommodation will burden an employer, will always be a key issue in determining the fairness of discrimination.²⁶¹

Research shows that there is strong support for this type of affirmative action as a form of redress in the labour market.²⁶² A study revealed that between 60% and 70% of South Africans favoured affirmative action.²⁶³ It was also discovered that

²⁵⁶ Section 1 of the Employment Equity Act 55 of 1998.

²⁵⁷ Section 1 of the Employment Equity Act 55 of 1998.

²⁵⁸ Griessel J 'Accommodating Diversity in the Workplace.' available at <https://www.labourguide.co.za/most-recent/2000-accommodating-diversity-in-the-workplace%20besoek%2006-04-2017> (accessed 6 June 2021).

²⁵⁹ Section 15(2)(c) of the Employment Equity Act, 1998.

²⁶⁰ Griessel J 'Accommodating Diversity in the Workplace.' available at <https://www.labourguide.co.za/most-recent/2000-accommodating-diversity-in-the-workplace%20besoek%2006-04-2017> (accessed 6 June 2021).

²⁶¹ Griessel J 'Accommodating Diversity in the Workplace.' available at <https://www.labourguide.co.za/most-recent/2000-accommodating-diversity-in-the-workplace%20besoek%2006-04-2017> (accessed 6 June 2021).

²⁶² Petrus R 'Employee Experience and Perceptions of Affirmative Action in a South African Organization: A Qualitative Study.' (unpublished MSocSc, University of Kwa-Zulu Natal, 2011) 36.

²⁶³ Petrus R 'Employee Experience and Perceptions of Affirmative Action in a South African Organization: A Qualitative Study.' (unpublished MSocSc, University of Kwa-Zulu Natal, 2011) 36.

affirmative action recipients have a higher favourable opinion of affirmative action than non-beneficiaries.²⁶⁴

While this type of affirmative action measure is valuable it does not assist in protecting all LGBT employees. All LGBT employees should be included in the definition of 'designated groups' mentioned in section 1 of the EEA.²⁶⁵ Only then will all LGBT employees be protected by this type of affirmative action measure.

2.3.4 Measures to ensure equitable representation of suitably qualified people from designated groups

Affirmative action should also include measures to-

- (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and...²⁶⁶

It is imperative that a designated employer implements affirmative action measures which sees the progression of people from designated groups in the workplace. This is required to address the disadvantages that people from designated groups experience in the workplace and to guarantee that they are fairly represented in all levels of the workplace.²⁶⁷ Members of the LGBT community who were disadvantaged during apartheid and who are in certain instances still subjected to discrimination on the ground of sexual orientation, do not fall within the definition of 'designated groups' and therefore all LGBT employees are not protected by this type of affirmative action measure.

2.3.5 Measures to retain and develop people from designated groups

Employee retention is critical in every business since the knowledge and skills which employees possess are critical to the ability of an enterprise to be economically

²⁶⁴ Petrus R 'Employee Experience and Perceptions of Affirmative Action in a South African Organization: A Qualitative Study.' (unpublished MSocSc, University of Kwa-Zulu Natal, 2011) 36.

²⁶⁵ Section 1 of the Employment Equity Act 55 of 1998.

²⁶⁶ Section 15(2)(d)(i) of the Employment Equity Act 55 of 1998.

²⁶⁷ Moore J 'Unfair Discrimination or affirmative action? A practical test with fairness and rationality at its heart.' available at <https://www.withoutprejudice.co.za/free/article/7264/view> (accessed on 19 August 2021).

competitive.²⁶⁸ It is difficult to prevent employees from resigning, however in circumstances where valuable employees leave the workplace turnover becomes dysfunctional.²⁶⁹ Since people from designated groups have suffered during apartheid, it is important to retain people from designated groups as is required by the EEA.²⁷⁰ Affirmative action should focus on creating opportunities for education, training, and growth to assist in redressing the imbalances caused by apartheid.²⁷¹ It is important that people from designated groups receive training and are afforded an opportunity to develop their skills. Section 15(2)(d)(ii) of the EEA²⁷² contributes to the development of skills of people from designated groups which in turn greatly assists them in the workplace. However, since LGBT employees do not form part of the meaning of 'people from designated groups', this type of affirmative action does not protect all LGBT employees. There are certain procedural obligations placed on designated employers that need to be adhered to.

2.4 PROCEDURAL OBLIGATIONS PLACED ON DESIGNATED EMPLOYERS

Designated employers are required to consult with their employees, conduct an analysis, draft an employment equity plan and report to the Director General.²⁷³ These procedural obligations are explained below. As far as the consultation is concerned, the employer is not only required to consult with the representative trade union/employees at the beginning of the affirmative action process, but also during the time when the designated employer complies with the other three procedural obligations.²⁷⁴ There are two types of analysis that should be conducted. The first analysis should be conducted into the policies, practices, procedures and the working environment to identify barriers that adversely affect people from designated groups. The second analysis should determine the degree of underrepresentation of people from designated groups in each level of the workplace.²⁷⁵ Since the

²⁶⁸ Kyndt E, Dochy F & Michielsen M 'Employee Retention: Organisational and Personal perspectives.' (2009) 2 *Vocations and Learning* 196.

²⁶⁹ Suresh L & Krishnaraj R 'A Study on the Importance of Employee Retention in Pharmaceutical Sector in India.' (2015) 32 *International Journal of Pharmaceutical Sciences Review and Research* 108.

²⁷⁰ Section 15(2)(d) of the Employment Equity Act 55 of 1998.

²⁷¹ Madala TH 'Affirmative Action – A South African Perspective.' (1999) 52 *SMU L. Rev.* 1544.

²⁷² Section 15(2)(d) of the Employment Equity Act 55 of 1998.

²⁷³ Section 13(2)(a) of the Employment Equity Act 55 of 1998.

²⁷⁴ Section 13(2)(a) of the Employment Equity Act 55 of 1998.

²⁷⁵ Section 13(2)(b) of the Employment Equity Act 55 of 1998.

identification of barriers and the determination of the degree of underrepresentation is concerned primarily with people from designated groups, all LGBT employees will not benefit from the analysis that designated employers are required to conduct. To ensure that all LGBT employees are protected, it is important that the audit includes LGBT employees.

The employment equity plan which designated employers are required to draft and implement represents the link between the outcome of the consultations and the analysis that was conducted on the one hand, and the achievement of employment equity on the other.²⁷⁶ The employment equity plan should include *inter alia* the affirmative action measures which the designated employer will implement.²⁷⁷ Designated employers are required to submit a report to the Director-General²⁷⁸ on the progress that has been made in implementing their employment equity plans.²⁷⁹ The obligations to draft and implement the employment equity plan as well as the obligation to report to the Director-General are valuable, however this does not benefit all LGBT employees due to all LGBT employees not falling under the definition of 'designated groups'.

2.5 DEFENCES AVAILABLE TO EMPLOYERS FACING ACTIONS OF ALLEGED UNFAIR DISCRIMINATION

An allegation of unfair discrimination can be refuted by proving that the behaviour in question does not fall within the terms held in section 6 of the EEA.²⁸⁰ The employer's first line of defence is to persuade the court that the conduct or omission was not discriminatory at all.²⁸¹ In the case of *Transport and General Workers Union and Another v Bayete Security Holding*,²⁸² a claim of unfair discrimination, according to the LC, emerges only when two or more similarly situated employees are treated

²⁷⁶ Burger R & Jafta R 'Affirmative action in South Africa: an empirical assessment of the impact on labour market outcomes.' (2010) 6.

²⁷⁷ Burger R & Jafta R 'Affirmative action in South Africa: an empirical assessment of the impact on labour market outcomes.' (2010) 6.

²⁷⁸ 'Director-General' means the Director-General of the Department of Labour.

²⁷⁹ Section 13(2)(d) of the Employment Equity Act 55 of 1998.

²⁸⁰ Section 6 of the Employment Equity Act 55 of 1998.

²⁸¹ Lebepe N *Inherent Requirements of the Job as a Defence to a Claim of Unfair Discrimination: Comparison Between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010) 25.

²⁸² *Transport and General Workers Union and Another v Bayete Security Holding* (1998) ZALC 147.

differently.²⁸³ As a result, differing pay levels for different employees is not sufficient to prove discrimination.²⁸⁴ When discriminatory conduct is committed by an employee, the second viable defence arises.²⁸⁵ The EEA specifically states that an employer is not responsible for an employee's actions if the employer can demonstrate that it did all that was reasonably possible to ensure that the employee did not contravene the EEA.²⁸⁶ Employers may utilise the third to prove that, even though the conduct or omission was discriminatory, it was not unfair.²⁸⁷ Section 6(2) of the EEA²⁸⁸ provides that:

It is not unfair discrimination to-

- (a) take affirmative action measures consistent with the purpose of this Act;
- or
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.²⁸⁹

The EEA specifically specifies 'affirmative action consistent with the purpose' of the EEA and 'an inherent requirements of a job' as defences that may be raised by an employer.²⁹⁰ The phrase 'inherent requirements of a job' comprises two key terms that define its meaning when used together.²⁹¹ The term 'inherent' is commonly used to describe a constant and important characteristic or attitude.²⁹² It may be deduced from this that only essential work tasks should be considered, and that if the

²⁸³ *Transport and General Workers Union and Another v Bayete Security Holding* (1998) ZALC 147 para 7.

²⁸⁴ *Transport and General Workers Union and Another v Bayete Security Holding* (1998) ZALC 147 para 7.

²⁸⁵ Lebepe N *Inherent Requirements of the Job as a Defence to a Claim of Unfair Discrimination: Comparison Between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010) 25.

²⁸⁶ Lebepe N *Inherent Requirements of the Job as a Defence to a Claim of Unfair Discrimination: Comparison Between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010) 25.

²⁸⁷ Lebepe N *Inherent Requirements of the Job as a Defence to a Claim of Unfair Discrimination: Comparison Between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010) 26.

²⁸⁸ Section 6(2) of the Employment Equity Act 55 of 1998.

²⁸⁹ Section 6(2) of the Employment Equity Act 55 of 1998.

²⁹⁰ Section 6(2) of the Employment Equity Act 55 of 1998.

²⁹¹ Lebepe N *Inherent requirements of the job as a defence to a claim of unfair discrimination: Comparison between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010) 34.

²⁹² Lebepe N *Inherent requirements of the job as a defence to a claim of unfair discrimination: Comparison between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010) 34.

condition is not satisfied, the job cannot be completed.²⁹³ In essence, an inherent requirement of a job is a condition that is critical to the job's performance and that the rejected applicant lacks.²⁹⁴ If a job requirement coincides with a prohibited ground of discrimination, the issue of unfair discrimination may arise.²⁹⁵ In *Whitehead v Woolworths*,²⁹⁶ the employer failed to justify that discrimination against pregnant woman was justified in terms of an inherent requirement of a job as decided by the LC.²⁹⁷ The case proceeded to appeal because it was considered that the LC applied a narrow interpretation.²⁹⁸ It must be proven that completing the work within a certain time frame could well be an inherent job requirement, but a party relying on this ground must convince the court that time was of the essence.

2.6 CONCLUSION

The main objective of this chapter is to determine the extent to which the South African legislative framework protects employees against unfair discrimination on the ground of sexual orientation. Section 5 and section 6 of the EEA provides protection to LGBT employees against unfair discrimination on the ground of sexual orientation. By virtue of legislation governing the definitions of direct and indirect discrimination, LGBT employees are protected against discrimination on the ground of sexual orientation. Section 11 of the EEA protects LGBT employees in instances of discrimination on the ground of sexual orientation by placing the burden of proof on the employer to show that discrimination did not occur or that it was rational and fair or was otherwise justifiable.²⁹⁹ Research shows that LGBT employees earn significantly less than heterosexual employees.³⁰⁰ Unfair discrimination in terms of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based

²⁹³ Lebepe N *Inherent requirements of the job as a defence to a claim of unfair discrimination: Comparison between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010) 34.

²⁹⁴ Du Toit D & Potgieter M 'Unfair Discrimination in the Workplace.' (2014) 88-89.

²⁹⁵ Du Toit D & Potgieter M 'Unfair Discrimination in the Workplace.' (2014) 89.

²⁹⁶ *Whitehead v Woolworths* (1999) 20 ILJ 2133 (LC).

²⁹⁷ *Whitehead v Woolworths* (1999) 20 ILJ 2133 (LC) para 53.

²⁹⁸ *Woolworths v Whitehead* 2000 ILJ 571 (LAC).

²⁹⁹ See para 2.2.2 above.

³⁰⁰ King EB & Cortina JM 'The Social and Economic Imperative of Lesbian, Gay, Bisexual, and Transgendered Supportive Organizational Policies.' (2010) 3 *Society for Industrial and Organisational Psychology* 70.

on the protected grounds in EEA, is prohibited.³⁰¹ The Regulations require employers to eliminate unfair discrimination on the ground of sexual orientation in terms and conditions of employment. Therefore, the legislation governing wage equality assists in protecting employees discriminated against on the ground of sexual orientation. LGBT employees are protected because of the remedies that are available to employees who are successful with unfair discrimination claims. LGBT employees are protected since the court may make any appropriate order, including one for damages and compensation.³⁰² The court can make an appropriate order for other remedies, such as including an order directing the employer to take steps to prevent the same unfair discrimination or similar practice occurring in the future in respect of other employees³⁰³ and an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer,³⁰⁴ amongst others. Once the court determines that the employee has been unfairly discriminated against, the remedies offered to the employee are adequate.

Legislation governing affirmative action only applies to people from designated groups. Section 1 of the EEA provides that black people, women and people with disabilities are the only groups that form part of 'people from designated groups'.³⁰⁵ This means that LGBT employees are not protected as a result of the law governing affirmative action unless they fall within the meaning of 'people from designated groups'. To ensure that all LGBT employees benefit from affirmative action the definition of 'designated groups' should be amended to include the LGBT community in the definition of 'designated groups'.³⁰⁶ Currently, all LGBT employees do not benefit from the procedural obligations that are placed on designated employers since these procedural obligations are placed on employers to benefit people from designated groups. In circumstances where the meaning of 'people from designated groups' is amended to include LGBT employees, these employees will also benefit from the procedural obligations which designated employers are required to comply with.

