# IS DISCRIMINATION LAW DOING THE JOB THAT IT IS SUPPOSED TO DO?

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In 2004 Professor Harry Arthurs presented a paper at the University of Cape Town in which he suggested that the impact of anti-discriminatory laws in the Canadian workplace had been rather modest and that despite these laws the wage gap between men and women have only narrowed a little bit, that few women were in managerial positions and that unemployment rates for aboriginal and coloured workers were much higher than for white workers.[1]

A quick scan of employment statistics in South Africa suggests the same pattern.[2] Yes, imbalances are not as bad as they used to be, but unemployment is still the highest amongst the broadly black groups and women are still trailing behind when it comes to managerial positions etc.

But can it really be claimed that (workplace) discrimination law is not doing the job it is supposed to do? This, to a large extent depends on what workplace discrimination law can realistically achieve.

The right to equality is entrenched in section 9 of the South African Constitution. In line with the Constitution, dedicated legislation had been passed by Parliament, including the Employment Equity Act 55 of 1998 (EEA) which regulates equality in the workplace. The Constitutional Court has held that when workplace discrimination is litigated, a litigant may not bypass the EEA and rely directly on the Constitution without first challenging the EEA as falling short of the constitutional standard.[3] For all intents and purposes therefore the EEA is the legislation that will be turned to in the case of workplace discrimination and not the Constitution.

Section 2 of the EEA defines the purpose of this Act as achieving equity in the workplace by-

> (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
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> (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

For the discussion that follows the focus will be on the first of the above. The EEA is expected to enhance equity (equal opportunity and fair treatment) by eliminating unfair discrimination. There are at least two possible barometers that can be used to measure the EEAs successes: workplace statistics and jurisprudence. Statistics, as pointed out above, suggest that disparities continue, but one should be careful to blame the statistics for what the

[1] H Arthurs and B Hepple *The Constituionalization of Labour Rights* IDLL Monograpgh series 01/04 2004.
[2] See generally the Commission for Employment Equity Annual Report 2008-2009 (www.labour.gov.za).
[3] *SA National Defence Union v Minister of Defence* [2007] 9 BLLR 785 (CC).

EEA is achieving or not achieving. There are simply too many other considerations that factor into these statistics. For instance, just as South Africa emerged from apartheid and introduced anti-discrimination laws the HIV/Aids pandemic moved into top gear.[4] Some of the other considerations include the poor education system that blacks were forced to participate in during the apartheid years,[5] the big shift to the services sector since the 1980s and the informalisation of the labour market.[6]

However, turning to the other barometer, jurisprudence suggests a high level of intolerance of unfair discrimination in the workplace. Workplace decisions based on the grounds listed in the EEA (for example, HIV/Aids, sexual orientation, disability, gender, race) have all been frowned upon by the (labour) courts (always emphasizing the dignity of the complainant) and have resulted in stiff consequences for the perpetrating employer. While this jurisprudence typically addresses the pathological cases only, there can be no doubt that this jurisprudence has nonetheless created a high level of awareness amongst many employers in South Africa. (In some instances, it results in attitudinal changes: The plight of the insulin dependent diabetic who was denied a position as a fire-fighter in *Independent Municipal & Allied Workers Union v City of Cape Town*[7] has created a high level of appreciation for how incapacitating the more discreet forms of discrimination can be.) As a result of this jurisprudence employers have taken at least formal steps to eliminate unfair discrimination. While eradicating unfair discrimination in the workplace to the extent that the employer cannot be legally penalised for its formal practices and policies is important, it can still be asked whether workplace discrimination law must not achieve more than this before it can claim success.

