

**UNINTENDED CONSEQUENCES OF LEGISLATION: AN INQUIRY  
INTO THE CONSTITUTIONALITY OF SECTION 194 OF THE LABOUR  
RELATIONS ACT**

**MINOR DISSERTATION PRESENTED FOR THE DEGREE OF  
MASTER OF LAWS**

By Minor Dissertation with Coursework  
Labour Law Specialisation

**DEPARTMENT OF COMMERCIAL LAW  
FACULTY OF LAW**

**UNIVERSITY OF CAPE TOWN**



Supervised by  
**ASSOCIATE PROFESSOR DEBBIE COLLIER**

Written by  
**LISA WOOD**  
(WDXLIS001)

**22 722 WORDS  
MARCH 2016**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

**Plagiarism Declaration**

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. I have used the footnote convention for citation and referencing. Each contribution to, and quotation in this dissertation from the work(s) of other people has been attributed, and has been cited and referenced.
3. This essay is my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.
5. I acknowledge that copying someone else's work, or part of it, is wrong, and declare that this is my own work.

Signature Signed by candidate

**Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the *Master of Laws: Labour Law Specialisation* in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.**

**I hereby declare that I have read and understood the regulations governing the submission of *Master of Laws: Labour Law Specialisation* dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.**

**DATE: 14 MARCH 2016**

**SIGNED:** Signed by candidate

## ACKNOWLEDGMENTS

First and foremost, I would like to thank my supervisor, Associate Professor Debbie Collier. Her encouragement, guidance, and insights were invaluable in the completion of this dissertation. It was a privilege to be supervised by an academic of her calibre, and a person for whom I have the greatest respect.

I would also like to extend my gratitude to the friends and colleagues who took time out of their busy days to read previous versions of this dissertation in order to provide me with feedback.

Lastly, I would like to thank each member of my family for their unrelenting support. However, I would like to dedicate my dissertation to one member in particular, my late father. A man whose insatiably inquisitive mind inspired my academic path and continues to feed my ambition. I am forever indebted to his desire for my success.

## **Abstract**

*A fundamental adjustment to our perspectives on the systemic inequalities that exist in South Africa is necessary. Our seemingly neutral laws need to be reassessed to fully understand their practical impact. Section 194 of the Labour Relations Act provides an overtly neutral law in the form of a limitation on the compensation awardable in employment matters. The limitation is the equivalent of either 12 or 24 month's remuneration. The text expresses that compensation must be 'just and equitable', but subject to the limitation. The judges and commissioners that have heard such employment matters have taken this concept of 'just and equitable' and interpreted it to either mean recovering loss suffered, or fairness on a sliding scale of 1 to 12 or 1 to 24 months' remuneration, depending on the case. This dissertation will argue that any text or interpretation of section 194 that utilises remuneration as its sole measurement, is constitutionally invalid. This is because systemic racial and gender inequality in South Africa prevent a free market of opportunity concerning the salaries available to a statistically significant number of women and black persons. The provision in question may not directly intend to differentiate between races and genders, but the indirect effect of the text and interpretation of section 194 is to cause disproportionate disadvantage to certain groups of persons. This dissertation will use case law to bring the unjust impact of section 194 to light; it will then suggest that any use of remuneration as a standard or measure will always create a prima facie case of unfair discrimination on the grounds of race and gender – at least in our country's current economic circumstances. The essential point is that differentiation on the ground of remuneration is inherently indirectly discriminatory, and will, therefore, always require justification for its use. This dissertation will then go on to inquire into the constitutionality within the context of section 194 – ultimately, the conclusion is that the current interpretation which quantifies compensation solely in terms of remuneration, as well as the text of the limitation on compensation that limits in terms of remuneration, cannot withstand constitutional scrutiny. This is followed by recommendations on how to move forward within the bounds of the Constitution. Racial and Gender inequality are embedded within the fabric of South Africa. It is imperative that we reassess the unintended effects of our laws if we are to achieve one of the fundamental goals of the Constitution: equality.*

## CONTENTS

<b>ACKNOWLEDGEMENTS.....</b>	<b>3</b>
<b>ABSTRACT.....</b>	<b>4</b>
<b>CHAPTER I: INTRODUCTION.....</b>	<b>7</b>
<b>CHAPTER II: ILLUSTRATING THE PROBLEM THROUGH CASE LAW.....</b>	<b>10</b>
<b><i>(a) Acknowledgment from the United States.....</i></b>	<b>16</b>
<b>CHAPTER III: DIFFERENTIATION ON THE GROUND OF REMUNERATION REQUIRES JUSTIFICATION.....</b>	<b>18</b>
<b><i>(a) The Right to Equality and the Prohibition of Discrimination.....</i></b>	<b>19</b>
<b><i>(b) Establishing Unfair Discrimination under South African Law.....</i></b>	<b>20</b>
<b><i>(i) The Legal Test.....</i></b>	<b>20</b>
<b><i>(ii) Differentiation in Indirect Discrimination.....</i></b>	<b>22</b>
<b><i>(aa) United States.....</i></b>	<b>22</b>
<b><i>(bb) United Kingdom .....</i></b>	<b>24</b>
<b><i>(cc) South Africa.....</i></b>	<b>25</b>
<b><i>(c) The Unavoidable Existence of Prima Facie Unfair Discrimination.....</i></b>	<b>28</b>
<b><i>(i) Statistical Evidence.....</i></b>	<b>28</b>
<b><i>(aa) Racial Inequality in the Workplace.....</i></b>	<b>28</b>
<b><i>(bb) Gender Inequality in the Workplace.....</i></b>	<b>30</b>
<b><i>(ii) The Common Sense Approach.....</i></b>	<b>33</b>
<b><i>(aa) Acknowledgement of Systemic Racial Inequality.....</i></b>	<b>33</b>
<b><i>(bb) Acknowledgement of Systemic Gender Inequality.....</i></b>	<b>35</b>
<b>CHAPTER IV: THE CONSTITUTIONALITY OF QUANTIFYING COMPENSATION IN TERMS OF REMUNERATION.....</b>	<b>38</b>
<b><i>(a) The Two Interpretations.....</i></b>	<b>38</b>
<b><i>(i) The Loss-Based Approach.....</i></b>	<b>38</b>

(ii) <i>The ‘Sui Generis’ Approach</i> .....	41
<b>(b) <i>The Extent of the Unconstitutionality</i></b> .....	<b>43</b>
<b>CHAPTER V: THE CONSTITUTIONALITY OF LIMITING COMPENSATION IN TERMS OF REMUNERATION</b> .....	<b>44</b>
(a) <i>The Limitation under Section 194 of the LRA</i> .....	45
(b) <i>The Extent of the Unconstitutionality</i> .....	45
(c) <i>Using Remuneration to Limit Compensation Cannot Withstand a     ‘Limitations Analysis’</i> .....	46
(i) <i>The Legal Position</i> .....	46
(ii) <i>Evaluating the Infringement of the Right to Equality</i> .....	48
<b>CHAPTER VI: RECOMMENDATIONS</b> .....	<b>51</b>
(a) <i>A New Constitutionally-Sound Interpretation</i> .....	51
(b) <i>Alternative Limitation Solutions from Foreign Jurisdictions</i> .....	55
(i) <i>United States</i> .....	55
(ii) <i>Canada</i> .....	59
(iii) <i>United Kingdom</i> .....	60
(c) <i>Replacing the ‘Remuneration’ Cap with a ‘Monetary’ Cap</i> .....	62
(d) <i>Capping by Applying a Form of Prescription</i> .....	64
<b>CHAPTER VII: CONCLUSION</b> .....	<b>65</b>
<b>BIBLIOGRAPHY</b> .....	<b>68</b>

## CHAPTER I: INTRODUCTION

A fundamental adjustment to our perspectives on the systemic inequalities that exist in South Africa is necessary. Our seemingly neutral laws need to be reassessed to fully understand their practical impact. This notion is of particular relevance now more than ever when not only are entities, nationally, calling out for transformation, but Parliament has convened a panel to review the practical impacts of post-1994 laws.<sup>1</sup> Parliament is confronted with the question of: why there is no evidence to support the realisation of transformation when the structures seeking equality are ostensibly in place? This dissertation will aim to shed light on the importance of this question by exposing an unforeseen consequence of a post-1994 law. In so doing, this dissertation will pursue a constitutional challenge to a law that has never previously been proposed.