³⁰¹ Section 6(4) of the Employment Equity Act 55 of 1998.

³⁰² Section 50(2) of the Employment Equity Act 55 of 1998.

³⁰³ Section 50(2)(c) of the Employment Equity Act 55 of 1998.

³⁰⁴ Section 50(2)(d) of the Employment Equity Act 55 of 1998.

³⁰⁵ Section 1 of the Employment Equity Act 55 of 1998.

³⁰⁶ Section 1 of the Employment Equity Act 55 of 1998.

The chapter that follows consists of a discussion on the legislation governing unfair discrimination of employees on the ground of sexual orientation in Canada.



CHAPTER 3

LEGISLATIVE PROVISIONS GOVERNING UNFAIR DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION IN CANADA

3.1 INTRODUCTION

The previous chapter revealed that in South Africa, section 6 of the EEA protects employees against unfair discrimination, whether it be direct or indirect, on numerous grounds, with sexual orientation being one of these grounds.³⁰⁷ The Regulations enacted in terms of the EEA provide steps which employers should comply with to eliminate unfair discrimination in terms and conditions of employment.³⁰⁸ The South African legislative provisions governing equal pay for work of equal value assist in protecting employees discriminated against on the ground of sexual orientation. In South Africa, affirmative action measures are only available to people from designated groups which consists of black people, women and people with disabilities only.³⁰⁹ Chapter 2 also revealed that it would be important to extend the scope of the application of the provisions governing affirmative action in South Africa to include LGBT employees.

Canada has three levels of government, namely the federal, provincial (or territorial) and the municipal.³¹⁰ The federal government enacts laws and manages programs and services that affect the entire country, while the provincial and territorial governments have the authority to make decisions with regard to areas of law that directly affect their province or territory.³¹¹ Municipal governments are in charge of enacting by-laws and providing services to a specific city, town, or village.³¹² Federal law in Canada will be analysed, and due to each province in Canada having their own set of laws, the Human Rights Codes in Ontario and British Columbia will be

³⁰⁷ See para 2.2 above.

³⁰⁸ See para 2.2.1.3 above.

³⁰⁹ See para 2.3.1 above.

³¹⁰ Parliament of Canada 'Our Country, Our Parliament.' available at <https://lop.parl.ca/About/Parliament/Education/OurCountryOurParliament/section2-e.aspx> (accessed 8 June 2021).

³¹¹ Parliament of Canada 'Our Country, Our Parliament.' available at <https://lop.parl.ca/About/Parliament/Education/OurCountryOurParliament/section2-e.aspx> (accessed 8 June 2021).

³¹² Parliament of Canada 'Our Country, Our Parliament.' available at <https://lop.parl.ca/About/Parliament/Education/OurCountryOurParliament/section2-e.aspx> (accessed 8 June 2021).

examined only as explained in the aims of the study. The Constitution Act³¹³ lists the responsibilities of both the federal and provincial/territorial government.³¹⁴

Canada is among the leading countries in the world in terms of the strength of its legal safeguards against discrimination on the ground of sexual orientation and the strides it has made towards ensuring equal treatment and opportunities for LGBT employees.³¹⁵ Almost all provincial labour federations have LGBT-inclusive policies, with an officially recognised LGBT caucus³¹⁶ in British Columbia, Saskatchewan, Manitoba, Ontario, Quebec and Nova Scotia.³¹⁷ The Constitution Act³¹⁸ of Canada comprises of two parts: The Canadian Charter of Rights and Freedoms³¹⁹ and the rights of Aboriginal peoples in Canada.³²⁰

The Canadian Charter of Rights and Freedoms³²¹ (hereafter referred to as the Charter) is the country's primary source of constitutional equality rights and protection against discrimination.³²² The Charter secures equality rights and protects against discrimination in law and government action.³²³ The Charter enumerates prohibited grounds of discrimination including race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, but the list is not considered exhaustive.³²⁴ The Charter, which emerged from constitutional amendments in the early 1980s, is Canada's primary source of constitutional equality rights and protection against discrimination.³²⁵ Section 15 of the Charter³²⁶ contains equality

³¹³ The Constitution Act, 1982.

³¹⁴ The Constitution Act, 1982.

³¹⁵ Wintemute R 'Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits.' (2004) 49 *McGill Law Journal* 1143.

³¹⁶ A caucus refers to a meeting at which local members of a political party register their preference among candidates running for office or select delegates to attend a convention.

³¹⁷ Hunt G & Eaton J 'Gay, Lesbian, Bisexual, and Transgender Workers.' In *'Equity, Diversity, and Canadian Labour.'* (2007) *University of Toronto Press* 149.

³¹⁸ The Constitution Act, 1982.

³¹⁹ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³²⁰ Aboriginal identity encompasses an enormous diversity of people, groups and interests located within varying socio-political, economic and demographic situations. In other words, Aboriginal people do not make up a single-minded monolithic entity, speaking with one voice. The Constitution of Canada provides that aboriginal people include: the Indian, Inuit and Métis peoples of Canada.

³²¹ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³²² Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³²³ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³²⁴ Section 15(1) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³²⁵ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³²⁶ Section 15 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

rights and prohibits certain forms of discrimination.³²⁷ Section 15 of the Charter prohibits all forms of discrimination³²⁸ that LGBT individuals may experience.³²⁹ Section 15 of the Charter³³⁰ provides that:

- (1) 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'³³¹

The Supreme Court of Canada declared in *Egan v Canada*³³² that sexual orientation is encompassed and found within the boundaries of section 15, as an analogous ground,³³³ and that individuals are protected from discrimination on this basis.³³⁴ Individuals who identify as part of the LGBT community have undeniably faced a historical disadvantage that has been generally acknowledged.³³⁵

The Canadian Human Rights Act of 1985 (Canadian Human Rights Act) is a federal law that contains various provisions relating to discrimination in the Canadian workplace.³³⁶ The purpose of the Canadian Human Rights Act³³⁷ is to broaden Canada's legal framework in order to give effect to the notion that all people should have equal access to opportunities.³³⁸ The Canadian Human Rights Act³³⁹ intends to

³²⁷ Section 15 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³²⁸ The forms of discrimination include race, national or ethnic origin, colour, religion, sex, age or mental or physical disability and sexual orientation (as per *Egan v Canada*).

³²⁹ Section 15 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³³⁰ Section 15 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³³¹ Section 15 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution of Canada, 1982.

³³² *Egan v Canada* [1995] 2 S.C.R.

³³³ Analogous grounds are personal characteristics that are immutable or changeable only at unacceptable cost to personal identity. Other analogous grounds in respect of section 15 of the Charter are marital status and citizenship.

³³⁴ *Egan v Canada* [1995] 2 S.C.R para 229.

³³⁵ One of many examples is evident in 1841, when the death penalty was imposed under Canadian Criminal Code on anybody who engages in a same-sex sexual relationship.

³³⁶ The Canadian Human Rights Act, 1985.

³³⁷ The Canadian Human Rights Act, 1985.

³³⁸ Section 2 of the Canadian Human Rights Act, 1985.

accommodate the needs of society's members in accordance with their duties and obligations as members of society, without being hampered or prohibited from doing so by discriminatory practices based on a variety of factors, sexual orientation being one of them.³⁴⁰ Every individual is afforded the protections found in the Canadian Human Rights Act³⁴¹ since section 2 of the Canadian Human Rights Act³⁴² of this statute provides that every person should have an equal opportunity to create the life they want and need without being hindered by discriminatory practices.³⁴³ Section 7 of the Canadian Human Rights Act³⁴⁴ provides that:

'It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in relation to an employee,
on a prohibited ground of discrimination.'³⁴⁵

In the 1970s and 1980s groups and other concerned organisations in Canada placed pressure on the federal and provincial governments to convince them to resolve inequities and barriers to employment faced by Canadians.³⁴⁶ In response to these pressures the Canadian government passed the Canadian Employment Equity Act S.C. of 1985³⁴⁷ (Canadian Employment Equity Act) in 1995.³⁴⁸ The purpose of the Canadian Employment Equity Act is to establish workplace equality by ensuring that no one is denied employment or benefits for reasons that do not relate to their ability.³⁴⁹ In order to achieve this purpose,³⁴⁹ the Canadian Employment Equity Act³⁵⁰ aims to address the employment disadvantages faced by women, Aboriginal

³³⁹ The Canadian Human Rights Act, 1985.

³⁴⁰ The other grounds include race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

³⁴¹ The Canadian Human Rights Act, 1985.

³⁴² Section 2 of the Canadian Human Rights Act, 1985.

³⁴³ Section 2 of the Canadian Human Rights Act, 1985.

³⁴⁴ Section 7 of the Canadian Human Rights Act, 1985.

³⁴⁵ Section 7 of the Canadian Human Rights Act, 1985.

³⁴⁶ The Professional Institute of the Public Service of Canada '*Pocket Guide to Employment Equity.*' (2007) 4.

³⁴⁷ Employment Equity Act S.C. 1995.

³⁴⁸ The Professional Institute of the Public Service of Canada '*Pocket Guide to Employment Equity.*' (2007) 4.

³⁴⁹ Section 2 of the Employment Equity Act S.C. 1995.

³⁵⁰ Employment Equity Act S.C. 1995.

peoples,³⁵¹ people with disabilities, and members of visible minorities.³⁵² Members of visible minorities are defined by the Canadian Employment Equity Act as ‘persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour’.³⁵³ This is accomplished by giving effect to the principle that employment equality entails not just treating people equally, but also taking particular steps and accommodating variances.³⁵⁴

The Ontario Human Rights Code³⁵⁵ is a provincial law that was enacted to prohibit actions that discriminate against individuals based on a protected ground in a protected social space.³⁵⁶ Section 1 of the Ontario Human Rights Code³⁵⁷ provides that:

‘Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.’³⁵⁸

The Human Rights Code³⁵⁹ is a provincial law that contains provisions governing the protection against discrimination in the workplace. The purpose of the Human Rights Code³⁶⁰ is to promote a climate of understanding and mutual respect in which all people are equal in dignity and rights,³⁶¹ to prevent discrimination prohibited by the Human Rights Code,³⁶² and to provide a means of redress for those who are discriminated against in violation of the Human Rights Code.³⁶³ Every person is entitled to the protection afforded in the Human Rights Code³⁶⁴ since section 3(b) of this Human Rights Code³⁶⁵ provides that this Human Rights Code aims to promote a

³⁵¹ In Canada, the term Indigenous peoples (or Aboriginal peoples) refers to First Nations, Métis and Inuit peoples. These are the original inhabitants of the land that is now Canada.

³⁵² Section 2 of the Employment Equity Act S.C. 1995.

³⁵³ Section 3 of the Employment Equity Act of Canada, 1986.

³⁵⁴ Section 2 of the Employment Equity Act S.C. 1995.

³⁵⁵ The Ontario Human Rights Code, 1962.

³⁵⁶ A protected social space refers to an invisible set of social and cultural relationships that translate to and are shaped by physical space that are protected.

³⁵⁷ Section 1 of the Ontario Human Rights Code, 1962.

³⁵⁸ Section 1 of the Ontario Human Rights Code, 1962.

³⁵⁹ British Columbia's Human Rights Code, 1996.

³⁶⁰ British Columbia's Human Rights Code, 1996.

³⁶¹ Section 3(b) of the British Columbia's Human Rights Code, 1996.

³⁶² Section 3(c) of the British Columbia's Human Rights Code, 1996.

³⁶³ Section 3(d) of the British Columbia's Human Rights Code, 1996.

³⁶⁴ British Columbia's Human Rights Code, 1996.

³⁶⁵ British Columbia's Human Rights Code, 1996.

climate of understanding and mutual respect where each and every individual is equal in dignity and rights.³⁶⁶

The purpose of this chapter is to compare the law in Canada governing unfair discrimination of employees on the ground of sexual orientation with the law in South Africa governing unfair discrimination on the ground of sexual orientation. This will be done to determine whether the South African law should be amended and/or supplemented. This chapter consists of a discussion on discrimination, unfairness and the remedies that are available to employees in Canada who are successful with unfair discrimination claims. Legislation governing equal pay in Canada is discussed and compared to the legislation governing equal pay for work of equal value in South Africa. The legislation governing affirmative action in Canada will be discussed and compared to that in South Africa.

3.2 UNFAIR DISCRIMINATION

3.2.1 Discrimination



In determining what constitutes 'discrimination', the Supreme Court of Canada's decision in *Andrews v Law Society of British Columbia*³⁶⁷ is continually referred to, which states that 'discrimination':

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'...is a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based upon personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.'³⁶⁸

In deciding whether or not there has been a violation of human rights statutes, intention is irrelevant. Liability is not limited under human rights legislation to whether or not an individual intended to discriminate. In *Ontario (Human Rights Commission)*

³⁶⁶ Section 3(b) of the British Columbia's Human Rights Code, 1996.

³⁶⁷ *Andrews v Law Society of British Columbia*, (1989) 1 SCR 143.

³⁶⁸ *Andrews v Law Society of British Columbia*, (1989) 1 SCR 143 para 4.

v Simpsons-Sears Ltd,³⁶⁹ the Supreme Court of Canada clarified the issue by providing:

'It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons' obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.'³⁷⁰

According to section 5(1) of the Ontario Human Rights Code,³⁷¹ every individual has the right to equal treatment in the workplace without discrimination, including on the ground of sexual orientation.³⁷² It is a violation of the Ontario Human Rights Code to deny or restrict employment opportunities in recruitment, training, promotion and transfers due to an employee's sexual orientation.³⁷³

Research shows that promotions, mentoring opportunities and certain assignments have been refused to some LGBT employees in Canada.³⁷⁴ Research has also shown that some LGBT employees have faced reduced wages, workplace discrimination and violence, as well as social alienation and isolation.³⁷⁵

In South Africa, discrimination is defined as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.³⁷⁶ The South African and the Canadian definition of 'discrimination' are similar. Both countries define discrimination as a distinction, whether direct or indirect, based on grounds relating to personal characteristics of an individual or group, such as sexual orientation.