The workplace, together with other fundamental structures in society such as the family, sport/religious/cultural bodies and the education system are important sites for the transformation of their members. It is suggested that it is only when workplace discrimination law becomes the means through which the mindset of the members of the workforce is changed, that it can truly claim success. It has been said that at the heart of equality is the appreciation of diversity as the preferred condition as opposed to it being a last resort:

> The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.[8]

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[4] M Ramphele *Laying Ghosts to Rest* (2008) 229.
[5] Ramphele 199.
[6] Theron, J 'The shift to services and triangular employment: implications for labour market reform' (2008) 29 *ILJ* 1.
[7] (2005) 26 *ILJ* 1404.
[8] *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355 (CC). Also see *MEC for Education: KwaZulu-Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of*

But can legislation really achieve this? Legislation is probably not a realistic means for realising this, but it is suggested that it can at least facilitate the adoption of policies and soft laws that can help. This is illustrated with reference to discipline in the workplace.

**Discipline and remedies.**

In terms of the EEA employers become liable to an employee if he or she becomes the victim of the discriminatory conduct of other employees if they (employers) fail to act promptly on reports of such discrimination.[9] Out of fear for the consequences of this and because of a need to be seen as acting in a politically correct manner, employers often respond boldly to such complaints by dismissing the culprit. While this is often the only and proper response to discrimination in the workplace it is suggested that there are incidences where this provides an opportunity to advance transformation in the workplace. Rycroft *et al* refers to the understandable tendency by courts in South Africa to sympathise with employers in such cases, especially where the dismissal is the result of racial discrimination by the perpetrator.[10] He argues that the basic premise of workplace discipline is to correct and rehabilitate improper workplace conduct and that the same sentiments should be applied in the case of an employee guilty of racial discrimination. In other words, a more therapeutic approach to discipline may help, not only to transform the perpetrator, but also to change the mindset of a very suspicious workforce belonging to the same race group (as the perpetrator). Dismissal, on the other hand, deepen the resentment of both the culprit and his peers in the workplace:

> We have been critical of the sanction of dismissal in the two cases discussed above and this may be interpreted as being soft on racism. Our suggestion that employers and trade unions should be open to dealing with racism in a more therapeutic manner may be dismissed as being inappropriate to environments where anything that is disruptive of productivity must be dealt with ruthlessly. We however argue for a balance, one that seeks to eradicate workplace racism as well as striving for individual transformation.[11]

These comments were made in the context of racial discrimination which has a particular significance in South Africa, but there is in principle no reason why this approach should not be applied in cases where the discrimination is based on another ground. However, this approach can only be successful if it is preceded by a deliberate effort by employers to change the mindsets of their workforce. This is not going to happen by merely responding to outcomes of jurisprudence and it is in this context that the use of soft laws can be very effective, albeit no guarantee to success.[12] Arthurs, for example, suggests that the elimination

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*Durban Girls' High School v Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute* 2008 (2) BCLR 99 (CC) where at [65] it said that the 'constitutional project . . . not only affirms diversity, but promotes and celebrates it' and that '[w]e cannot celebrate diversity by permitting it only when no other option remains.'

[9] Section 60.

[10] Rycroft, A and Thabane, T 'Racism in the workplace' (2008) 29 *ILJ* 43.

[11] 52.

[12] In *SATAWU on behalf of Finca v Old Mutual life Assurance Co (SA) Ltd* (2006) 27 *ILJ* 1204 (LC) Revelas J, in the context of racial discrimination, commented that '[t]he undisputed evidence was that there was no lack of training in this particular area of human relationships within the first respondent. It is the response to such training which was the problem in this matter. Some mindsets will not respond to training.'

of workplace discrimination in Canada is the result of 'changing social attitudes, the mobilization of political pressure and patient mid-level interventions by human rights attitudes.'[13]

The answer to the question in the title of this paper must therefore be ambiguous: Yes and No. Anti-discrimination law and concomitant jurisprudence can do a lot to create awareness of the need for equity in the workplace, but it cannot ensure equity in the workplace. This requires a different type of intervention of a far more discreet nature. In other words, anti-discrimination workplace laws can be the key that ignites the equity engine, but it cannot be the fuel that is required to drive the engine.

[13] See n 1.