The purpose of this dissertation is two-fold. First, it will be established that differentiation on the ground of remuneration triggers *prima facie* unfair discrimination. Second, the judicial interpretation and text of s 194 of the Labour Relations Act<sup>2</sup> which utilises remuneration differentiation, will be scrutinised and found to unfairly discriminate due the disproportionate disadvantage caused in a manner which cannot be justified.

---

<sup>1</sup> Thulani Gqirana, News24 'Parliament to Review Impact of Post-1994 Laws' (2016). Available at <http://www.news24.com/SouthAfrica/News/parliament-to-review-impact-of-post-1994-laws-20160119> [Accessed 2 March 2016].

<sup>2</sup> Labour Relations Act 66 of 1995. Hereafter referred to as the 'LRA'. Section 194 of the LRA is pivotal to this dissertation. This will be dealt with in detail in Chapter V below; however, it will benefit understanding to reproduce this section at this early stage:

**"194 Limits on Compensation**

(1) The compensation awarded to an *employee* whose *dismissal* is found to be unfair because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of remuneration on the date of *dismissal*.

(2) ...

(3) The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.

(4) The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' *remuneration*."

Section 194 of the LRA provides an overtly neutral law in the form of a limitation on the compensation awardable in employment matters. The limitation is the equivalent of either 12 or 24 months' remuneration. The text expresses that compensation must be 'just and equitable', but subject to the limitation. The judges and commissioners that have heard such employment matters have taken this concept of 'just and equitable' and interpreted it to either mean recovering loss suffered, or fairness on a sliding scale of 1 to 12 or 1 to 24 months' remuneration, depending. This dissertation will argue that any text or interpretation of section 194 that solely utilises remuneration in its measurement, is constitutionally invalid. This is because systemic racial and gender inequality in South Africa prevent a free market of opportunity concerning the salaries available to a statistically significant number of women and black persons.<sup>3</sup> The provision in question may not directly intend to differentiate between races and genders, but the indirect effect of the text and interpretation of section 194 is to cause disproportionate disadvantage to certain groups of persons.

The concept of indirect discrimination caused by a statute which differentiates between persons in terms of their remuneration, where the statute operates within a social reality of racialised income inequality, has previously been posited by Alan Rycroft.<sup>4</sup> Rycroft's argument related to the Workmen's Compensation Act,<sup>5</sup> which, amongst other things, computed workers' compensation based on their earnings.<sup>6</sup> Rycroft stated that since black workers constitute the lowest paid race group, compensation may be discriminatory as black workers sustaining an injury will

---

<sup>3</sup> Sampie Terreblanche *A History of Inequality in South Africa 1652-2002* 1ed (2002) 391-392; The Minister in the Presidency Responsible for Women with the Development Policy Research Unit 'The Status of Women in the South African Economy' August 2015 at p 67. Accessible at <http://www.gov.za/documents/status-women-south-african-economy-9-aug-2015-0000> [Accessed 17 January 2016].

<sup>4</sup> Alan Rycroft 'Unfair Discrimination in Employment' (1990) 1 *South African Human Rights Yearbook* 371. 'Indirect discrimination' is defined in Section 1 of the Promotion of Equality and Prevention of Discrimination Act 4 of 2000: "discrimination means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly – (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds." Also see Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5ed (2010) 260 and *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC) at 292. This concept will be further discussed in Chapter III.

<sup>5</sup> Workmen's Compensation Act 30 of 1941.

<sup>6</sup> Rycroft op cit note 4 at 374.

necessarily be compensated less than white workers – for the same injury.<sup>7</sup> The Act has since been repealed.

The Employment Equity Act<sup>8</sup> also has relevance to this dissertation. Section 50(2)(a) of the EEA provides for the Labour Court's power to order compensation payable to the employee in the event that the employer is found to have unfairly discriminated against him or her. An important distinction from the LRA is that compensation awarded under the EEA is not subject to any limitation on the awardable value. Therefore, to the extent that this dissertation will attack the constitutionality of the LRA's limitation on compensation in Chapter V, this is not relevant to the EEA. However, the aspects of this dissertation discussed in Chapters IV and VI concerning the challenge to the interpretation that has been imposed on the calculation of compensation, are directly relevant to the EEA as well as the LRA. This dissertation should be interpreted to apply to the EEA, in addition to the LRA, in that regard.

This dissertation consists of seven chapters. In Chapter II, it will use case law to bring the unjust impact of section 194 to light. Thereafter, in Chapter III, it will establish that any use of remuneration as a standard or measure of differentiation will always trigger a *prima facie* case of unfair discrimination on the grounds of race and gender. This conclusion will be reached until our country's current economic circumstances alters substantially. The essential point is that remuneration is inherently discriminatory, and will, therefore, always require justification for its use. This dissertation will go on to inquire into the constitutionality within the context of section 194 of the LRA in Chapters IV and V. Ultimately, the conclusion in Chapter IV is that the current interpretation of the section which quantifies compensation solely in terms of remuneration cannot be justified. Additionally, in Chapter V, the text of the section in limiting compensation in terms of remuneration, also cannot withstand constitutional scrutiny. Chapter VI follows the above conclusions by making recommendations on how to move forward within the bounds of the Constitution.<sup>9</sup> Finally, in Chapter VII, this dissertation concludes that racial and

---

<sup>7</sup> Ibid.

<sup>8</sup> Employment Equity Act 55 of 1998. Hereafter referred to as the 'EEA'.

<sup>9</sup> The Constitution of the Republic of South Africa, 1996. Hereafter referred to as the 'Constitution'.

gender inequality are embedded within the fabric of South Africa. It is imperative that we reassess the unintended effects of our laws if we are to achieve one of the fundamental goals of the Constitution: equality.<sup>10</sup>

## CHAPTER II: ILLUSTRATING THE PROBLEM THROUGH CASE LAW

Potential challenges to the constitutionality of s 194 of the LRA are revealed in the process of reading relevant case law. When the race and gender of the employee in the case is examined, trends emerge. A trend such as black women receiving relatively high awards in terms of months of remuneration, but these translate into negligible awards in real monetary terms. Then a corresponding trend in white men receiving a full range of awards in terms of months of remuneration, but the award in real monetary terms is always sizeable due to high monthly salaries. However, only four South African cases and one foreign case will be discussed to illustrate the problems caused by quantifying compensation and limiting compensation in terms of remuneration.

The point of departure is an analysis of two cases which demonstrate how seemingly generous awards can result in negligible real sums when an employee is poorly remunerated. The case of *Masondo v Crossway*<sup>11</sup> involved a black female employee who worked full days, six days per week, performing various jobs for her employer in his grocery and bakery business.<sup>12</sup> It was established practice that the employee worked her shifts during the day. She then became pregnant and took maternity leave. When she returned, the employer informed her that he had been left with no choice, but to retrench an employee. The employee selected had been the one that had regularly worked the night shift. Therefore, the employer informed her that she would now need to work the night shift. The employer insisted this regardless of the fact that there were other employees that did not have protected reasons for not wanting to work late hours.<sup>13</sup> The employee, a new mother, refused

---

<sup>10</sup> The Constitution specifically pursues 'substantive equality'. This concept specifically advocates for different treatment of persons when equal treatment would serve to further embed inequality. Section 9(2) of the Constitution legitimises this approach to equality. See *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) at para 27.

<sup>11</sup> *Masondo v Crossway* (1998) 19 ILJ 171 (CCMA). Hereafter referred to as '*Masondo*'.