³⁶⁹ *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*, [1985] 2 SCR 536.

³⁷⁰ *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*, [1985] 2 SCR 536 at 15.

³⁷¹ Section 5(1) of the Ontario Human Rights Code, 1962.

³⁷² Section 5(1) of the Ontario Human Rights Code, 1962.

³⁷³ Ontario Human Rights Commission '*Policy on discrimination and harassment because of sexual orientation.*' (2000) 24.

³⁷⁴ Sasso T & Ellard-Gray A '*In & Out: Diverging Perspectives on LGBT Inclusion in the Workplace.*' (2015) 19.

³⁷⁵ Sasso T & Ellard-Gray A '*In & Out: Diverging Perspectives on LGBT Inclusion in the Workplace.*' (2015) 19.

³⁷⁶ See para 2.2.1 above.

3.2.1.1 Protected Grounds

Discriminating against individuals in the workplace on the protected grounds contained in the Ontario Human Rights Code³⁷⁷ is prohibited.³⁷⁸ Not every instance of preferential treatment would be considered a violation of human rights legislation; each law specifies the grounds that are protected by said law. The Ontario's Human Rights Code includes sexual orientation as one of the protected grounds.³⁷⁹

The Human Rights Code³⁸⁰ in British Columbia contains provisions relating to the protection against discrimination in the workplace. Section 13(1)(b) of the British Columbia's Human Rights Code³⁸¹ provides that:

'a person must not...

(b) discriminate against a person regarding employment or any term or condition of employment-

because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.'³⁸²

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It was determined in the case of *British Columbia Human Rights Tribunal v Schrenk*,³⁸³ that section 13(1)(b) of British Columbia's Human Rights Code³⁸⁴ prohibits discrimination against employees where that discrimination has a sufficient nexus with the employment context, according to the modern theory of legislative interpretation and the particular rules that relate to the interpretation of human rights legislation.³⁸⁵

³⁷⁷ Section 10 of the Ontario Human Rights Code, 1962.

³⁷⁸ Section 10 of the Ontario Human Rights Code, 1962.

³⁷⁹ The Ontario Human Rights Code, 1962.

³⁸⁰ British Columbia's Human Rights Code, 1996.

³⁸¹ Section 13 of the British Columbia's Human Rights Code, 1996.

³⁸² Section 13(1)(b) of the British Columbia's Human Rights Code, 1996.

³⁸³ *British Columbia Human Rights Tribunal v Schrenk* 2017 SCC 62, [2017] 2 S.C.R. 795.

³⁸⁴ Section 13 (1)(b) of the British Columbia's Human Rights Code, 1996.

³⁸⁵ *British Columbia Human Rights Tribunal v Schrenk* 2017 SCC 62, [2017] 2 S.C.R. 795.

3.2.1.2 Direct discrimination

The Human Rights Codes do not define direct discrimination.³⁸⁶ However, the Ontario Human Rights Commission provides that direct discrimination can occur 'when individuals or organisations specifically exclude people with disabilities³⁸⁷ in housing, employment or services, withhold benefits that are available to others, or impose extra burdens that are not imposed on others, without a legitimate or *bona fide* reason'.³⁸⁸ This type of discrimination against individuals with disabilities is frequently founded on negative attitudes, stereotypes and bias.³⁸⁹ Infringing on an individual's right to equal treatment in specific situations is prohibited under the Ontario Human Rights Code,³⁹⁰ which provides protection against discrimination on the prohibited grounds.³⁹¹ In the case of *Radek v Henderson Development (Canada) Ltd*,³⁹² it was held that there is no requirement to prove an intention to discriminate; the focus of the enquiry is placed on the effect the respondent's actions had on the complainant.³⁹³

South Africa's definition of 'direct discrimination' makes use of the words 'unfavourable treatment of a person or group as a result of that person or group's actual or presumed feature' and Ontario's definition of 'direct discrimination' makes use of the words 'exclude people'. However, both terms have the same negative effect on an individual. In South Africa, as opposed to Ontario, it is not necessary for

³⁸⁶ Yu A 'Direct Discrimination and Indirect Discrimination: A Distinction with a Difference.' (2019) 9 *Western Journal of Legal Studies* 3.

³⁸⁷ The Ontario Human Rights Commission defines 'disability' as: 1) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device. 2) a condition of mental impairment or a developmental disability. 3) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language. 4) a mental disorder or 5) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.

³⁸⁸ Ontario Human Rights Commission 'Forms of discrimination.' available at <http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/6-forms-discrimination> (accessed 10 October 2021).

³⁸⁹ Ontario Human Rights Commission 'Forms of discrimination.' available at <http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/6-forms-discrimination> (accessed 10 October 2021).

³⁹⁰ The Ontario Human Rights Code, 1962.

³⁹¹ Yu A 'Direct Discrimination and Indirect Discrimination: A Distinction with a Difference.' (2019) 9 *Western Journal of Legal Studies* 3.

³⁹² *Radek v Henderson Development (Canada) Ltd* 2005 BCHRT 302.

³⁹³ *Radek v Henderson Development (Canada) Ltd* 2005 BCHRT 302 para 482.

there to be discriminatory intent and the discriminatory practice should have an adverse effect on the dignity of the affected person.³⁹⁴ It is also important to note that everyone is protected by the direct discrimination legislation in South Africa, whereas the definition of 'direct discrimination' in Ontario provides that direct discrimination may only take place in respect of people with disabilities.

3.2.1.3 Indirect discrimination

Tribunals and courts have consistently ruled that adverse discrimination (hereafter referred to as indirect discrimination) is no less a breach of human rights law than direct discrimination, and that it is the consequences thereof that matter.³⁹⁵ In the case of *Ontario Human Rights Commission v Simpsons-Sears*,³⁹⁶ it was determined that indirect discrimination occurs when an employer, for legitimate business purposes, adopts a regulation that has a discriminatory effect on a prohibited ground by imposing duties, fines or restrictive requirements on any particular characteristic of the employee or group that are not imposed on other members of the work force.³⁹⁷

Constructive discrimination is defined in section 11(1) of the Ontario Human Rights Code.³⁹⁸ Constructive and adverse discrimination are terms that are used interchangeably. Section 11(1) of the Ontario Human Rights Code³⁹⁹ provides that:

'A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.⁴⁰⁰

³⁹⁴ See para 2.2.1.1 above.

³⁹⁵ Day S & Brodsky G 'The Duty to Accommodate: Who Will Benefit.' (1996) *The Canadian Bar Review* 457.

³⁹⁶ *Ontario Human Rights Commission v Simpsons-Sears* [1985] 2 SCR 536.

³⁹⁷ *Ontario Human Rights Commission v Simpsons-Sears* [1985] 2 SCR 536 para 18.

³⁹⁸ Section 11 of the Ontario Human Rights Code, 1962.

³⁹⁹ Section 11 of the Ontario Human Rights Code, 1962.

⁴⁰⁰ Section 11 of the Ontario Human Rights Code, 1962.

Based on the provisions above it may be concluded that constructive discrimination in Canada would classify as indirect discrimination in South Africa. Indirect discriminatory measures are often implemented in the service of perfectly innocent or even commendable purposes but have unforeseen implication for groups that share a protected characteristic.⁴⁰¹ If a procedure or regulation disadvantages those who share a protected characteristic, but only in an indirect way, it is considered indirect discrimination in terms of the law; that is, if there is not a complete coincidence between the group harmed by the rule and the group distinguished by some protected characteristic, but the rule still disadvantages a greater deal of employees who have the protected characteristic than those employees who do not.⁴⁰²

The definition of indirect discrimination in Canada is similar to what it is in South Africa.⁴⁰³ At its core, the definition of indirect discrimination in both countries provide that indirect discrimination occurs when seemingly objective barriers exclude members of particular groups due to the members of those groups not being able to surmount the barriers. Canada, just like South Africa, makes provision for the protection of LGBT employees against indirect discrimination on the ground of sexual orientation.

3.2.1.4 Wage inequality

Wage equality is governed by section 11 of the Canadian Human Rights Act⁴⁰⁴ which provides that it is a discriminatory practice for an employer to develop or sustain salary disparities between male and female employees performing equal-value labour in the same workplace.⁴⁰⁵ The criteria which should be used to determine the worth of work produced by employees engaged in the same establishment is a composite of the skill, effort, and responsibility necessary in the performance of the task, as well as the working circumstances.⁴⁰⁶ Separate establishments formed or

⁴⁰¹ Moreau S 'The Moral Seriousness of Indirect Discrimination', in Collins H & Khaitan T '*Foundation of Indirect Discrimination Law.*' 1 ed (2018) *Bloomsbury Publishing* 2.

⁴⁰² Moreau S 'The Moral Seriousness of Indirect Discrimination', in Collins H & Khaitan T '*Foundation of Indirect Discrimination Law.*' 1 ed (2018) *Bloomsbury Publishing* 2.

⁴⁰³ See para 2.2.1.2 above.

⁴⁰⁴ Section 11 of the Canadian Human Rights Act, 1985.

⁴⁰⁵ Section 11(1) of the Canadian Human Rights Act, 1985.

⁴⁰⁶ Section 11(2) of the Canadian Human Rights Act, 1985.

maintained by an employer exclusively or largely for the purpose of developing or maintaining pay disparities between male and female employees are regarded as being the same establishment.⁴⁰⁷ Paying male and female employees different salaries is not discriminatory if the difference is based on a factor that is established by guidelines issued by the Canadian Human Rights Commission according to subsection 27(2) as a reasonable factor that explains the difference.⁴⁰⁸ For the avoidance of doubt, sex is not a valid element supporting salary disparities.⁴⁰⁹ In order to end a discriminatory practice specified in section 11 of the Canadian Human Rights Act, an employer may not reduce wages.⁴¹⁰ For the purposes of this section, wages are defined as 'any form of remuneration payable for work performed by an individual and includes salaries, commissions, vacation pay, dismissal wages and bonuses; reasonable value for board, rent, housing and lodging; payments in kind; employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans.'⁴¹¹

According to Christopher Carpenter's Canadian report (with regard to salary), gay men in Canada receive approximately 12 percent less than their heterosexual counterparts, despite the fact that gay men in Canada are significantly more likely to be white, highly educated and live in urban areas, in comparison to their heterosexual counterparts.⁴¹² Even after determining the demographic characteristics, educational attainment, and location, these differences still persist.⁴¹³

The disadvantage faced by transgendered employees is evident, especially economically.⁴¹⁴ According to a 2011 study prepared for the National Center for Transgender Equality and the National Gay and Lesbian Task force, 58 percent of transgendered employees earn less than \$50,000 per year, compared to 41% of the general population, and four times as many transgendered employees earn less than

⁴⁰⁷ Section 11(3) of the Canadian Human Rights Act, 1985.

⁴⁰⁸ Section 11(4) of the Canadian Human Rights Act, 1985.

⁴⁰⁹ Section 11(5) of the Canadian Human Rights Act, 1985.

⁴¹⁰ Section 11(6) of the Canadian Human Rights Act, 1985.

⁴¹¹ Section 11(7) of the Canadian Human Rights Act, 1985.

⁴¹² Carpenter CS 'Sexual Orientation, Work, and Income in Canada.' (2008) 41 *The Canadian Journal of Economics* 1241.

⁴¹³ Carpenter CS 'Sexual Orientation, Work, and Income in Canada.' (2008) 41 *The Canadian Journal of Economics* 1241.

⁴¹⁴ Rayside D 'The Challenges in Expanding Workplace Equity Policy: The Case of Sexual Diversity.' (2012) 62 *University of Toronto Law Journal* 7.

\$10,000.⁴¹⁵ Unemployment was double the national average, and 90% of employees said that they were harassed or discriminated against at work.⁴¹⁶

The wage equality legislation in Canada is extensive since it governs equal wages, assessment of value of work, separate establishments, no reduction of wages and the definition of wages. However, section 11(1) of the Canadian Human Rights Act states that it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees.⁴¹⁷ The Canadian and South African legislation governing wage equality is similar, however the wage equality legislation in Canada is concerned with the inequality between the wages of female and male employees only. The legislation governing wage equality in South Africa, similar to Canadian law, governs equal wages, assessment of value of work and a difference in terms of conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value.⁴¹⁸ South African legislation proves to protect LGBT employees better than Canadian law, because, unlike Canadian law, South African legislation governing wage equality makes specific reference to prohibited grounds which includes the ground of sexual orientation.⁴¹⁹

3.2.2 Unfairness

The Canadian law does not make use of the term 'unfair discrimination', but it does contain actions which are discriminatory and illegal. The plaintiff must establish a *prima facie* case of discrimination by proving its existence on a balance of probabilities.⁴²⁰ If this threshold is breached, the burden of proof shifts to the defendant to prove that the discrimination was justified by a legislative exception or exemption, as in the case of *Ontario Human Rights Commission v Simpsons Sears*.⁴²¹ In *Quebec v Bombardier Inc*,⁴²² consistent with the numerous statutory

⁴¹⁵ Grant JM, Mottet LA & Tanis J 'Injustice at Every Turn: A Report of the National Transgender Discrimination Survey.' (2011) 42.

⁴¹⁶ Grant JM, Mottet LA & Tanis J 'Injustice at Every Turn: A Report of the National Transgender Discrimination Survey.' (2011).

⁴¹⁷ Section 11(1) of the Canadian Human Rights Act, 1985.

⁴¹⁸ See para 2.2.1.3 above.

⁴¹⁹ See para 2.2.1.3 above.

⁴²⁰ Sheppard C & Chabot ML 'Obstacles to Crossing the Discrimination Threshold: Connecting Individual Exclusion to Group-Based Inequalities.' (2018) 9.