<sup>12</sup> *Ibid* at p 171.

<sup>13</sup> *Ibid* at p 173.

to work the night shift due to her family responsibilities to her child.<sup>14</sup> Despite explaining the extent of her circumstances that prevented her from working night shifts, her employer insisted that she work at that time. Therefore, the employee resigned as she felt she had no other options available.<sup>15</sup> The employer could give no more reason than: he designed the shift schedule in the manner that he did because it was his preference.<sup>16</sup>

The commissioner found that the employer had unfairly discriminated against the employee on the ground of family responsibility, and held that the dismissal was an automatically unfair constructive dismissal.<sup>17</sup> Section 194 of the LRA permitted the commissioner to order compensation that may not exceed the equivalent of 24 months' remuneration.<sup>18</sup> The reasoning in *Masondo* concerning quantifying compensation considered the remuneration loss of the employee as well as the unfairness of the employer's conduct. The commissioner argued that as the employee had been unemployed for 6 months, she is entitled to the payment of that outstanding remuneration. The commissioner did not take into consideration that she had been unable to find alternative employment. Furthermore, the employer had acted offensively, but awarding compensation greater than an additional 6 months would be punitive to the employer.<sup>19</sup> The employee was awarded 12 months' remuneration, which equated to the trivial value of R12 000.<sup>20</sup>

A more recent case, with a similar result, is the case of *Ekhamanzi Springs (Pty) Ltd v Mnomiya*.<sup>21</sup> The employee was a black female who worked as a general assistant at the employer's factory – the factory was rented from the owner of the land, which was an organisation of religious affiliation.<sup>22</sup> In order to gain access to the factory, an employee would have to use the entrance to the land owner's property and enter through the gate manned by security personnel. These guards

---

<sup>14</sup> Ibid at p 174.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid at p 176.

<sup>17</sup> Ibid at p 181.

<sup>18</sup> Section 194(3) of the LRA.

<sup>19</sup> Supra note 11 at p 181.

<sup>20</sup> Ibid.

<sup>21</sup> *Ekhamanzi Springs (Pty) Ltd v Mnomiya* (2014) 35 ILJ 2388 (LAC). Hereafter referred to as '*Mnomiya*'.

<sup>22</sup> Ibid at para 2.

were instructed to deny entrance to persons that exhibited certain forms of behaviour that were disapproved of by the land owner.<sup>23</sup> Many types of behaviour would prevent an employee's entering the estate, but, specifically, persons who are involved in sexual relationships outside of marriage were not permitted entry.<sup>24</sup> The employee became pregnant and she was unmarried. Once this came to the attention of the security guards, they disallowed her from entering the premises to fulfil her employee duties and she was told she would not be permitted to enter in future – her employer was present and did nothing to assist her.<sup>25</sup> She protested and told her employer that he was effectively dismissing her; therefore, she would like a letter to that effect, but this was denied.<sup>26</sup>

The court reasoned that denying an employee access to the premises to fulfil her duties as an employee amounted to dismissing her. Furthermore, as the reason for denying her entry – and, therefore, the reason for her dismissal – was her pregnancy, the dismissal fell to be declared automatically unfair.<sup>27</sup> The court in *Mnomiya* noted that the prohibition of unfair discrimination on the grounds of pregnancy is not a right preserved for married women.<sup>28</sup> The judge upheld the decision of the court *a quo*, which awarded the employee twelve months' compensation.<sup>29</sup> Twelve months, at the rate of remuneration at the time of dismissal, resulted in the employee being awarded a total sum of R7945 for a case involving discrimination.<sup>30</sup>

Moving on to the cases falling on the other side of the spectrum – where awarding compensation quantified or limited in terms of months of remuneration can result in excessively large sums. The first example of this is *Hibbert v ARB Electrical Wholesalers (Pty) Ltd*<sup>31</sup> which involved a white male employee of 64 years of age who worked as an external sales person whom went out of the office to gain new

---

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* at paras 3-4.

<sup>26</sup> *Ibid* at para 3.

<sup>27</sup> *Ibid* at paras 33-34.

<sup>28</sup> *Ibid* at para 24.

<sup>29</sup> *Ibid* at paras 1 and 34.

<sup>30</sup> *Ibid* at para 1.

<sup>31</sup> *Hibbert v ARB Electrical Wholesalers (Pty) Ltd* (2013) 34 ILJ 1190 (LC). Hereafter referred to as '*Hibbert*'.

clients.<sup>32</sup> The employer asserted that the normal retirement age for the company was 64 years; therefore, the employer sought to terminate the employee's employment contract on the grounds that the employee had reached retirement age – the employer claimed to not intend this to be a dismissal.<sup>33</sup> The case revolved around the disagreement between the parties of whether there was a normal retirement age that had been agreed to, and what the normal retirement age was – if one existed.<sup>34</sup> Several factors led to the differing beliefs between the parties. There was a provident fund that stipulated the normal retirement age of 64 years; however, the employee was never a member of this fund. Furthermore, there had been employees previously that had retired after the age of 64 years.<sup>35</sup>

The court ruled that the employer had not been able to establish a case that there was a normal or agreed retirement age for the employee; therefore, the judge found that the employee had been dismissed. This meant that the dismissal was automatically unfair due to discrimination on the ground of age.<sup>36</sup> The court acknowledged the compensation limitation in the LRA of the equivalent of 24 months' remuneration in the case of automatically unfair dismissals.<sup>37</sup> The judge imposed an award that only took account of the remuneration loss of the employee. The employee expected to retire at the age of 65 years, he was denied one more year of income. The judge reasoned that this was not a particularly unfair automatically unfair dismissal and awarded the lost remuneration the employee would have earned. The award was for the equivalent of 12 months' remuneration, which equated to a large sum of R420 000.<sup>38</sup>

The next case demonstrates how one of the smallest awards in terms of months of remuneration can be equivalent to a significant award if the employee is in a high-earning position. The employee in the case of *Solidarity on behalf of de Vries and Denel (Pty) Ltd t/a Denel Land Systems*<sup>39</sup> was, again, a white male who was

---

<sup>32</sup> Ibid at para 8.

<sup>33</sup> Ibid at paras 1-4.

<sup>34</sup> Ibid at para 15.

<sup>35</sup> Ibid at paras 7 and 10.

<sup>36</sup> Ibid at paras 22-23.

<sup>37</sup> Ibid at para 31; Section 194(3) of the LRA.

<sup>38</sup> Ibid at paras 31 and 36.

<sup>39</sup> *Solidarity on behalf of de Vries and Denel (Pty) Ltd t/a Denel Land Systems* (2009) 30 ILJ 2210 (BCA). Hereafter referred to as '*Solidarity obo de Vries*'.

employed as a technician working for a branch of the company located in the United Arab Emirates.<sup>40</sup> The dispute began when the employee committed acts of gross misconduct. A problem had occurred with a piece of equipment and a member of the technician team questioned the team, as a whole, why a certain procedure had not been followed. The employee then became enraged and began verbally abusing the fellow technician. The verbal abuse included degrading racist language and threats to injure his colleague's person.<sup>41</sup> The victimised technician reported the incident to his supervisor, and the employer began the process of initiating a disciplinary enquiry.

At the hearing, the employee was found guilty of misconduct and various punishments were implemented, including: requiring the employee apologise to the other technician, giving the employee a final written warning, and disqualifying the employee from receiving his upcoming salary increase.<sup>42</sup> However, the victim of the abuse was not satisfied with level of punishment awarded given the severity of the employee's actions. The victim pursued the matter and took the grievance further up the corporate ladder. His efforts resulted in the employer holding another disciplinary enquiry for the misconduct of the employee.<sup>43</sup> However, this hearing was compromised by the person chairing the enquiry. The chair claimed that the same punishment ordered as before was appropriate because the employee and the victim have reconciled. Later, evidence came to light that the victim had been coerced by the chair to accept the apology, and yet another disciplinary enquiry was initiated to decide the matter correctly.<sup>44</sup> The same charges of misconduct came before a new chair and he determined that the appropriate order was dismissal – the employee was dismissed with one month's notice.<sup>45</sup>

The commissioner considered the reasons the employer was able to put forward for conducting additional disciplinary enquiries, but the commissioner found these reasons wanting. The additional disciplinary enquiries were unfair and rendered the

---

<sup>40</sup> Ibid at p 2212.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid at p 2213.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid at pp 2214-2215.

<sup>45</sup> Ibid at p 2215.

dismissal of the employee procedurally unfair.<sup>46</sup> The commissioner further argued that the dismissal was substantively unfair as the previous punishments were not revoked before the new punishment of dismissal was ordered. This resulted in the employee being punished twice for the same misconduct.<sup>47</sup> The commissioner then considered the relevant factors to determining the value of the compensation to be awarded. He took into account all relevant factors, from the problematic conduct of the employer in dealing with the misconduct, to the appalling nature of the misconduct committed by the employee.<sup>48</sup> The commissioner decided that an award equivalent to one month's remuneration would be just and equitable in the circumstances. However, because the employee held a very highly remunerated position, this seemingly insignificant award had the monetary value of R46 000.

These cases illustrate the problem with the remuneration-based limitations in section 194 of the LRA as well as the manner in which courts have interpreted the section to quantify compensation. When racial and gender inequality are entrenched into the economy, as is the case in South Africa currently, a statistically significant number of black persons and women will disproportionately benefit less than white persons and men from any structure that utilises remuneration as its measure.<sup>49</sup> The fact that the employees in the cases of *Masondo* and *Mnomiya* were limited in their claims for remuneration at a rate grossly less than the employees in *Hibbert* and *Solidarity obo de Vries* from the moment they stepped into conciliation cannot be defended. The employees in *Masondo* and *Mnomiya*, even if they received the maximum compensation available to them of the equivalent of 24 months' remuneration, they were still limited to less than either of the employees in *Hibbert* and *Solidarity obo de Vries* would have received if they were awarded the equivalent of a single month's remuneration.

*Masondo* and *Mnomiya* involved fairly notable cases of discrimination amongst the claim, whereas the other cases involved little or no discrimination. Yet, because

---

<sup>46</sup> Ibid at p 2222.

<sup>47</sup> Ibid at p 2224.

<sup>48</sup> Ibid.

<sup>49</sup> The Minister in the Presidency Responsible for Women with the Development Policy Research Unit 'The Status of Women in the South African Economy' August 2015 at p 67. Accessible at <http://www.gov.za/documents/status-women-south-african-economy-9-aug-2015-0000> [Accessed 17 January 2016].

of the limitations placed on compensation being valued in terms of remuneration, and some judicial officers opting to approach quantification of compensation by measuring the sum in terms of remuneration, the awards provided to the lower paid employees were disproportionately low and the higher paid employees' were disproportionately high.

Before an analysis of relevant legal principles is conducted, it benefits a discussion of proposed legislative change to consider the case law of a foreign jurisdiction.

**(a) Acknowledgment from the United States**

As early as 1969, the United States had accepted the idea of the realities of a racially unequal economy revealing indirect discrimination within seemingly neutral laws of literacy testing. In April of 1969, the case of *Gaston County, North Carolina v United States*<sup>50</sup> came before the Supreme Court of the United States and brought such issues to light. Previously, in the United States, the law enforced the sitting of a literacy test for persons of voting age and who wished to register to vote for an election.<sup>51</sup> This was then abolished in 1964 when Congress passed legislation suspending the use of any tests as prerequisites to being eligible to vote.<sup>52</sup> This law was passed on the basis of recognising that, historically, the education system provided to black persons – specifically from the region of Gaston County in North Carolina – had been grossly inferior to that of white persons.<sup>53</sup> The original law instituting the literary tests as prerequisites to voting eligibility were found to disproportionately deny black persons the right to vote despite the law applying equally to all races. The law abolishing the tests was recognising indirect discrimination. However, the legislation provided for an appeal process that may be instituted by an effected State, were they to desire the re-establishment of the

---

<sup>50</sup> *Gaston County, North Carolina v United States* 395 U.S. 285 (1969). Hereafter referred to as 'Gaston County'. This case was relied upon in *Griggs et al v Duke Power Co.* 401 U.S. 424 (1971), which will be discussed in Chapter III below.

<sup>51</sup> *Ibid* at pp 286-287.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid* at pp 287-288.

prerequisite literary tests.<sup>54</sup> It is on this point of law that the *Gaston County* case came to be.

Gaston County, North Carolina were challenging the suspension of the tests and wished to have the practice reinstated. The applicants had failed in previous courts as the judges were not satisfied that there was enough evidence to show that previously disadvantaged black persons would not be disproportionately denied the right to vote were the tests to be reinstated.<sup>55</sup> Congress remarked (when suspending the use of tests) that if the testing was to be reinstated for the reason proffered by the applicant – that the law no longer provides unequal education and it is necessary to have a certain level of literacy in voters – the consequences would be ironic. The law would have the effect of taking years of previous violation of equal education and use it as an excuse to violate the right to vote.<sup>56</sup> The court accepted that acknowledgment of the social fact that there are still remains of a segregated school system, coupled with statistical evidence of white persons having higher literacy rates than black persons, was sufficient to prove that black persons would be unfairly disadvantaged by the use of literacy tests as a prerequisite to voting eligibility.<sup>57</sup> The court believed these realities of the community meant that the equal application of literacy tests across races would unavoidably create discriminatory effect.

The *Gaston County* case made an important point that even if it can be shown that great changes have been effected to ensure the new generations are not as disadvantaged, there are still generations living that have already become victims to discriminatory treatment and will not benefit in the same way, within their lifetime, to the positive measures implemented. Therefore, removing obstacles to promote the achievement of equality in the future does not eliminate the fact that inequality is still present today. Equally applying literacy tests to both races only brings the inequality to the surface – and especially exposes discrimination amongst the older generations.<sup>58</sup>

---

<sup>54</sup> Ibid at p 287.

<sup>55</sup> Ibid at pp 287-288.

<sup>56</sup> Ibid at p 289.

<sup>57</sup> Ibid at p 291.

<sup>58</sup> Ibid at pp 298-297.

*Gaston County* does not make express mention of the concepts of indirect discrimination or disparate impact; however, these are clearly the ideas being discussed and enforced.<sup>59</sup> South Africa is confronted on a daily basis with the realities of its deeply unequal economy across many categories of person.<sup>60</sup> Therefore, following in the thought process established in *Gaston County*, we can acknowledge the fact that it is simply true to say that a statistically significant number of black persons and women are remunerated at a lower level than white persons and men.<sup>61</sup> We can explore statistics that reveal how far this truth penetrates into the economy. And finally, we can accept, as the court did in *Gaston County*, that the intention to correct the past, or even making progress to remedy previous disadvantage, does not detract from the social fact that, currently, “remuneration” exposes discrimination.

### **CHAPTER III: DIFFERENTIATION ON THE GROUND OF REMUNERATION REQUIRES JUSTIFICATION**

Remuneration, as a means of differentiating between persons, may appear harmless and an example of neutrality.<sup>62</sup> However, when the persons subjected to the application of that differentiation live within an economy where “the game is rigged”, a statistically significant number of women and black persons are never given the opportunity to “win” under a measure that rewards the higher earning.<sup>63</sup> This chapter will explore how legal principles can demonstrate that using remuneration as a means to differentiate between persons (within the current economic status quo of South Africa) will always yield a finding of *prima facie* indirect unfair discrimination. As a result, this dissertation will conclude that remuneration cannot be used without justification.

---

<sup>59</sup> The United States refers to ‘disparate impact’ instead of our term, ‘indirect discrimination’.

<sup>60</sup> *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) at para 27.