⁴²¹ *Ontario Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536 para 28-29.

discrimination cases decided since the case of *Simpsons Sears*,⁴²³ the Court held that the plaintiff bears the initial legal burden of proving prima facie discrimination, as has been the case in countless statutory discrimination cases since the *Simpsons Sears*⁴²⁴ case.⁴²⁵ The defendant therefore has the legal burden of proving that his or her choice or behaviour was justified under the applicable human rights legislation or by the courts.⁴²⁶

In South Africa, the EEA makes provision for unfair discrimination.⁴²⁷ In Canada, there is no mention of 'unfair discrimination', but only discrimination which is unlawful. In South Africa, the burden of proof is on the employer where discrimination is alleged on a listed ground such as sexual orientation. In Canada, the plaintiff must prove discrimination on a balance of probabilities to establish a prima facie case. If this threshold is met, the burden of proof will shift to the defendant to prove that the discrimination was justified by a legislative exception or exemption.

3.2.3 Remedies

Employees who have been discriminated against may submit a human rights complaint, as well as a grievance.⁴²⁸ Employees may demand remuneration for any wages lost as a result of discrimination and/or refusal to adapt to the point of undue hardship on the part of their employer.⁴²⁹ An employee may also be awarded damages for the injury to their dignity, feelings and self-respect that may have been caused by the actions of their employer.⁴³⁰

Section 4 of the Canadian Human Rights Act⁴³¹ provides that:

⁴²² *Quebec v Bombardier Inc* 2015 SCC 39, [2015] 2 SCR 789.

⁴²³ *Ontario Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536.

⁴²⁴ *Ontario Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536.

⁴²⁵ *Quebec v Bombardier Inc* 2015 SCC 39, [2015] 2 SCR 789 para 35-37.

⁴²⁶ *Quebec v Bombardier Inc* 2015 SCC 39, [2015] 2 SCR 789 para 35-37.

⁴²⁷ See para 2.2 above.

⁴²⁸ L&E Global 'Anti-Discrimination Laws in Canada,' available at <https://knowledge.leglobal.org/anti-discrimination-laws-in-canada/> (accessed 1 June 2021).

⁴²⁹ L&E Global 'Anti-Discrimination Laws in Canada,' available at <https://knowledge.leglobal.org/anti-discrimination-laws-in-canada/> (accessed 1 June 2021).

⁴³⁰ L&E Global 'Anti-Discrimination Laws in Canada,' available at <https://knowledge.leglobal.org/anti-discrimination-laws-in-canada/> (accessed 1 June 2021).

⁴³¹ Section 4 of the Canadian Human Rights Act, 1985.

'A discriminatory practice, as described in sections 5 to 14.1, may be the subject of a complaint under Part III and anyone found to be engaging or have engaged in a discriminatory practice may be made subject to an order as provided in sections 53 and 54.'⁴³²

The remedies available to a complainant are governed by section 53 of the Canadian Human Rights Act.⁴³³ Section 53(2)(a), (b) and (c) of the Canadian Human Rights Act apply to employees. Section 53(2) of the Canadian Human Rights Act⁴³⁴ provides that:

'If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

- (a) that the person ceases the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
 - (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
 - (ii) making an application for approval and implementing a plan under section 17;
- (b) that the person makes available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
- (c) that the person compensates the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.'⁴³⁵

Compensation for lost wages is the most common remedy for discrimination.⁴³⁶ Other remedies include posting the applicable Human Rights Code in prominent locations on employer premises, putting a stop to their unlawful actions,

⁴³² Section 4 of the Canadian Human Rights Act, 1985.

⁴³³ Section 53 of the Canadian Human Rights Act, 1985.

⁴³⁴ Section 53(2) of the Canadian Human Rights Act, 1985.

⁴³⁵ Section 53(4) of the Canadian Human Rights Act, 1985.

⁴³⁶ Jain HC '*Race and Sex Discrimination in Employment in Canada: Theories, Evidence and policies.*' (2005) 37 *Relations industrielles* 353.

compensating the complainant for general damages, and compensating the complainant for expenses incurred, among others.⁴³⁷

In South Africa, section 50(1) of the EEA provides the court with the power to make any suitable order, including one for damages and compensation in any situations contemplated in the EEA.⁴³⁸ Section 50(2) of the Canadian Employment Equity Act⁴³⁹ outlines the orders a court may make in response to discrimination.⁴⁴⁰ In Canada, section 53(2), 53(3) and 53(4) of the Canadian Human Rights Act⁴⁴¹ provides similar orders to that in South Africa's EEA. Just like the EEA, these orders include a court's power to make an order against an individual found to be engaging or having engaged in discriminatory practice, including that the individual cease the discriminatory behaviour and take steps to redress the situation or prevent the same or similar behaviour from occurring in the future.⁴⁴² However, Canadian legislation governing remedies to discrimination provide more protection to LGBT employees as it includes a subsection that makes provision for a remedy that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied as a result of the practice. South African legislation should be amended to ensure that LGBT employees who were victims of discrimination on the ground of sexual orientation in the workplace are afforded the rights, opportunities or privileges that are being or were denied as a result of the discriminatory practice.

3.3 AFFIRMATIVE ACTION

Through enacting Canada's Employment Equity Act⁴⁴³ in 1986, which was later amended in 1995, Canada took another important step in protecting the interests of

⁴³⁷ Other forms of remedies included to compensate for pain and humiliation suffered by the complainant, reinstate the complainant, write a letter of apology to the complainant, offer employment or opportunity for employment or interview etc. at the next available job opening, allow the relevant Human Rights Commission to conduct human rights workshop for company executives, amend application form and /or other selection tools, write a letter of apology to the relevant Human Rights Commission, and to provide separate facilities for women.

⁴³⁸ See para 2.2.3 above.

⁴³⁹ See para 2.2.3 above.

⁴⁴⁰ See para 2.2.3 above.

⁴⁴¹ Section 53(2),53(3) and 53(4) of the Canadian Human Rights Act, 1985.

⁴⁴² Section 53(2) of the Canadian Human Rights Act, 1985.

⁴⁴³ Employment Equity Act of Canada, 1986.

historically disadvantaged individuals.⁴⁴⁴ The Canadian Employment Equity Act⁴⁴⁵ was enacted to address the disadvantages in the workplace that women, Aboriginal peoples, people with disabilities, and members of visible minorities face by putting into practice the principle that employment equity entails more than just treating people the same, but also requiring special measures and differences to be accommodated.⁴⁴⁶

Section 3 of Canada's Employment Equity Act⁴⁴⁷ defines members of visible minorities as 'persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour'.⁴⁴⁸ Any private and public sector employer with 100 or more employees must enforce employment equity in consultation with a recognised bargaining body.⁴⁴⁹ This should be accomplished by recognising and resolving barriers to jobs for members of disadvantaged groups; enforcing policies and procedures that ensure that individuals from disadvantaged groups have a reasonable level of representation in the workforce; and annually preparing and setting targets and timeframes.⁴⁵⁰

Section 5 of the Employment Equity Act⁴⁵¹ of Canada mandates the implementation of employment equity.⁴⁵² Section 5 of the Canadian Employment Equity Act⁴⁵³ provides that:

WESTERN CAPE
'Every employer shall implement employment equity by-

- a. identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and
- b. instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated

⁴⁴⁴ Thomas A 'Employment equity in South Africa: Lessons from the global school.' (2002) 23 *International Journal of Manpower* 244-245.

⁴⁴⁵ Employment Equity Act of Canada, 1986.

⁴⁴⁶ Section 2 of the Employment Equity Act of Canada, 1986.

⁴⁴⁷ Section 3 of the Employment Equity Act of Canada, 1986.

⁴⁴⁸ Section 3 of the Employment Equity Act of Canada, 1986.

⁴⁴⁹ Hlongwane P *The Implementation of Affirmative Action Policy Within the Pretoria District of the South African Police Service* (unpublished PDPM thesis, University of South Africa, 2013) 21.

⁴⁵⁰ Hlongwane P *The Implementation of Affirmative Action Policy Within the Pretoria District of the South African Police Service* (unpublished PDPM thesis, University of South Africa, 2013) 21.

⁴⁵¹ Section 5 of the Employment Equity Act S.C. 1995.

⁴⁵² Section 5 of the Employment Equity Act S.C. 1995.

⁴⁵³ Section 5 of the Employment Equity Act S.C. 1995.

groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in:

- (i) the Canadian workforce, or
- (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.⁴⁵⁴

3.3.1 Identifying and eliminating employment barriers against persons in designated groups

Employers should conduct a thorough evaluation of their personnel policies and procedures in order to identify and eliminate work barriers that discriminate against people from designated groups.⁴⁵⁵ Word-of-mouth recruiting, credentialism, irrelevant height and weight limits, overstated employment experience, probable bias in psychological tests, discrimination in job interviews, and glass ceilings in promotion possibilities are all examples of these practices.⁴⁵⁶

The identification and removal of unjust discriminatory barriers to employment opportunities is one of the most important requirements for a successful employment equality programme.⁴⁵⁷ Such discriminatory barriers are subtle, having evolved into patterns of behaviour that are embedded in the workplace's social and administrative structures and culture, and which generate or maintain a position of relative disadvantage for specific groups or people based on their group identity.⁴⁵⁸

3.3.2 Instituting such positive policies and practices and making such reasonable accommodations

Employers must establish employment equity plans that incorporate positive steps such as proactive recruiting, selection, training, and advancement of historically

⁴⁵⁴ Section 5 of the Employment Equity Act S.C. 1995.

⁴⁵⁵ Jain HC, Horwitz F & Wilkin C 'Employment Equity in Canada and South Africa: A Comparative Review.' (2012) 23 *The International Journal of Human Resource Management* 22.

⁴⁵⁶ Jain HC, Horwitz F & Wilkin C 'Employment Equity in Canada and South Africa: A Comparative Review.' (2012) 23 *The International Journal of Human Resource Management* 22.

⁴⁵⁷ Jain HC, Horwitz F & Wilkin C 'Employment Equity in Canada and South Africa: A Comparative Review.' (2012) 23 *The International Journal of Human Resource Management* 22.

⁴⁵⁸ Agocs C & Burr C 'Employment equity, affirmative action and managing diversity: assessing the differences.' (1996) 17 *International Journal of Manpower* 31.

disadvantaged persons to address the impact of previous discrimination.⁴⁵⁹ Reasonable accommodation measures, such as accommodating religious observances, giving flexible working hours, maternity leave, women's bathroom facilities, and drafting and implementing racial and sexual harassment policies, should all be included in the employment equity plans. Internal and external workplace analysis⁴⁶⁰ must be included in employment equity plans.⁴⁶¹ Lastly, strategies to recruit, retain, train, develop and promote eligible people from designated groups within the company should be included in the employment equity plans.⁴⁶² Proactive attempts to attract and train people from designated groups, ensuring that recruitment teams are made up of people from designated groups, offering recruitment materials in several languages, and implementing mentorship programmes are all examples of good practices.⁴⁶³

Just like South Africa, Canada makes provision for affirmative action in its legislation. The difference between affirmative action legislation in South Africa and Canada is that section 15(2) of the EEA makes provision for more forms of affirmative action measures than section 5 of the Employment Equity Act in Canada. Another difference between the affirmative action legislation implemented in South Africa and Canada is found in the definition of 'people from designated groups'. In South Africa, black people, women and people with disabilities are the only groups that form part of 'people from designated groups'.⁴⁶⁴ In Canada, 'designated groups' consists of women, Aboriginal peoples, persons with disabilities and members of visible minorities.⁴⁶⁵ Both Canada and South Africa's legislation governing affirmative action does not provide protection to all LGBT employees. When it comes to affirmative action legislation in South African and Canada, neither country provides adequate protection to LGBT employees.

⁴⁵⁹ Jain HC, Horwitz F & Wilkin C 'Employment Equity in Canada and South Africa: A Comparative Review.' (2012) 23 *The International Journal of Human Resource Management* 22.

⁴⁶⁰ Such as stock and flow analysis of its workforce utilising Canadian Census labour force numbers at the industrial and occupational levels.

⁴⁶¹ Jain HC, Horwitz F & Wilkin C 'Employment Equity in Canada and South Africa: A Comparative Review.' (2012) 23 *The International Journal of Human Resource Management* 22.

⁴⁶² Jain HC, Horwitz F & Wilkin C 'Employment Equity in Canada and South Africa: A Comparative Review.' (2012) 23 *The International Journal of Human Resource Management* 22.

⁴⁶³ Jain HC, Horwitz F & Wilkin C 'Employment Equity in Canada and South Africa: A Comparative Review.' (2012) 23 *The International Journal of Human Resource Management* 22.

⁴⁶⁴ See para 2.3.1 above.

⁴⁶⁵ Section 3 of the Employment Equity Act S.C. 1995.

3.4 PROCEDURAL OBLIGATIONS

Canada's employment equity policies and programmes are among the most advanced in the world at the federal level.⁴⁶⁶ Section 9(1)(a) of Canada's Employment Equity Act⁴⁶⁷ provides that:

'For the purpose of implementing employment equity, every employer shall collect information and conduct an analysis of the employer's workforce, in accordance with the regulations, in order to determine the degree of the underrepresentation of persons in designated groups in each occupational group in that workforce.'⁴⁶⁸

3.4.1 Collect information and conduct an analysis of the employer's workforce

Collecting information, consultations with their employees, and conducting an analysis of the employer's workforce are useful tools to determine the degree of underrepresentation of designated groups. However, the collection of information and analysis that should be conducted will only determine the degree of underrepresentation of people from designated groups. Since all LGBT employees do not fall within the definition of 'designated groups', the degree of underrepresentation of all LGBT employees will not be determined.

3.4.2 Conduct a review of the employer's employment systems, policies and practice to identify employment barriers

Allowing for the identification of employment barriers against designated groups by reviewing the employer's employment systems, policies and practices will allow for greater protection to people from designated groups once these barriers are eradicated.⁴⁶⁹ These employment barriers can be identified in an employment equity plan, which will be discussed below. The eradication of barriers will not positively affect all LGBT employees since all LGBT employees do not fall within the definition of 'designated groups' as provided by Canada's Employment Equity Act.⁴⁷⁰

⁴⁶⁶ Bakan A & Kobayashi A 'Employment Equity Policy in Canada: An Interprovincial Comparison' (2000) *Status of Women Canada* 13.