<sup>61</sup> The Minister in the Presidency Responsible for Women with the Development Policy Research Unit ‘The Status of Women in the South African Economy’ August 2015 at p 67. Accessible at <http://www.gov.za/documents/status-women-south-african-economy-9-aug-2015-0000> [Accessed 17 January 2016].

<sup>62</sup> An example of this misconception was present in the case of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC).

<sup>63</sup> Terreblanche op cit note 3; The Minister in the Presidency Responsible for Women with the Development Policy Research Unit ‘The Status of Women in the South African Economy’ August 2015 at p 67. Accessible at <http://www.gov.za/documents/status-women-south-african-economy-9-aug-2015-0000> [Accessed 17 January 2016].

**(a) The Right to Equality and the Prohibition of Discrimination**

In a constitutional supremacy, like South Africa, the point of departure is the Constitution. The Constitution contains the right to equality in section 9 of its Bill of Rights. This right aims to prohibit the differential treatment of persons, in general. However, it specifically provides for a prohibition on the infringement of the right in the form of discrimination on various listed grounds (or an unlisted ground that can be proved to have similar adverse effect).<sup>64</sup> These prohibited grounds include, amongst others, race and gender.<sup>65</sup>

Since the enactment of the Constitution, the courts have interpreted the right to equality and given meaning to its text. Consequently, the courts have laid down the thresholds that must be overcome by each party in order to prove or disprove an infringement of the right to equality.<sup>66</sup> Mere differentiation between persons is not prohibited by the Constitutional right, alone – the same goes for discrimination.<sup>67</sup> The right to equality protects all persons by prohibiting unfair discrimination. Judicial interpretation has given content to the meaning of differentiation, discrimination, and unfair discrimination.<sup>68</sup> The person claiming infringement of the right to equality in the form of unfair discrimination carries the burden of establishing a *prima facie* case.<sup>69</sup> Once this is achieved, a presumption of unfair discrimination arises.<sup>70</sup> The burden then shifts to the defending party to justify the alleged conduct as not unfair.<sup>71</sup>

Discrimination can take the form of either direct or indirect – both of which are prohibited by our Constitution.<sup>72</sup> Specifically, section 9(3) of the Constitution provides that the state may not unfairly discriminate *directly or indirectly* against anyone on a

---

<sup>64</sup> Sections 9(3)-9(4) of the Constitution. See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) for an example of a case where an analogous ground was recognised.

<sup>65</sup> The listed grounds under s 9(3) of the Constitution are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

<sup>66</sup> See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

<sup>67</sup> *Ibid* at para 43.

<sup>68</sup> See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at paras 24-26; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paras 43-52.

<sup>69</sup> This derives from s 8(4) of the Interim Constitution of the Republic of South Africa Act 200 of 1993 and s 9(5) of the Constitution.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid*.

<sup>72</sup> Sections 9(3) and 9(4) of the Constitution.

listed or analogous ground. Section 9(4) of the Constitution then extends this prohibition to '[n]o person may unfairly discriminate directly or indirectly against anyone [...]' on the same grounds as above. Direct discrimination occurs when a particular provision of law or practice expressly differentiates on a listed ground in its text.<sup>73</sup> The differentiation is in the wording of the provision itself and this need not be intentional.<sup>74</sup> Indirect discrimination, on the other hand, is present when a provision or practice of law makes no express reference to particular groups of persons, but when the provision or practice is applied, the effect disadvantages a disproportionate number of one or more groups of persons.<sup>75</sup> Therefore, proving indirect discrimination necessarily is accompanied by additional obstacles as evidence will need to be led to establish that differentiation exists in the impact of the challenged law.

### **(b) Establishing Unfair Discrimination under South African Law**

This section will outline the current legal authorities that operate in our law when establishing the existence of unfair discrimination. Specifically, the standard of proof to be satisfied in order to substantiate a case of *indirect* unfair discrimination.

#### **(i) The Legal Test**

The decision in *Harksen v Lane NO and Others*<sup>76</sup> laid the foundation for proving a *prima facie* case of unfair discrimination. The test consists of two steps. The first step is to establish differentiation between groups of persons. The differentiation must also have a rational connection to the legitimate government purpose sought by the relevant law.<sup>77</sup> If there is no rational connection, the enquiry is complete and the differentiation is unconstitutional on the basis of irrationality.<sup>78</sup> If there is a rational connection, there may still be unfair discrimination – thus, the test continues. The second step has two aspects. The first aspect involves showing that the

---

<sup>73</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC) at p 289.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid* at p 292.

<sup>76</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC). Hereafter referred to as '*Harksen*'.

<sup>77</sup> *Ibid* at para 42.

<sup>78</sup> *Ibid* at para 44.

differentiation amounts to discrimination.<sup>79</sup> Differentiation can amount to discrimination in two ways. If the differentiation is based on a ground listed in section 9(3) of the Constitution or if it is based on an analogous ground.<sup>80</sup> Essentially, differentiation becomes discrimination when the relevant ground that is the reason for the differential treatment has the ability to impair a person's fundamental dignity.<sup>81</sup> The grounds listed in section 9(3) of the Constitution have been identified as always having the ability to impair a person's fundamental dignity if used as a basis for treating people differently. An analogous ground would require evidence to support the claim that it has the same or similar effect on a person when used to treat him or her differently.<sup>82</sup> Therefore, if a party alleging unfair discrimination can prove that the provision or practice of law differentiates on a ground listed in section 9(3) of the Constitution, the differentiation is presumed to be discrimination – while analogous grounds must be justified as stated above.<sup>83</sup> The second aspect is to show that the discrimination amounts to unfair discrimination.<sup>84</sup> The grounds listed in section 9(3) of the Constitution were selected not only because they always have the ability to impair a person's fundamental dignity, but also because they are grounds that have been used historically to oppress and disadvantage persons.<sup>85</sup>

In summary, the *Harksen* test states that if discrimination is proved on a listed ground, unfairness will be presumed – it would then be for the defending party to justify the law or conduct.<sup>86</sup>

An analogous ground would introduce a separate evidentiary burden to show that the unlisted ground discriminates unfairly. Factors to be considered when determining the unfairness of the discrimination are: first, the position of the complainants in society and whether, as a group, they have been previously disadvantaged; second, the nature of the provision or power, and the purpose it

---

<sup>79</sup> Ibid at para 45.

<sup>80</sup> Ibid at para 46.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid at para 47.

<sup>85</sup> Ibid at para 49.

<sup>86</sup> Ibid at para 53.

seeks to achieve; and third, the extent of the infringement on the rights of the complainant, and the degree of harm done to fundamental dignity.<sup>87</sup>

A conclusion that can be reached from the *Harksen* test is that if a person alleging unfair discrimination can discharge the burden of proving the presence of differentiation on a listed ground, unfairness and discrimination will be presumed.

(ii) *Differentiation in Indirect Discrimination*

Indirect discrimination carries an additional burden of proving that an express neutral differentiation causes a secondary discriminatory differentiation through its impact. South Africa's approach to proving indirect discrimination is somewhat of a hybrid of various foreign jurisdictions. In this regard, Dupper explains the approaches that have been followed in the United States and the United Kingdom, and how we fall somewhere in between.<sup>88</sup>

(aa) United States

The case of *Griggs et al v Duke Power Co.*<sup>89</sup> was the first of its kind in questioning an employment practice's invalidity by virtue of its indirectly discriminating. The case involved an employment practice that required a high school education as a prerequisite for being appointed to certain departments of the company. There was a subsequent policy that was introduced alongside the high school education requirement, which required new applicants to achieve satisfactory results in aptitude tests that the company would administer. These were found to disproportionately prevent black persons from being recruited into all departments, except those that were historically allocated for black persons. Furthermore, the tests and high school education requirement were determined to have no bearing on an applicant's ability to perform the work in question.<sup>90</sup> The essential point in *Griggs* is that the requirements for job positions are permitted, and they may even cause disparate

---

<sup>87</sup> Ibid at para 51.

<sup>88</sup> Ockert Dupper 'Proving Indirect Discrimination in Employment: A South African View' (2000) 21 *ILJ* 747 at 751-761.

<sup>89</sup> *Griggs et al v Duke Power Co.* 401 U.S. 424 (1971). Hereafter referred to as '*Griggs*'.

<sup>90</sup> Ibid at 427-431.

impact on prohibited grounds, but only if it serves to fulfil an inherent requirement of the job. Therefore, the current position in the United States was created: policies causing disparate impact and acting to preserve a racially unequal economy are invalid if lacking a rational connection to job performance. In addition, this seminal case emphasised the need to look to the consequences of policies when dealing with indirect discrimination.

*Griggs* was followed by a later Supreme Court case called *Watson v Fort Worth Bank & Trust*.<sup>91</sup> This case involved a black employee at the respondent bank who applied for several promotions, but was unsuccessful for each one – being overlooked each time for a white applicant. There was no specific policy that created this result, but rather she claimed a trend in hiring that was causing disparate impact.<sup>92</sup>

This case was pivotal in developing United States law regarding the evidentiary burden that must be overcome by a person alleging disparate impact. *Watson* introduced the necessity for the plaintiff in such a case to identify a specific policy that he or she is challenging.<sup>93</sup> The case went on to state that once a policy has been identified, statistical evidence will need to be submitted to support the claim that the policy is causing a disparate impact on a particular group of persons.<sup>94</sup> The court said that statistical evidence will assist the plaintiff in proving a *prima facie* case, but it is not taken as fact that the statistics and the correlation presented are true. The defending party is given the right of rebuttal and may present their own countering statistical evidence.<sup>95</sup> Furthermore, the statistics should reveal a substantial disparate impact.<sup>96</sup>

Lastly, the court confirmed the defence proposed in the *Griggs* case – that an employer is permitted to have a policy which causes disparate impact if the policy is necessary for the business.<sup>97</sup> United States law requires a fairly heavy burden for the

---

<sup>91</sup> *Watson v Fort Worth Bank & Trust* 487 U.S. 977 (1988). Hereafter referred to as '*Watson*'.

<sup>92</sup> *Ibid* at 982-983.

<sup>93</sup> *Ibid* at 994.

<sup>94</sup> *Ibid* at 994-995.

<sup>95</sup> *Ibid* at 996.

<sup>96</sup> *Ibid* at 995.

<sup>97</sup> *Ibid* at 997.

plaintiff in a case of disparate impact. The plaintiff must clearly identify the offending policy, this in itself can be problematic in certain cases; they must then bring sophisticated statistical evidence that reveals an inequality in the workplace as well as society; and finally, the plaintiff will have to show sufficient correlation between the statistics and the policy to withstand the defending party's rebuttal.

(bb) United Kingdom

The law in the United Kingdom prohibits a 'requirement or condition' that causes disparate impact.<sup>98</sup> From an initial reading, these terms immediately appear more restrictive than the United States' approach of prohibiting a discriminating 'practice'. However, whether the terms' effect would be narrow depended on how the courts would approach its interpretation. Unfortunately, the court in *Perera v Civil Service Commission (No 2)*<sup>99</sup> took the narrowest of approaches. Dupper briefly outlines the facts of the case: the selection criteria for an available position that was advertised included that persons with a good command of the English language would receive preferential treatment - the applicant was of Sri Lankan descent and felt that this criterion caused adverse effects on persons not originating from the United Kingdom.<sup>100</sup> The court in *Perera* took the view that the criteria listed for the position were only preferences of the employers and that they did not amount to an absolute bar to being hired.<sup>101</sup> The crux of the court's opinion was that unless the plaintiff could show that the specific criterion of having a good command of the English language was the cause of disparate impact, there was no direct correlation. Therefore, the United Kingdom holds a very narrow view of what qualifies as disparate impact.

When the circumstances are appropriate, and the plaintiff is able to show a 'requirement or condition' as the cause of the disparate impact, the plaintiff then has to discharge an additional evidentiary burden. The plaintiff will have to show that the identified requirement or condition does, in fact, cause the alleged indirect discrimination. Dupper states that the United Kingdom has taken an opposing

---

<sup>98</sup> Dupper op cit note 88 at 753.

<sup>99</sup> *Perera v Civil Service Commission (No 2)* [1983] ICR 428. Hereafter referred to as '*Perera*'.

<sup>100</sup> Dupper op cit note 88 at 756.

<sup>101</sup> *Ibid*; *Perera v Civil Service Commission (No 2)* [1983] ICR 428 at 437.

approach to the United States regarding the evidentiary burden as well.<sup>102</sup> The United Kingdom went so far as to display a hesitance to allowing statistical evidence as proof of disparate impact.<sup>103</sup> The United Kingdom has rather taken a ‘common sense’ approach to determining indirect discrimination cases.<sup>104</sup> The belief is that a case’s determination rests on acknowledging social facts which are general knowledge.<sup>105</sup>

The case of *Briggs v North Eastern Education & Library Board*<sup>106</sup> is an example of the common sense approach.<sup>107</sup> In *Briggs*, the court relied on common sense in determining a requirement that teachers be responsible for extracurricular activities after the school day, was indirectly discriminatory against female teachers.<sup>108</sup> This was due to the acknowledgment of the social fact that women are still the primary caregivers in families.<sup>109</sup> Therefore, the law in the United Kingdom carries a much lower evidentiary burden for the plaintiff when showing that ‘requirements and conditions’ will cause disparate impact. The common sense approach requires the court to acknowledge social facts from its common knowledge.

(cc) South Africa

As discussed above, our Constitution specifically prohibits the state and any individual from indirectly discriminating against anyone on one or more of the grounds listed in section 9(3), or an analogous ground.<sup>110</sup> The Constitution does not specify what form the discrimination must take. Therefore, a statutory provision and a legal practice suffice to be identified as the items challenged for causing indirect discrimination. South Africa aims to make the task of the applicant to prove a *prima facie* case on a listed ground the least burdensome as possible.<sup>111</sup> For this reason, our law has not opted to narrow the scope of what can be challenged as causing

---

<sup>102</sup> Dupper op cit note 88 at 764.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> *Briggs v North Eastern Education & Library Board* 1990 IRLR 181. Hereafter referred to as ‘*Briggs*’.

<sup>107</sup> Dupper op cit note 88 at 764-765.

<sup>108</sup> Ibid; *Briggs v North Eastern Education & Library Board* 1990 IRLR 181 at 187.

<sup>109</sup> Ibid.

<sup>110</sup> Sections 9(3)-9(4) of the Constitution.

<sup>111</sup> Dupper op cit note 88 at 749.

indirect discrimination. Dupper argues that it is unlikely that the courts will ever adopt a very technical approach to this aspect of the applicant's case.<sup>112</sup> The first step of proving indirect discrimination is to identify, in a simple way, the aspects of law that are alleged to be causing discrimination and that will be the subject of the constitutional challenge.

The issue arises as to the approach that South Africa has taken towards the extent of the evidentiary burden that must be satisfied. The South African courts appear to have taken an approach somewhere in between the United States and the United Kingdom.

In the case of *City Council of Pretoria v Walker*,<sup>113</sup> the court took an approach equivalent to the United Kingdom's common sense approach. This case involved different areas of Pretoria being subjected to different methods of measuring water and electricity facility use.<sup>114</sup> One area, which was historically inhabited by white persons, was charged a tariff based on actual consumption, as measured by a meter which each home had had installed by the municipality. The second area, which was historically composed of townships inhabited by black persons, was charged a flat rate (lower than the tariff) as meters had not yet been installed.<sup>115</sup> The court accepted common knowledge of the social fact that the one area had historically been inhabited by white persons and the other had been inhabited by black persons. Therefore, the policy of the City Council indirectly differentiated on the ground of race.<sup>116</sup> The court did not require any statistical evidence to support the representation of races in the different areas. A concern that arose amongst the judges of the court was that there were defensible reasons for why the City Council had instituted this policy. In addition, the policy was only an interim solution until the infrastructure could be distributed. However, Langa DP correctly stated that such concerns are to be raised when establishing the fairness of the discrimination, or in rebuttal to a *prima facie* case. The fact that there is unequal treatment, indirectly, between races is sufficient to show differentiation.<sup>117</sup>

---

<sup>112</sup> Ibid at 761.