⁴⁶⁷ Section 9(1)(a) of the Employment Equity Act S.C. 1995.

⁴⁶⁸ Section 10(1)(a) of the Employment Equity Act S.C. 1995.

⁴⁶⁹ Section 9(1)(b) of the Employment Equity Act S.C. 1995.

⁴⁷⁰ Employment Equity Act S.C. 1995.

3.4.2.1 Employment equity plan

The employment equity plan outlines the measures to be used to attain the targeted results for employment equity and diversity.⁴⁷¹ The plan includes the collection of workforce information, workplace analysis, employment systems review, positive practices, the monitoring of progress, review and revision of the employment equity plan, communication with employees, consultation and collaboration with employee representatives and the maintenance of records.⁴⁷²

In both South Africa and Canada procedural obligations are placed on employers. In South Africa and Canada employers are required to collect information, consult with their employees and analyse the information received. In South Africa, this information is first utilised to identify barriers that adversely affect people from designated groups and secondly to determine the degree of representation of people from designated groups. In both South Africa and Canada, since the identification of barriers and the determination of the degree of underrepresentation is determined primarily for the benefit of people from designated groups, all LGBT employees will not benefit from the analysis that designated employers are required to conduct. It is important that the audit in both jurisdictions includes LGBT employees to ensure that all LGBT employees are protected. The procedural obligations placed on designated employers fail to protect all LGBT employees since all LGBT employees do not fall within of the definition of 'designated groups' in both Canada and South Africa.

3.5 DEFENCES THAT MAY BE RAISED BY EMPLOYERS

The only federal defence that an employer can rely on is section 10 of the Canadian Human Rights Act⁴⁷³ when faced with claims of discrimination in the workplace.⁴⁷⁴ Section 10 of the Canadian Human Rights Act⁴⁷⁵ provides that:

'It is a discriminatory practice for an employer, employee organization or employer organization

- a) to establish or pursue a policy or practice, or

⁴⁷¹ Canada Economic Development 'Employment Equity and Diversity Plan.' (2013) 4.

⁴⁷² Canada Economic Development 'Employment Equity and Diversity Plan.' (2013) 4.

⁴⁷³ Section 10 of the Canadian Human Rights Act, 1985.

⁴⁷⁴ Section 10 of the Canadian Human Rights Act, 1985.

⁴⁷⁵ Section 10 of the Canadian Human Rights Act, 1985.

b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.⁴⁷⁶

To rely on this defence the employer has to prove that the policy or practice that was implemented does not 'deprive or tend to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination'.

Section 13 of British Columbia's Code governs instances in which an employer may refuse to continue to employ a person and when discrimination against a person regarding employment or any term or condition of employment will not be unlawful.⁴⁷⁷ Section 13(3) of British Columbia's Code⁴⁷⁸ provides that:

Subsection (1) does not apply

- a) as it relates to age, to a bona fide scheme based on seniority, or
- b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.⁴⁷⁹

Section 11 of Ontario's Human Rights Code⁴⁸⁰ governs constructive discrimination.⁴⁸¹ The conduct in this instance will not amount to discrimination if it can be proven that the conduct is reasonable and *bona fide* in the circumstances.⁴⁸²

In South Africa, an employer has the ability to choose from a variety of defences when faced with claims of discrimination against employees on the ground of sexual orientation.⁴⁸³ In Canada, an employer can only rely on section 10 of the Canadian Human Rights Act in direct and indirect discrimination claims on the ground of sexual orientation. Employers in Canada will not be able to rely on section 13 of British

⁴⁷⁶ Section 10 of the Canadian Human Rights Act, 1985.

⁴⁷⁷ Section 13 of the British Columbia's Human Rights Code, 1996.

⁴⁷⁸ Section 13(3) of the British Columbia's Human Rights Code, 1996.

⁴⁷⁹ Section 13(3) of the British Columbia's Human Rights Code, 1996.

⁴⁸⁰ See para 3.2.1.3 above.

⁴⁸¹ See para 3.2.1.3 above.

⁴⁸² See para 3.2.1.3 above.

⁴⁸³ See para 2.5 above.

Columbia's Code as employers can only rely on this section if the discrimination is based on the ground of age, marital status, physical or mental disability and/or sex.⁴⁸⁴ Employers will be able to rely on section 11 of Ontario's Human Rights Code in discrimination claims on the ground of sexual orientation, but only if the discrimination in question is indirect discrimination.

3.6 CONCLUSION

The purpose of this chapter is to discuss the legislation in Canada governing unfair discrimination of employees on the ground of sexual orientation. The legislation governing unfair discrimination on the ground of sexual orientation in Canada was compared to the law governing unfair discrimination on the ground of sexual orientation in South Africa. Section 15 of the Canadian Charter regulates equality in Canada, similar to section 9 of the Constitution in South Africa.⁴⁸⁵

The concept of direct discrimination in South Africa is different to the definition of direct discrimination in Ontario. In South Africa direct discrimination takes place when an act results in unfavourable treatment of a group or person as a result of an actual or presumed feature.⁴⁸⁶ In Ontario direct discrimination can occur when people with disabilities are expressly excluded from housing, employment or services, benefits that are available to others or when extra burdens are imposed that are not imposed on others, without a reasonable or *bona fide* reason. The definition of direct discrimination provides more protection to LGBT employees in South Africa than in Ontario, as it is not needed for there to be discriminatory intent and the discriminatory practice should have a negative effect on the affected person's dignity. South Africa's legislation protects everyone from direct discrimination, whereas Ontario's definition of 'direct discrimination' provides that direct discrimination may only take place in respect of people with disabilities. The definition of indirect discrimination in South Africa and Canada provides, at its core, that indirect discrimination takes place when seemingly objective barriers exclude people of particular groups due to the people of those groups not being able to overcome the barriers. Canada, just like South Africa, makes provision for the

⁴⁸⁴ Section 13(3) of the British Columbia's Human Rights Code, 1996.

⁴⁸⁵ See para 1.1 above.

⁴⁸⁶ See para 2.2.1.1 above.

protection of LGBT employees against indirect discrimination on the ground of sexual orientation.

The wage equality legislation in Canada governs equal wages, assessment of value of work, separate establishments, no reduction of wages and the definition of wages. The wage equality legislation in Canada is concerned with the inequality between the wages of female and male employees only as opposed to South Africa where specific mention is made of listed grounds that includes the ground of sexual orientation. For this reason, the legislation governing wage equality in South Africa provides more protection to LGBT employees.

South African legislation grants the court the right to make any appropriate order, including one for damages and compensation.⁴⁸⁷ Canadian legislation provides similar orders to that in South Africa's EEA. These orders include the power of a court to make an order against an individual found to be engaging or having engaged in discriminatory practice, including that the individual cease the discriminatory behaviour and take steps to redress the situation or prevent the same or similar behaviour from occurring in the future, just as the EEA does.⁴⁸⁸ South African legislation should be amended to ensure that LGBT employees who were victims of discrimination on the ground of sexual orientation in the workplace are afforded the rights, opportunities or privileges that are being or were being denied as a result of the discriminatory practice which is a remedy that may be provided to employees in Canada.

The affirmative action legislation implemented in South Africa and Canada is different since South African legislation makes provision for more forms of affirmative action measures than what Canada does. There is also a difference between the definition of 'people from designated groups' in Canada and South Africa. In Canada, 'designated groups' is defined to include women, Aboriginal peoples, persons with disabilities and members of visible minorities.⁴⁸⁹ Affirmative action measures in South Africa are only applicable to people from designated groups, of which LGBT employees do not form part of. In both South Africa and Canada, the procedural

⁴⁸⁷ See para 2.2.3 above.

⁴⁸⁸ Section 53(2) of the Canadian Human Rights Act, 1985.

⁴⁸⁹ Section 3 of the Employment Equity Act S.C. 1995.

obligations placed on designated employers assist in protecting the interests of people from designated groups. However, due to all LGBT employees not falling within the definition of 'designated groups' in Canada or South Africa, the procedural obligations imposed on designated employers fail to protect all LGBT employees.

The chapter that follows consists of a discussion on the legislation governing unfair discrimination of employees on the ground of sexual orientation in New Zealand.



CHAPTER 4

LEGISLATIVE PROVISIONS GOVERNING UNFAIR DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION IN NEW ZEALAND

4.1 INTRODUCTION

Chapter 2 revealed that in South Africa employees are protected against direct and indirect discrimination on the ground of sexual orientation by the enactment of section 6 of the EEA. Chapter 3 revealed that the meanings of 'direct discrimination' in South Africa and Ontario are similar. The definition of 'indirect discrimination' in Canada is similar to that in South Africa. Chapter 3 also revealed that more protection is provided to the LGBT employees in South Africa than in Canada insofar as the provisions governing wage equality is concerned. The South African provisions governing affirmative action only applies to people from designated groups. This means that LGBT employees are not always protected by affirmative action legislation unless they fall within one of these groups and therefore the legislation governing affirmative action does not always assist in protecting such employees. Women, Aboriginal peoples, people with disabilities, and members of visible minorities form part of 'people from designated groups' in Canada.⁴⁹⁰ Chapter 3 thus revealed further that in Canada, similar to South Africa, all LGBT employees do not form part of people from designated groups.

New Zealand is a constitutional monarchy which operates with a system of elected and autonomous government that makes laws and advises the executive government, which is made up of Ministers and their departments (referred to as 'the Crown').⁴⁹¹ The legislature, the executive and the judiciary makes up the three branches of New Zealand's government and possesses and utilises a unicameral parliament.⁴⁹² New Zealand does not have a written constitution.⁴⁹³ The Human Rights Act of New Zealand⁴⁹⁴ (hereafter referred to as the HRA) aims to guarantee

⁴⁹⁰ See para 3.3.2 above.

⁴⁹¹ Glazebrook S, Baird N & Holden S 'New Zealand: Country Report on Human Rights.' (2009) 40 *Victoria University of Wellington Law Review* 57.

⁴⁹² A unicameral government means having a single legislative chamber.

⁴⁹³ Allan J 'Why New Zealand Doesn't Need a Written Constitution.' (1998) 5 *Agenda - A Journal of Policy Analysis and Reform* 487.

⁴⁹⁴ Section 5 of the Human Rights Act, 1993.

that everyone in New Zealand is treated fairly and equitably.⁴⁹⁵ The Bill of Rights Act⁴⁹⁶ (BoRA) contains provisions governing discrimination and applies to the legislature, executive or judicial branches of the government of New Zealand and other persons or bodies performing public functions.⁴⁹⁷ The HRA applies to everyone to whom the BoRA does not apply.

The Employment Relations Act⁴⁹⁸ (hereafter referred to as the ERA) promotes equal employment opportunity policies and provide employers with a variety of resources to ensure that all workers are considered for the employment of their choosing and have the opportunity to perform to their full potential.⁴⁹⁹ The ERA provides instances where employees could be discriminated against by their employers.⁵⁰⁰ The fundamental goal of the ERA, according to section 3(a),⁵⁰¹ is to develop healthy working relationships by promoting reciprocal trust and confidence in all aspects of the workplace and employment relationship.⁵⁰² The ERA only applies to employees (any persons employed by an employer to do any work for hire or reward in terms of a contract of employment), while the HRA applies to employees and to any other person who is a victim of discrimination, such as an applicant who is unsuccessful due to discrimination.⁵⁰³

The Equal Pay Act⁵⁰⁴ aims to correct New Zealand's unequal pay rate between employees.⁵⁰⁵ The Equal Pay Act applies to every employee in paid employment and strives to eliminate and prohibit discrimination in the rates of pay of males and females in paid employment.⁵⁰⁶

The objective of this chapter is to compare the law governing unfair discrimination of employees on the ground of sexual orientation in New Zealand with that in South Africa. It consists of a discussion on discrimination, unfairness and the remedies that

⁴⁹⁵ Section 5 of the Human Rights Act, 1993.

⁴⁹⁶ Section 3 of the Bill of Rights Act, 1990.

⁴⁹⁷ Section 3 of the Bill of Rights Act, 1990.

⁴⁹⁸ Employment Relations Act, 2000.

⁴⁹⁹ Daldy B, Poot J & Roskrug M 'Perception of Workplace Discrimination Among Immigrants and Native Born New Zealanders.' (2013) *SSRN Electronic Journal* 4.

⁵⁰⁰ Section 104 of the Employment Relations Act, 2000.

⁵⁰¹ section 3(a) of the Employment Relations Act, 2000.

⁵⁰² Section 3(a) of the Employment Relations Act, 2000.

⁵⁰³ Section 21A(2)(b) of the Human Rights Act, 1993.

⁵⁰⁴ Section 2A(1) of the Equal Pay Act, 1972.

⁵⁰⁵ Section 2A(1) of the Equal Pay Act, 1972.

⁵⁰⁶ Schedule 2 of the Equal Pay Act, 1972.

are available to employees. The law governing equal pay and affirmative action in New Zealand will also be discussed. The law governing the aforementioned legal topics in New Zealand will be discussed and compared to that in South Africa to determine whether the South African legislation should be amended and/or supplemented to protect LGBT employees.

4.2 UNFAIR DISCRIMINATION

Discrimination on a prohibited ground is only unlawful if it occurs in a specified area, such as employment or the provision of goods and services.⁵⁰⁷ For example, it is unlawful for an employer to discriminate by reason of any of the prohibited grounds when hiring, firing or offering terms of employment.⁵⁰⁸ Section 22 of the HRA⁵⁰⁹ provides that:

- (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—
 - (a) to refuse or omit to employ the applicant on work of that description which is available; or
 - (b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or
 - (c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
 - (d) to retire the employee, or to require or cause the employee to retire or resign, —
by reason of any of the prohibited grounds of discrimination.
- (2) It shall be unlawful for any person concerned with procuring employment for other persons or procuring employees for any employer to treat any person

⁵⁰⁷ Turner MJ *Discrimination in the Workplace: Authenticity and the Genuine Occupational Qualification Exception* (unpublished LLM thesis, University of Otago, 2014) 5.

⁵⁰⁸ Turner MJ *Discrimination in the Workplace: Authenticity and the Genuine Occupational Qualification Exception* (unpublished LLM thesis, University of Otago, 2014) 5.

⁵⁰⁹ Section 22 of the Human Rights Act, 1993.

seeking employment differently from other persons in the same or substantially similar circumstances by reason of any of the prohibited grounds of discrimination.⁵¹⁰

Section 19(1) of BoRA⁵¹¹ provides that:

‘Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.’⁵¹²

The HRA of New Zealand does not make mention of ‘unfair’ discrimination, but the Act does govern ‘unlawful’ discrimination.⁵¹³ The HRA makes it unlawful to discriminate on many grounds.⁵¹⁴ The protected grounds found in section 21(1) of the HRA⁵¹⁵ include sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation.⁵¹⁶ Section 21 of the HRA⁵¹⁷ also applies to the parties to whom the BoRA applies.

Direct and indirect discrimination against employees is prohibited by the ERA.⁵¹⁸ Section 104 of the ERA⁵¹⁹ reads:

‘An employee is discriminated against in that employee’s employment if the employee’s employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or the employee’s union membership status or involvement in union activities in terms of section 107,—

- (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

⁵¹⁰ Section 22(2) of the Human Rights Act, 1993.

⁵¹¹ Section 19(1) of the Bill of Rights Act of 1990.

⁵¹² Section 19(1) of the Bill of Rights Act of 1990.

⁵¹³ This is evident in Part 2 of the Human Rights Act of New Zealand.

⁵¹⁴ Section 22(2) of the Human Rights Act, 1993.

⁵¹⁵ Section 21(1) of the Human Rights Act, 1993.

⁵¹⁶ Section 21(1) of the Human Rights Act, 1993.

⁵¹⁷ Section 21 of the Human Rights Act, 1993.

⁵¹⁸ Section 104 of the Employment Relations Act, 2000.

⁵¹⁹ Section 104 of the Employment Relations Act, 2000.

- (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
- (c) retires that employee or requires or causes that employee to retire or resign.⁵²⁰

Section 105 of the ERA⁵²¹ contains the prohibited grounds, which include sex, marital status, race and sexual orientation.⁵²² Section 104 of the ERA and section 105 of the ERA protects LGBT employees since section 104 of the ERA lists the circumstances under which discrimination takes place and section 105 of the ERA includes sexual orientation as a prohibited ground. The HRA also provides protection to LGBT employees since this statute makes it unlawful to discriminate against employees on the ground of sexual orientation.

Section 22 of the HRA, section 104 of the ERA and section 105 of the ERA in New Zealand is similar to South Africa's sections 5 and 6 of the EEA⁵²³ in that South Africa's legislation provides for the prohibition of discrimination of employees on various grounds in certain circumstances as is the case in New Zealand's legislation. However, with regard to the term 'unfairness', in South Africa, the legislation makes provision for the elimination of 'unfair discrimination'⁵²⁴ and the prohibition thereof.⁵²⁵ In New Zealand, there is no mention of 'unfair discrimination', but only discrimination which is unlawful.

4.2.1 Discrimination

The BoRA, ERA and the HRA does not define the term 'discrimination'.⁵²⁶ The Court of Appeal found in *Minister of Health v Atkinson & Ors*⁵²⁷ that the Ministry's policy was discriminatory on the surface, providing that differential treatment is regarded as treatment to be discriminatory if, when considered in context, it results in a significant

⁵²⁰ Section 104 of the Employment Relations Act, 2000.

⁵²¹ Section 105 of the Employment Relations Act, 2000.

⁵²² Section 105 of the Employment Relations Act, 2000.

⁵²³ See para 2.2 above.

⁵²⁴ See para 2.2 above.

⁵²⁵ See para 2.2 above.

⁵²⁶ Magallanes CI 'Application of Affirmative Action Law in New Zealand: Definition and Results.' (2004) 2 HRR Journal 10.

⁵²⁷ *Minister of Health v Atkinson & Ors* COA CA205/2011.

disadvantage.⁵²⁸ Discrimination is defined as acting in favour of or against an individual, and it entails drawing a contrast between one individual and another and treating them differently.⁵²⁹ Less favourable treatment refers to a comparison between two individuals in which one individual is treated less favourably than the other.⁵³⁰ Discrimination is viewed as being directed at a single individual, typically the individual who has been treated unfairly or unequally; in many cases, this less favourable treatment will be illegal under anti-discrimination legislation.⁵³¹

In South Africa, discrimination is defined as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁵³² New Zealand's definition of discrimination is similar to South Africa's definition of discrimination in that at its core, both definitions define discrimination as prejudicial treatment of individuals and groups based on a variety of prohibited grounds.

4.2.1.1 Direct Discrimination

Direct discrimination takes place when a person is treated less favourably than another in a similar situation on the basis of a prohibited ground.⁵³³ Even if there is no similar circumstance, direct discrimination includes harmful actions or omissions.⁵³⁴

Discrimination on a prohibited ground is only unlawful if it occurs in a specified area, such as employment or the provision of goods and services.⁵³⁵ For example, it is unlawful for an employer to discriminate by reason of any of the prohibited grounds when hiring, firing or offering terms of employment.⁵³⁶ A Maori woman was instructed

⁵²⁸ *Minister of Health v Atkinson & Ors* COA CA205/2011 para 43.

⁵²⁹ D'Ambrosio L 'Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995.' (2003) 5.

⁵³⁰ D'Ambrosio L 'Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995.' (2003) 5.

⁵³¹ D'Ambrosio L 'Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995.' (2003) 5.

⁵³² See para 2.2.1 above.

⁵³³ Human Rights Commission 'Equality and Freedom from Discrimination.' (2010) 27.

⁵³⁴ for example, in the case of a woman who is pregnant.

⁵³⁵ Turner MJ *Discrimination in the Workplace: Authenticity and the Genuine Occupational Qualification Exception* (unpublished LLM thesis, University of Otago, 2014) 5.

⁵³⁶ Section 22 of the Human Rights Act, 1993.

to cover her forearm Moko while waitressing in the case of *Haupini v SRCC Holdings Ltd*.⁵³⁷ It was held by the Human Rights Review Tribunal that the instruction to cover up the tattoo did not amount to direct discrimination on the ground of race.⁵³⁸ This is due to the tattoo free policy being found to be reasonable, and the employer would have treated a non-Maori with a forearm tattoo in the exact same manner.⁵³⁹

South Africa's definition of direct discrimination is similar to that of New Zealand's definition in that both definitions provide that direct discrimination is the unfavourable treatment of an individual in a similar situation due to a presumed feature or of a prohibited ground. However, South Africa's definition of direct discrimination goes further to provide that the discriminatory practice needs to have a negative impact on the dignity of the individual who is discriminated against.

4.2.1.2 Indirect Discrimination

Indirect discrimination occurs when a seemingly neutral practice or condition has a disproportionately detrimental effect on one of the groups against which discrimination is unlawful, and the practice or condition cannot be reasonably justified.⁵⁴⁰ Section 65 of the HRA⁵⁴¹ governs indirect discrimination and provides that:

'Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.'⁵⁴²

⁵³⁷ *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20.

⁵³⁸ *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20 para 279.

⁵³⁹ *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20 para 279.

⁵⁴⁰ Human Rights Commission '*Equality and Freedom from Discrimination.*' (2010) 27.

⁵⁴¹ Section 65 of the Human Rights Act, 1993.

⁵⁴² Section 65 of the Human Rights Act, 1993.

The employer bears the burden of proving that the conduct in question is exempt from being unlawful.⁵⁴³ Employers can justify indirect discrimination so that there is no need to depend on the Genuine Occupational Qualification⁵⁴⁴, by showing that there is a 'good reason'⁵⁴⁵ for the practice or necessity.⁵⁴⁶ In the case of *Claymore Management Ltd v Anderson*,⁵⁴⁷ it was held that indirect discrimination prohibits behaviour which appears to be neutral, but 'nonetheless has a discriminatory effect on people or groups because of a prohibited ground'.⁵⁴⁸ The emphasis is on the impact of the behaviour and whether that impact results in an individual or group being treated differently as a result of that effect.⁵⁴⁹

The definition of indirect discrimination is similar in South African and New Zealand. At its core, the definition of indirect discrimination in both countries provide that when a relatively neutral practice or condition has a disproportionately negative impact on one of the protected groups, and the practice or condition cannot be reasonably justified. New Zealand, just like South Africa, makes provision for the protection of LGBT employees against indirect discrimination on the ground of sexual orientation. South Africa and New Zealand's legislation governing indirect discrimination affords identical protection to LGBT employees since both these statutes provide the list of grounds in respect of which indirect discrimination is prohibited with sexual orientation being one of these grounds.

⁵⁴³ Section 92F(2) of the Human Rights Act, 1993; *Claymore Management Ltd v Anderson* 2 NZLR 537 [2003] para 100.

⁵⁴⁴ refers to an attribute of a person of a particular sex or racial origin which makes them more suited to a particular job, allowing an employer to choose them for the job in preference to someone of another sex or race.

⁵⁴⁵ Section 65 of the Human Rights Act provides that where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of Part Two has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

⁵⁴⁶ Turner MJ *Discrimination in the Workplace: Authenticity and the Genuine Occupational Qualification Exception* (unpublished LLM thesis, University of Otago, 2014) 6.

⁵⁴⁷ *Claymore Management Ltd v Anderson* 2 NZLR 537 [2003].

⁵⁴⁸ *Claymore Management Ltd v Anderson* 2 NZLR 537 [2003] para 97.

⁵⁴⁹ For example, imposing minimum height restrictions tends to rule out more women or Asians, thus subjecting them to detriment.

4.2.1.3 Wage Inequality

Research shows that due to many organisations discriminating against gay men, gay men earn less than their heterosexual peers.⁵⁵⁰ Section 2AAC of the Equal Pay Act⁵⁵¹ provides that:

‘An employer must ensure that—

- (a) there is no differentiation, on the basis of sex, between the rates of remuneration offered and afforded by the employer to employees of the employer who perform the same, or substantially similar, work; and
- (b) there is no differentiation, on the basis of sex, between the rates of remuneration offered and afforded by the employer for work that is exclusively or predominantly performed by female employees and the rate of remuneration that would be paid to male employees who—
 - (i) have the same, or substantially similar, skills, responsibility, and experience; and
 - (ii) work under the same, or substantially similar, conditions, and with the same, or substantially similar, degrees of effort.⁵⁵²

Section 2A of the Equal Pay Act⁵⁵³ provides that:

‘No employer shall refuse or omit to offer or afford any person the same terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion, and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description by reason of the sex of that person.’⁵⁵⁴

The issue in the case of *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*⁵⁵⁵ concerned a lack of equal pay for work of equal value.⁵⁵⁶ This was a landmark case that prompted legislative change in New

⁵⁵⁰ Drydakis N ‘Sexual orientation and labor market outcomes: Sexual orientation seems to affect job access and satisfaction, earning prospects, and interaction with colleagues.’ (2019) *IZA World of Labour* 3.

⁵⁵¹ Section 2AAC of the Equal Pay Act, 1972.

⁵⁵² Section 2AAC of the Equal Pay Act, 1972.

⁵⁵³ Section 2A of the Equal Pay Act, 1972.

⁵⁵⁴ Section 2A of the Equal Pay Act, 1972.

⁵⁵⁵ *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2015] 2 NZLR 437 (CA).

⁵⁵⁶ *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2015] 2 NZLR 437 (CA) para 2.

Zealand with regard to equal pay for work of equal value.⁵⁵⁷ In New Zealand, wage equality is governed by section 2AAC of the Equal Pay Amendment Act and section 2A of the Equal Pay Act.⁵⁵⁸ Wage equality is governed by multiple Regulations and section 6(4) of the EEA in South Africa.⁵⁵⁹

In New Zealand, section 2AAC of the Equal Pay Amendment Act explicitly mentions 'on the basis of sex' and section 2A of the Equal Pay Act expressly makes use of the words 'by reason of the sex of that person'. The wage equality legislation in New Zealand merely aims to remedy the inequality between the wages of female and male employees only. South African legislation governing wage equality provides more protection to LGBT employees against discrimination on the ground of sexual orientation. The legislation governing wage equality in South Africa, similar to New Zealand legislation, provides that there is no differentiation between the rates of the wages provided by the employer to employees of the same employer who perform the same, or substantially similar work.⁵⁶⁰ South African legislation, just like New Zealand legislation, prohibits discrimination in terms and conditions of employment, including remuneration of employees who perform work of equal value.⁵⁶¹ However, unlike New Zealand legislation governing wage equality, South African legislation governing wage equality specifically makes reference to sexual orientation as a prohibited ground.⁵⁶²

4.2.2 Unfairness

New Zealand legislation does not make use of the term 'unfairness', but it does refer to 'unlawful' discrimination. The employer bears the burden of proving that the conduct in question is unlawful in terms of any provision in Part 2.⁵⁶³ The burden of proof shifts to the employer to establish an exception based on a *bona fide* occupational requirement when the complaint establishes discrimination.⁵⁶⁴ This is

⁵⁵⁷ *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2015] 2 NZLR 437 (CA).

⁵⁵⁸ Section 2A of the Equal Pay Act, 1972.

⁵⁵⁹ See para 2.2.1.3 above.

⁵⁶⁰ See para 2.2.1.3 above.

⁵⁶¹ See para 2.2.1.3 above.

⁵⁶² See para 2.2.1.3 above.

⁵⁶³ Section 92F(2) of the Human Rights Act, 1993.

⁵⁶⁴ *Ontario (Human Rights Commission) v Etobicoke (Borough)* [1982] 1 SCR 202.

due to the employer having relevant knowledge to support its conduct.⁵⁶⁵ Just like New Zealand, South African legislation governing the burden of proof places the burden on the employer, but only in cases where discrimination is on a listed ground.