<sup>113</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC). Hereafter referred to as '*Walker*'.

<sup>114</sup> Ibid at para 5.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid at para 33.

<sup>117</sup> Ibid at para 34.

South African law followed on from *Walker* by introducing a very basic use of statistics in the case of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others*.<sup>118</sup> This case involved a company that differentiated between salary employees and wage employees by allowing both categories to one retirement benefit fund; then of the other two funds, one was for salary employees and the second was for wage employees. However, the salary employees were almost exclusively white persons and the wage employees were exclusively black persons.<sup>119</sup> It is also important to note the benefits under these different funds were not identical. The court looked at the statistics of the representation of different races in different remuneration categories. The extent of the analysis was to reveal that weekly wage paid employees were entirely composed of black persons, while 50 of the monthly salary paid employees were white persons compared to only 8 black persons.<sup>120</sup> The court was satisfied with these unsophisticated statistics. The conclusion was that to use the manner in which an employee was paid by this specific company as a differentiating factor, indirectly differentiates on the ground of race.

The aim of South Africa's anti-discrimination legislation is to put as few obstacles as possible in the way of an applicant.<sup>121</sup> Therefore, it is not difficult to understand why the approach of our courts has been to follow more closely on the side of the United Kingdom's approach. And while it would seem very unlikely that South African courts would ever shift far on the spectrum towards the United States approach, it is likely to be common practice in proving indirect discrimination to rely on unsophisticated statistical evidence – to some degree. Thus, an applicant attempting to discharge the evidentiary burden in a claim of indirect discrimination would need to identify the aspect of law they believe to be discriminatory. Thereafter, an applicant must support such an allegation with common sense reasoning of social facts, and basic statistical support.

---

<sup>118</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC). Hereafter referred to as '*Leonard Dingler*'.

<sup>119</sup> *Ibid* at 287-288.

<sup>120</sup> *Ibid* at 287.

<sup>121</sup> Dupper op cit note 88 at 769.

**(c) *The Unavoidable Existence of Prima Facie Unfair Discrimination***

This section will combine the two approaches of statistical evidence and common sense to reach the conclusion that differentiation on the ground of remuneration is *prima facie* unfairly discriminatory. This argument is strengthened by the result that if either approach were not favoured, both individual approaches sufficiently reach the abovementioned conclusion.

**(i) *Statistical Evidence***

Various statistical evidence will be submitted in support of demonstrating that inequality exists in the workplace between men and women, and black persons and white persons. The comparison groups have been limited to just two of each for ease of discussion, it is not intended to suggest these are the only groups that yield statistically significant results of inequality.

**(aa) Racial Inequality in the Workplace**

A statistic that should be noted at the beginning, in order to understand the degree of inequality, is that black persons constitute approximately 73 per cent of the employed population, and white persons are approximately 13 per cent of the employed population.<sup>122</sup> The starting point will always be education when discussing the bottomline of why there is a difference in the jobs and remuneration available to different races. This dissertation will not attempt to offer an opinion on why the statistics around education reveal the inequality they do, the intention is to simply state the facts with which we are presently confronted. Therefore, concerning matric qualifications, approximately 54 per cent of the black population have less than a matric qualification; this is compared to approximately nine per cent of the white population.<sup>123</sup> The opposite side of this is that approximately 16 per cent of the black

---

<sup>122</sup> The Minister in the Presidency Responsible for Women with the Development Policy Research Unit 'The Status of Women in the South African Economy' August 2015 at p 56. Accessible at <http://www.gov.za/documents/status-women-south-african-economy-9-aug-2015-0000> [Accessed 17 January 2016].

<sup>123</sup> Statistics South Africa 'Quarterly Labour Force Survey: Quarter 3: 2015' 27 October 2015 p vi. Accessible at [http://www.statssa.gov.za/?page\\_id=1854&PPN=P0211&SCH=6255](http://www.statssa.gov.za/?page_id=1854&PPN=P0211&SCH=6255) [Accessed 17 January 2016]. Note that all statistics used from this source are from 2015.

population have some form of tertiary education, but this pales in comparison to approximately 49 per cent of the white population holding tertiary qualifications.<sup>124</sup> Not having a matric qualification drastically hinders a person's ability to find decent employment and employment with high earning potential.<sup>125</sup> In addition, a tertiary education does not guarantee a higher remuneration; however, as a whole, persons with tertiary education do have the greatest earning potential in their lifetime.<sup>126</sup> Therefore, from these statistics alone, black persons are far more likely to earn lower remunerations than white persons.

Moving on to the employment statistics, approximately 58 per cent of the employed white female population and 62 per cent of the employed white male population are employed in high skilled jobs.<sup>127</sup> This is compared to approximately 18 per cent of the employed black female population and 14 per cent of the employed black male population.<sup>128</sup> A horrifying corresponding statistic to the above is that approximately only one per cent of the employed white female population and 4 per cent of the employed white male population are employed in low skilled employment;<sup>129</sup> this being when approximately 43 per cent of the employed black female population and 30 per cent of the employed black male population are employed in low skilled positions.<sup>130</sup> These statistics show that white persons are exponentially more likely to be employed in higher skilled positions, while black persons are significantly more likely to be employed in lower skilled positions. Remuneration is not entirely connected to the skill level of the employment, but it is still very substantially connected.<sup>131</sup> Essentially, the more easily an employee can be replaced, the lower the remuneration – this follows simple supply and demand economics. Therefore, it can again be concluded that black persons are more likely to earn lower remunerations than white persons.

---

<sup>124</sup> Ibid.

<sup>125</sup> Terreblanche op cit note 3 at 383.

<sup>126</sup> Ibid.

<sup>127</sup> Statistics South Africa op cit note 123 at p viii.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Terreblanche op cit note 3 at 383.

Furthermore, a racialised unemployment rate also reveals that white persons are more likely to be employed than black persons – the white and black labour force unemployment rate is at approximately 6 per cent and 29 per cent, respectively.<sup>132</sup>

A statistical report on the average income of households exposed that, in 2011, when a black person was the head of a household, that household's average annual income was less than a fifth of the average household income in a household headed by a white person.<sup>133</sup> This statistic is atrocious, but it should be noted that this is not, in itself, a clear representation of the inequality in remuneration across races, as it includes all forms of income from every member of a household.

The final statistic is of the greatest concern to equality. Statistics show that average remuneration received by black males and females, in 2013, was less than one third of the average remuneration received by white males and females.<sup>134</sup> There are many possible mitigating factors for why such disparity exists. However, there comes a point where the justifications will run dry and a vast degree of the disparity will be unexplained by anything other than discrimination and inequality.

Although there are many measures in place (statutory and societal) that are trying to remedy these disparities, the present truth cannot be escaped. The economic status quo of South Africa with which we are faced dictates: a statistically significant number of black persons will be disproportionately disadvantaged if the value of a person's earnings is used as a measure of differentiation.

#### (bb) Gender Inequality in the Workplace

All statistics referenced in this section derive from the August 2015 government report on the status of women in the South African economy.<sup>135</sup> The statistics are, therefore, current, relevant and acknowledged by government.

---

<sup>132</sup> Ibid at 5.

<sup>133</sup> Statistics South Africa 'Earnings and Spending in South Africa, 2006-2011' (2015) Report no. 01-11-02 p 13. Accessible at [http://www.statssa.gov.za/?page\\_id=1854&PPN=Report-01-11-02](http://www.statssa.gov.za/?page_id=1854&PPN=Report-01-11-02) [Accessed 21 February 2016].