4.2.3 Remedies

Employees may file a Human Rights Commission complaint or a personal grievance with the Employment Relations Authority⁵⁶⁶ in the event of unlawful discrimination.⁵⁶⁷ It is important to note that an employee can only take one of the aforementioned courses of action for redress. If a satisfactory resolution cannot be found here and the criteria for appeal has been met, then the complainant may be taken to the Employment Court.⁵⁶⁸

Employees may choose to mediate, file a personal grievance in terms of the ERA, or file a complaint with the Human Rights Commission if they are of the opinion that they have been unfairly discriminated against during their term of employment.⁵⁶⁹ First, the employee and employer should attempt to resolve the issue through discussion; if that fails, the parties should utilise the complimentary and confidential employment mediation service.⁵⁷⁰ A party may file a personal grievance with the Employment Relations Authority if the issue remains unresolved.⁵⁷¹ Section 103 of the ERA⁵⁷² describes a personal grievance as a grievance in relation to unjustified dismissal, duress related to union membership, sexual harassment, an employer's

⁵⁶⁵ *Ontario Human Rights Commission v Simpson-Sears Ltd* [1985] 2 SCR 536 para 28.

⁵⁶⁶ The Employment Relations Authority aids in resolving employment relationship problems by looking into the facts and making a decision based on the merits of the case, not on technicalities.

⁵⁶⁷ Harwood C 'Dressed for Success? Gendered Appearance Discrimination in the Workplace.' (2007) 38 *Victoria University of Wellington Law Review* 589.

⁵⁶⁸ Harwood C 'Dressed for Success? Gendered Appearance Discrimination in the Workplace.' (2007) *Victoria University of Wellington Law Review* 589.

⁵⁶⁹ Employment New Zealand. 'Discrimination.' available at <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/discrimination/> (accessed 20 April 2021).

⁵⁷⁰ Employment New Zealand. 'Discrimination.' available at <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/discrimination/> (accessed 20 April 2021).

⁵⁷¹ Employment New Zealand. 'Discrimination.' available at <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/discrimination/> (accessed 20 April 2021).

⁵⁷² Section 123(1) of the Employment Relations Act, 2000.

unreasonable conduct that disadvantages the employee, racial harassment, or discrimination.⁵⁷³

Section 123(1) of the ERA⁵⁷⁴ regulates remedies available to employees, once the Court determined that the employee has a personal grievance.⁵⁷⁵ An employee who is successful with a claim of unlawful discrimination will be remedied in terms of this section. Section 123(1) of the ERA⁵⁷⁶ provides that:

'Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies.'⁵⁷⁷

The aforementioned section includes that the first remedy includes the reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee.⁵⁷⁸ In the case of *WXN v Auckland International Airport Ltd*,⁵⁷⁹ the Court granted the employee's application to be reinstated on an interim basis after he declined to be vaccinated against COVID-19, contrary to a vaccine mandate.⁵⁸⁰

The next remedy includes the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.⁵⁸¹ The last remedy includes the payment to the employee of compensation by the employee's employer.⁵⁸² This includes compensation for humiliation, loss of dignity, and injury to the feelings of the employee,⁵⁸³ as well as the loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.⁵⁸⁴

⁵⁷³ Section 123(1) of the Employment Relations Act, 2000.

⁵⁷⁴ Section 123(1) of the Employment Relations Act, 2000.

⁵⁷⁵ Section 123(1) of the Employment Relations Act, 2000.

⁵⁷⁶ Section 123(1) of the Employment Relations Act, 2000.

⁵⁷⁷ Section 123(1) of the Employment Relations Act, 2000.

⁵⁷⁸ Section 123(1)(a) of the Employment Relations Act, 2000.

⁵⁷⁹ *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205.

⁵⁸⁰ *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205 para 207.

⁵⁸¹ Section 123(1)(b) of the Employment Relations Act, 2000.

⁵⁸² Section 123(1)(c) of the Employment Relations Act, 2000.

⁵⁸³ Section 123(1)(c)(i) of the Employment Relations Act, 2000.

⁵⁸⁴ Section 123(1)(c)(ii) of the Employment Relations Act, 2000.

In South Africa, section 50(1) of the EEA provides the court with the power to make any suitable order, including one for damages and compensation in any situations contemplated in the EEA.⁵⁸⁵ Section 50(2) of the EEA goes on to provide the orders a court may make in response to discrimination.⁵⁸⁶ South Africa's legislation governing remedies to an employee who has been unfairly discriminated affords LGBT employees more protection than New Zealand's legislation governing remedies afforded to employees who have been discriminated against. South Africa's legislation authorises the court to make an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees.⁵⁸⁷ This is an important section since it will assist in ensuring that employees of the LGBT community will be protected against unfair discrimination, on the ground of sexual orientation.

4.3 AFFIRMATIVE ACTION

Both the HRA⁵⁸⁸ and the BoRA⁵⁸⁹ recognise that in order to address and eradicate discrimination, positive steps are required to allow particular groups in the community to achieve equal outcomes with others.⁵⁹⁰ Affirmative action measures are those that intend to assist particular minority groups in society; they can be used in any sphere of public life, although they are most often found in education and the employment sphere.⁵⁹¹

Both the HRA and the BoRA provide ostensibly different regimes with regard to regulating the legality of affirmative action measures.⁵⁹² These two pieces of legislation are discussed below.

⁵⁸⁵ Section 50(1) of the Employment Equity Act, 1998.

⁵⁸⁶ Section 50(2) of the Employment Equity Act, 1998.

⁵⁸⁷ Section 50(2)(c) of the Employment Equity Act, 1998.

⁵⁸⁸ Human Rights Act of 1993.

⁵⁸⁹ Bill of Rights Act of 1990.

⁵⁹⁰ Human Rights Commission. 'Positive actions to achieve equality: Why can some groups be treated differently in some situations.' available at <https://www.hrc.co.nz/enquiries-and-complaints/faqs/positive-actions-achieve-equality/> (accessed 14 April 2021).

⁵⁹¹ Magallanes CI 'Application of Affirmative Action Law in New Zealand: Uncertainty in Coverage, Definition and Results.' (2004) 2 HRR Journal 1.

⁵⁹² Magallanes CI 'Application of Affirmative Action Law in New Zealand: Uncertainty in Coverage, Definition and Results.' (2004) 2 HRR Journal 7.

4.3.1 Human Rights Act of 1993

Differential treatment is *prima facie* illegal under the HRA.⁵⁹³ Affirmative action is made legal by a specific exception in the Act. Section 73(1) of the HRA⁵⁹⁴ provides that:

‘Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part shall not constitute such a breach if—

- (a) it is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part; and
- (b) those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.’⁵⁹⁵

The term ‘community’ is not defined but, in the context of employment, it would refer to the community of related employees.⁵⁹⁶ In the case of *Amaltal Fishing Co Ltd v Nelson Polytechnic*,⁵⁹⁷ the Tribunal concluded that in order to establish a breach of these provisions, the plaintiff would have to show that the defendant failed to enrol people on the course solely due to a specific feature.⁵⁹⁸ In this case, the Tribunal decided that there had not been enough evidence presented and therefore the plaintiff’s claim under the HRA failed.⁵⁹⁹

WESTERN CAPE

4.3.2 Bill of Rights Act of 1990

Affirmative action is treated by the BoRA as remedial measures for those disadvantaged by discrimination, just like the HRA, but more explicitly.⁶⁰⁰ Affirmative action is regulated by section 19(2) of the BoRA⁶⁰¹ which provides that:

⁵⁹³ In other words, it does not need to be adverse discrimination in order to be unlawful.

⁵⁹⁴ Section 73(1) of the Human Rights Act, 1993.

⁵⁹⁵ Section 73(1) of the Human Rights Act, 1993.

⁵⁹⁶ Magallanes CI ‘*Application of Affirmative Action Law in New Zealand: Uncertainty in Coverage, Definition and Results.*’ (2004) 2 HRR Journal 8.

⁵⁹⁷ *Amaltal Fishing Co Ltd v Nelson Polytechnic* (1994) [1996] NZAR 97.

⁵⁹⁸ *Amaltal Fishing Co Ltd v Nelson Polytechnic* (1994) [1996] NZAR 97 pg. 21.

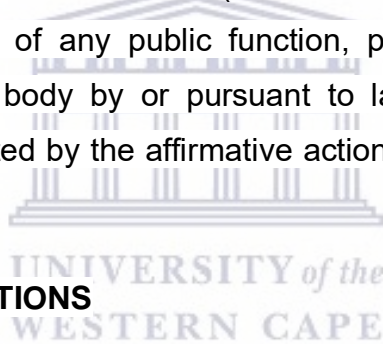
⁵⁹⁹ *Amaltal Fishing Co Ltd v Nelson Polytechnic* (1994) [1996] NZAR 97 pg. 21-22.

⁶⁰⁰ Magallanes CI ‘*Application of Affirmative Action Law in New Zealand: Uncertainty in Coverage, Definition and Results.*’ (2004) 2 HRR Journal 10.

⁶⁰¹ Section 19 of the Bill of Rights Act, 1990.

'Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.'⁶⁰²

Just like South Africa, New Zealand makes provision for affirmative action in their legislation. This is evident from section 19 of the BoRA⁶⁰³ and section 73(1) of the HRA of New Zealand which governs affirmative action.⁶⁰⁴ A difference between affirmative action legislation in South Africa and New Zealand is that in South Africa affirmative action constitutes a duty, as provided for in section 15 of the EEA, and South African legislation allows for affirmative action to be raised as a defence in terms of section 6(2) of the EEA.⁶⁰⁵ This is not the case in New Zealand. In New Zealand, affirmative action may be raised as a defence, however, does not constitute a duty. South African legislation governing affirmative action only applies to designated employers and to black people, women and people with disabilities. Affirmative action legislation in New Zealand (HRA and BoRA) applies to 'any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.'⁶⁰⁶ Therefore, all LGBT employees will not be protected by the affirmative action legislation in New Zealand, just like in South Africa.



4.4 PROCEDURAL OBLIGATIONS

Employers are required to take steps to promote a fair workplace.⁶⁰⁷ The Equal Employment Opportunity (EEO) is a practice aimed at eliminating workplace discrimination on the ground of age, colour, disability, employment status, ethical belief, ethnic or national origins, family status, marital status, political opinion, race, religious belief, sex, and sexual orientation.⁶⁰⁸ The EEO should be comprehensive and flexible enough to recognise and respond to all types of discrimination, including

⁶⁰² Section 19(2) of the Bill of Rights Act, 1990.

⁶⁰³ Section 19 of the Bill of Rights Act, 1990.

⁶⁰⁴ Section 5 of the Employment Equity Act S.C. 1995.

⁶⁰⁵ Section 6(2) of the Employment Equity Act, 1998.

⁶⁰⁶ Section 3 of the Bill of Rights Act, 1990; Part 2 of the Human Rights Act provides that Part 2 applies to persons and bodies referred to in section 3 of New Zealand' Bill of Rights Act, 1990.

⁶⁰⁷ Falcon L 'What is Equal Employment Opportunity in New Zealand.' available at <https://legalvision.co.nz/employment/equal-employment-opportunity/> (accessed 15 September 2021).

⁶⁰⁸ Mintrom M & True J 'Framework for the Future: Equal Employment Opportunities in New Zealand.' (2004) 10 *Auckland University Law Review* 7.

those that cannot be seen or testified to.⁶⁰⁹ The EEO is a concept, a practice, and a philosophy that is always evolving.⁶¹⁰ To establish a diverse and safe workplace for all employees, an employer may draft an EEO policy.⁶¹¹ However, even though New Zealand's legislation makes provision for the prohibition of discrimination in the workplace, there is no law requiring employers to implement an equal opportunity policy. In South Africa, the EEA places obligations on designated employers to comply with procedural obligations.⁶¹² Similar obligations are not placed on employers in New Zealand.

4.5 DEFENCES AVAILABLE TO EMPLOYERS

There are a few exceptions to the unlawful discrimination legislation where it is lawful to treat an individual differently based on a prohibited ground of discrimination that is normally prohibited.⁶¹³ These exceptions only apply in the following areas: Ship and aircraft crew, National security, Work outside New Zealand; Authenticity and privacy, Religious purposes, Disability, Age, Superannuation schemes and Employment of a political nature.⁶¹⁴ In *McAlister v Air New Zealand*,⁶¹⁵ the Court considered a section 30 exception (HRA) in which a pilot in command was demoted at the age of sixty to allow Air New Zealand to comply with the United States Federal Aviation Administration's age restrictions.⁶¹⁶ The Supreme Court determined that there was a section 30 Genuine Occupation Qualification (GOQ) and that the employer's prohibitions fell within the statutory phrases "for any other reason".⁶¹⁷

None of the exceptions listed above apply to unlawful discrimination in the workplace on the ground of sexual orientation. Societal values or interests may prevail at times,

⁶⁰⁹ Mintrom M & True J 'Framework for the Future: Equal Employment Opportunities in New Zealand.' (2004) 10 *Auckland University Law Review* 7.

⁶¹⁰ Mintrom M & True J 'Framework for the Future: Equal Employment Opportunities in New Zealand.' (2004) 10 *Auckland University Law Review* 7.

⁶¹¹ Falcon L 'What is Equal Employment Opportunity in New Zealand.' available at <https://legalvision.co.nz/employment/equal-employment-opportunity/> (accessed 15 September 2021).

⁶¹² See para 2.4 above.

⁶¹³ Employment New Zealand 'Exceptions to unlawful discrimination.' available at <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/exceptions-to-unlawful-discrimination/> (accessed 8 June 2021).

⁶¹⁴ Employment New Zealand 'Exceptions to unlawful discrimination.' available at <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/exceptions-to-unlawful-discrimination/> (accessed 8 June 2021).

⁶¹⁵ *McAlister v Air New Zealand Ltd* [2009] NZSC 78.

⁶¹⁶ *McAlister v Air New Zealand Ltd* [2009] NZSC 78 para 2.

⁶¹⁷ *McAlister v Air New Zealand Ltd* [2009] NZSC 78 para 17.

as indicated by specific exceptions.⁶¹⁸ For example, section 28 of the HRA⁶¹⁹ permits discrimination on the ground of sex to comply with religious teachings or practices, such as Catholic priests being only male.⁶²⁰ General exceptions have a broader reach, but they are used at the court's or tribunal's discretion.⁶²¹ If some duties of the work tasks fall inside an exception and giving those functions to another employee will not unduly disrupt the employer's operations, an exception to unlawful discrimination will not apply.⁶²² New Zealand's legislation allows for no remedy available to an employer in an unlawful discrimination claim on the ground of sexual orientation, whereas in South Africa legislation the employer may raise defences, such as the defence of affirmative action or an inherent requirement of the job.⁶²³

4.6 CONCLUSION

The objective of this chapter is to compare the law in New Zealand governing unfair discrimination of employees on the ground of sexual orientation to the law in South Africa governing unfair discrimination of employees on the ground of sexual orientation. Section 104 of the ERA sets out the manners in which an employee will be seen to be discriminated against directly or indirectly by their employer on any of the prohibited grounds specified in section 105.⁶²⁴

The meaning of discrimination in South Africa is similar to that of New Zealand. In South Africa direct discrimination takes place when an act results in unfavourable treatment of a group or person as a result of an actual or presumed feature. In both South Africa and New Zealand, both meanings of direct discrimination indicate that direct discrimination is the unfavourable treatment of a person in a comparable circumstance owing to a presumed feature or of a prohibited ground. New Zealand, just like South Africa, makes provision for the protection of LGBT employees against indirect discrimination on the ground of sexual orientation. More protection is

⁶¹⁸ Turner MJ *Discrimination in the Workplace: Authenticity and the Genuine Occupational Qualification Exception* (unpublished LLM thesis, University of Otago, 2014) 6.

⁶¹⁹ Section 28 of the Human Rights Act, 1993.

⁶²⁰ Section 28 of the Human Rights Act, 1993.

⁶²¹ Turner MJ *Discrimination in the Workplace: Authenticity and the Genuine Occupational Qualification Exception* (unpublished LLM thesis, University of Otago, 2014) 6.

⁶²² Employment New Zealand 'Exceptions to unlawful discrimination.' available at <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/exceptions-to-unlawful-discrimination/> (accessed 8 June 2021).

⁶²³ See para 2.5 above.

⁶²⁴ Section 104 of the Employment Relations Act, 2000.

afforded to LGBT employees in South Africa than in New Zealand when it comes to indirect discrimination since the law in New Zealand governing indirect discrimination merely states when indirect discrimination occurs and that it is unlawful. South African legislation contains the list of prohibited grounds upon which indirect discrimination is prohibited which includes the ground of sexual orientation.

It is evident that the wage equality legislation in New Zealand merely aims to eliminate the inequality between the wages of female and male employees, therefore, South Africa's legislation governing wage equality affords more protection to LGBT employees. In South Africa, the wage equality legislation aims to eliminate the inequality between the wages of employees on more grounds with sexual orientation being one of these grounds.

South Africa's legislation governing remedies available to an employee who has been unfairly discriminated against goes further than New Zealand's legislation by allowing the court to make an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees.⁶²⁵ This is important since it assists in ensuring that employees of the LGBT community are protected against unfair discrimination on the ground of sexual orientation.

The difference in affirmative action legislation in South Africa and New Zealand is that New Zealand has two different pieces of legislation governing affirmative action whereas South Africa only has one.⁶²⁶ BoRA and the HRA provides that 'persons or groups who need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community' will be able to rely on this legislation.⁶²⁷ This includes LGBT employees. South African legislation governing affirmative action only applies to black people, women and people with disabilities. All LGBT employees are not protected by the affirmative action measures provided for in terms of the EEA as all LGBT employees are not black, or women or people with disabilities. Neither South Africa, nor New

⁶²⁵ See para 2.2.3 above.

⁶²⁶ See para 2.3 above.

⁶²⁷ See para 4.6 above.

Zealand's legislation governing affirmative action provides protection to all LGBT employees.

The chapter that follows contains the conclusion and recommendations.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

The aim of this dissertation is to determine the extent to which the South African legislative provisions governing discrimination on the ground of sexual orientation protects employees and whether the said provisions should be amended and/or supplemented. To make the aforementioned determination the legislative provisions governing discrimination of employees on the ground of sexual orientation in Canada and New Zealand have been compared to that in South Africa. Section 9 of the Constitution in South Africa governs the right to equality and prohibits unfair discrimination on grounds that include the ground of sexual orientation.⁶²⁸ The EEA was enacted *inter alia* to give effect to section 9 of the Constitution.⁶²⁹ In Canada, section 15 of the Charter prohibits discrimination on various grounds and the Supreme Court of Canada held that sexual orientation forms part of these grounds. New Zealand does not have a written Constitution.⁶³⁰ However, protection is provided to LGBT employees by the HRA, Employment Equity Act and the BoRA. LGBT employees in South Africa are protected as a result of section 9 of the Constitution and the EEA.

5.1.1 Unfair Discrimination

Section 5 of the EEA places the burden on employers to 'take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice' and section 6 of the EEA prohibits unfair discrimination on grounds that include the ground of sexual orientation. The aforementioned sections protect employees in South Africa against unfair discrimination on the ground of sexual orientation. As far as Canada is concerned, section 5(1) of the Ontario Human Rights Code and section 7 of the Canadian Human Rights Act provides that everyone should be treated equally in Canada. Similarly, In New Zealand, section 22 of the HRA and section 19 of BoRA reiterate

⁶²⁸ See para 1.1 above.

⁶²⁹ See para 1.1 above.

⁶³⁰ See para 4.1 above.

that everyone has the right to be free from discrimination. It is evident that LGBT employees in South Africa are protected adequately in comparison to the protections provided to employees in Canada and New Zealand.

Direct discrimination legislation protects everyone in South Africa, whereas it protects persons with a disability in Canada. The concept of direct discrimination in South Africa is similar to that in New Zealand, in that both define direct discrimination as the unfavourable treatment of an individual in a comparable position because of a presumed feature or a presumed feature. The definition of indirect discrimination is similar in South Africa, Canada and New Zealand.⁶³¹ At its core, the definition of indirect discrimination in these three jurisdictions provide that indirect discrimination occurs when seemingly objective barriers exclude members of particular groups due to the members of those groups not being able to surmount the barriers. The legislation in South Africa, Canada and New Zealand makes provision for the protection of LGBT employees against indirect discrimination on the ground of sexual orientation.

In South Africa, the concept of unfairness is used.⁶³² In New Zealand, the word 'unfairness' is not used, however, 'unlawfulness' is used, while the law in Canada makes provision for actions that are discriminatory and illegal.⁶³³ In South Africa, where discrimination is alleged on a listed ground such as sexual orientation, the burden is on the employer to prove either that the alleged discrimination did not take place or is rational and not unfair, or is otherwise justifiable.⁶³⁴ In Canada, the plaintiff must establish a *prima facie* case of discrimination by proving its existence on a balance of probabilities.⁶³⁵ If this threshold is breached, the burden of proof shifts to the defendant to prove that the discrimination was justified by a legislative exception or exemption.⁶³⁶ In New Zealand, the employer bears the burden of proving a Part 2 exemption.⁶³⁷ The burden of proof shifts to the employer to establish an exception based on a *bona fide* occupational requirement when the complaint

⁶³¹ See para 2.2.1.2 above.

⁶³² See para 2.2.2 above.

⁶³³ See para 3.2.2 above.

⁶³⁴ See para 2.2.2 above.

⁶³⁵ See para 3.2.2 above.

⁶³⁶ See para 3.2.2 above.

⁶³⁷ See para 4.2.2 above.

establishes discrimination.⁶³⁸ The position in South Africa and New Zealand, is different to that in Canada since the burden is on the employer in the case of claims of discrimination on the ground of sexual orientation in South Africa and New Zealand. South Africa provides more protection to LGBT employees than in Canada in this regard.

The remedies available to employees in South Africa who are successful with unfair discrimination claims include the LC's right to make any appropriate order for damages, compensation and an order/award requiring the employer to take appropriate actions to avoid unfair discrimination or a similar practice from occurring to other employees in the future.⁶³⁹ In Canada, employees may demand remuneration for any wages lost as a result of discrimination and/or refusal to adapt to the point of undue hardship on the part of their employer.⁶⁴⁰ An employee may also be awarded damages for the injury to their dignity, feelings and self-respect that may have been caused by the actions of their employer.⁶⁴¹ The remedies also include that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice.⁶⁴² In New Zealand, the first remedy for discrimination is either reinstatement in the employee's previous position or placement in a position that is no less favourable to the employee.⁶⁴³ The second remedy is for the employer to pay the employee for all or part of the wages or any money lost as a consequence of the grievance.⁶⁴⁴ The employee's employer must provide compensation to the employee as the last remedy.⁶⁴⁵ The legislation in South Africa governing the remedies offered to employees who are successful with claims of unfair discrimination, including those on the ground of sexual orientation, protect LGBT employees. However, this legislation can be supplemented to include that the employer makes available to the victim of the discriminatory practice on the first reasonable occasion the rights, opportunities or privileges that are being or were denied, as provided for in the legislation governing remedies in Canada.

⁶³⁸ See para 4.2.2 above.

⁶³⁹ See para 2.2.3 above.

⁶⁴⁰ See para 3.2.7 above.

⁶⁴¹ See para 3.2.7 above.

⁶⁴² See para 3.2.7 above.

⁶⁴³ See para 4.2.3 above.

⁶⁴⁴ See para 4.2.3 above.

⁶⁴⁵ See para 4.2.3 above.

The Employment Equity Regulations of 2014 regulates the actions that employers should take to eradicate unfair discrimination in terms and conditions of employment in South Africa.⁶⁴⁶ The legislation governing wage equality in South Africa proves to protect LGBT employees more than Canadian and New Zealand's legislation. South African wage equality legislation includes the meaning of work of equal value, the variables that should be taken into account in establishing whether two jobs are of equal value and the grounds to justify a difference in remuneration.⁶⁴⁷ Unlike the legislative frameworks governing wage equality in Canada and New Zealand, the South African wage equality legislation makes specific reference to prohibited grounds which includes the ground of sexual orientation.⁶⁴⁸ In New Zealand and Canada, wage equality legislation focuses solely on salary disparities between male and female employees. Therefore, the legislation governing wage equality in South Africa assists in protecting employees discriminated against on the ground of sexual orientation.

5.1.2 Affirmative Action

In South Africa, affirmative action legislation assists in the protection of 'people from designated groups'.⁶⁴⁹ The term 'people from designated groups' only includes black people, women and people with disabilities.⁶⁵⁰ This implies that all LGBT employees are not protected by affirmative action legislation. The fact that LGBT employees are not expressly included in the definition of 'people from designated groups' can be identified as a shortcoming of the legislative framework. The Canadian Employment Equity Act⁶⁵¹ was enacted to address the disadvantages of women, Aboriginal peoples, people with disabilities, and members of visible minorities. This means that all LGBT employees are not protected by the Canadian legislative provisions governing affirmative action. In New Zealand, both the HRA and the BoRA recognise that in order to address and eradicate discrimination, positive steps are required to allow particular groups in the community to achieve equal outcomes with others.⁶⁵² New Zealand legislation governing affirmative action applies to 'any person or body

⁶⁴⁶ See para 2.2.1.3 above.

⁶⁴⁷ See para 2.2.1.3 above.

⁶⁴⁸ See para 2.2.1.3 above.

⁶⁴⁹ See para 2.3 above.

⁶⁵⁰ See para 2.3.1 above.

⁶⁵¹ Employment Equity Act of Canada, 1986.

⁶⁵² See para 4.3 above.

in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.’⁶⁵³ Therefore, all LGBT employees will not be protected by the affirmative action legislation in New Zealand. In all three jurisdictions it is evident that the affirmative action legislation assists in protecting employees who form part of the groups who were unfairly discriminated against in the past but fails to include all LGBT employees in the meaning of persons who are meant to benefit from the legislation governing affirmative action. Therefore, affirmative action legislation in South Africa fails to protect all LGBT employees against discrimination on the ground of sexual orientation in the workplace.

The legislation governing procedural obligations in Canada, for the purpose of implementing employment equity, requires that every employer must collect information and perform an analysis of its workforce in order to establish the degree of underrepresentation of people from designated groups in each occupational category in that workforce.⁶⁵⁴ Procedural obligations placed on employers in New Zealand provides that employers implement an EEO which is a practice aimed at the elimination of workplace discrimination on multiple grounds, including sexual orientation.⁶⁵⁵ Unlike Canada, there is no regulation requiring companies to have an equal opportunity policy in place. In South Africa, however, all LGBT employees do not benefit from the procedural obligations that are placed on designated employers since these procedural obligations are placed on designated employers to benefit people from designated groups. Since all LGBT employees do not fall within the meaning of ‘people from designated groups’, this may be identified as a shortcoming of the South African legislative framework.

5.2 RECOMMENDATIONS AND FINAL REMARKS

There is a need to amend and supplement the legislative framework governing unfair discrimination on the ground of sexual orientation. The legislation governing remedies in South Africa should be supplemented to include an apology to be issued by the employer to the employee concerned as an additional remedy with the aim of remedying the harm suffered by a complainant. In Canada, the remedies include that

⁶⁵³ See para 4.3 above.

⁶⁵⁴ See para 3.3 above.

⁶⁵⁵ See para 4.4 above.

the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice.⁶⁵⁶ South African legislation should be supplemented to ensure that LGBT employees who were victims of discrimination on the ground of sexual orientation in the workplace are afforded the rights, opportunities or privileges that are being or were being denied as a result of the discriminatory practice.

Section 1 of the EEA should be amended to include all employees from LGBT communities to ensure that all LGBT employees are protected by the provisions governing affirmative action in South Africa. Should the legislative framework governing unfair discrimination on the ground of sexual orientation be amended and supplemented as recommended, LGBT employees in South Africa will be protected even more than what they are at present.

Word count: 32375

⁶⁵⁶ See para 3.2.3 above.

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