<sup>134</sup> The Minister in the Presidency Responsible for Women with the Development Policy Research Unit op cit note 122 at p 67.

<sup>135</sup> Ibid.

An interesting initial statistic offered by the report comes from an engendered form of the gross national income per capita. This economic lens already demonstrates a disparity: the female value being R8 539, and the male share being R15 233.<sup>136</sup> It should be noted that the nature of this statistic does not fully represent the so-called wage-gap, but it is certainly a telling inequality between genders.

A statistical starting point that should be acknowledged to better assist understanding is that men make up approximately 54 per cent of the labour force and women make up 46 per cent.<sup>137</sup> This is important because there are not as many women employed, or wanting to work, as men. Therefore, a formal concept of equality would not be on a 50/50 ratio, but rather a 54/46 ratio for men and women, respectively.

First glance at the figures of female to male unemployed persons advances a perception of reasonable equality – the total number of men unemployed is relatively equal to the total number of women unemployed. However, in real terms, this is of concern. The concern arises due to the abovementioned statistic that the male labour force is considerably larger than the female labour force.<sup>138</sup> Therefore, it can be concluded that there is a higher unemployment rate for women than for men.

Another statistic, the first glance at which appears less alarming than it truly is, is the total number of men to women employed in low skilled jobs. The total number of men employed in low skilled jobs is only approximately 12 per cent less than the total number of women employed in low skilled jobs. Yet, again this must be viewed in light of the fact that the female labour force is notably smaller than the male labour force.<sup>139</sup> As a result, the conclusion must be drawn that women are more likely to be employed in low skilled jobs than men. As mentioned above, it is trite that the lower the skill required for a job, the lower the wage.<sup>140</sup>

---

<sup>136</sup> Ibid at p 29.

<sup>137</sup> Ibid at p 50. This is the broad definition of the labour force, it is important to include discouraged work-seekers as this reflects on opportunities for different types of persons. It may also be interesting to note that female discouraged work-seekers is greater than male discouraged work-seekers.

<sup>138</sup> Ibid at p 50.

<sup>139</sup> Ibid at pp 61-62.

<sup>140</sup> Terreblanche op cit note 3 at 383.

Further statistics show that men hold a little over 60 per cent of high skilled jobs. Within the category of high skilled jobs, women hold only approximately 31 per cent of managerial positions. The report goes on to expressly state its own conclusion from the statistics that women are more likely to be lower earners and engaged in lower paid work than men.<sup>141</sup>

The South African government has calculated that the wage gap between men and women, in 2005, was that, on average, women earn 79 per cent of men's average salaries.<sup>142</sup> However, from my own calculations of the information provided earlier in the report: by 2013, women were earning, on average, 73 per cent of men's average salaries.<sup>143</sup> This is a disturbing result as it exposes the implication that the gap between a woman's average salary and a man's average salary has only widened, despite measures being put in place to advance women. The so-called wage-gap between men and women does vary between types of profession; however, it should be noted that in every category of occupations, women always earn less, on average, than men. The smallest earning differential is where women earn, on average, 93 per cent of men's remuneration.<sup>144</sup> That said, what is fairly detestable is that this disparity falls into the domestic work category of employment – a category that is almost entirely occupied by women and carries the patriarchal perception of being a “female job” – and yet, women earning less than men perseveres.<sup>145</sup> The largest earning differential is so vast it leaves one pondering how it is tolerated. In the skilled agriculture and fishing category of employment, a woman will earn, on average, 21 per cent of a man's average remuneration.<sup>146</sup> Every lens through which this statistic could conceivably be viewed will be fruitless in attempting to explain away the existence of discrimination.

A final indication of gender inequality in remuneration can be identified within tax records. From 2010 to 2013, despite the total number of male taxpayers decreasing and the total number of female taxpayers increasing, male taxable income increased

---

<sup>141</sup> The Minister in the Presidency Responsible for Women with the Development Policy Research Unit op cit note 122 at p 66 and 68, respectively.

<sup>142</sup> Ibid at p 70.

<sup>143</sup> Ibid at p 67, own calculation from statistics.

<sup>144</sup> Ibid at p 70.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

by more than female taxable income. Therefore, overall male income increased by more than overall female income in those given years – regardless of growth in female employment and recession in male employment.

There are many avenues to pursue in the analysis of inequality, as is shown by the array of statistics, but it is overwhelmingly clear that a statistically significant number of women earn less than men in South Africa.

(ii) *The Common Sense Approach*

The common sense or common knowledge approach will be applied by means of acknowledgement of social facts concerning historical racial and gender inequality in South Africa, as well as the government's use of implementing statutory measures to remedy inequality in race and gender.

(aa) Acknowledgement of Systemic Racial Inequality

Racial inequality and its derivations in South Africa seem to most so obvious that they need no explanation. However, putting aside the deeply regrettable violent persecution and looking at the educational and economic oppression alone, we can begin to see why South Africa is still confronted with such entrenched racially-defined poverty.<sup>147</sup> In the words of Mokgoro J: "Apartheid [...] deprive[d] the majority of the right to self actualisation and to control their own destinies."<sup>148</sup> This was the effect of the laws that governed the education and employment of black persons, and still is the case today.<sup>149</sup>

Black persons are permitted to seek any employment they wish under South Africa's new constitutional democracy – that is to say there are no longer laws preventing this. However, permission does not equate to ability. The two biggest obstacles black persons face today in finding more highly remunerated employment are lack of access to decent education and lack of experience.<sup>150</sup> These obstacles

---

<sup>147</sup> Terreblanche op cit note 3 at 382.

<sup>148</sup> *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) at para 71.

<sup>149</sup> Terreblanche op cit note 3 at 334-337.

<sup>150</sup> *Ibid* at 398.

predominantly come from the poverty that so many black persons still endure.<sup>151</sup> Another reason that is so often overlooked is that the older generations cannot offer support for the younger generations in terms of education and higher skilled employment due to being previously oppressively denied opportunities.<sup>152</sup> In the case of *Brink v Kitshoff NO*,<sup>153</sup> O'Regan J briefly listed what Apartheid did to entire races of people.<sup>154</sup> Amongst others, she lists that black persons were not allowed to own property, they were not allowed to live in areas allocated to white persons (which consisted of almost 90 per cent of land), they were not allowed access to senior jobs or established schools and universities or even libraries.<sup>155</sup> Facilities inferior to all white facilities were provided to black persons. The inferior education system was not simply of lesser quality, but also deliberately denied black students various subjects, such as mathematics.<sup>156</sup> This was to ensure black persons were not equipped to pursue highly skilled jobs available – which were, in any event, reserved for the white population.<sup>157</sup> Apartheid aimed to place the strongest of barriers in front of all black persons in order to ensure the advantage of the minority white population.<sup>158</sup> What is so tragic for our nation is how notably successful these goals of Apartheid were – and, therefore, is why these barriers are still present even after the policies have been removed.

Section 1 of the Constitution, expressly states that “non-racism and non-sexism” are founding values of the Republic of South Africa. This amounts to an acknowledgement that this was not necessarily the case previously, but will be the goal moving forward. The EEA provides a mandate for specific qualifying employers (designated employers) to implement affirmative action measures for designated groups.<sup>159</sup> Black persons are defined as a designated group in s 1 of the EEA. This statutory acknowledgment of the inequality that exists between races reflects the commonly held belief of the country. The Broad-Based Black Economic

---

<sup>151</sup> Ibid at 382-384.

<sup>152</sup> Ibid at 396-398.

<sup>153</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

<sup>154</sup> Ibid at para 40.

<sup>155</sup> Ibid.

<sup>156</sup> Francis Wilson ‘Historical Roots of Inequality in South Africa’ (2011) 26(1) *Economic History of Developing Regions* 1 at 10

<sup>157</sup> Ibid.

<sup>158</sup> Terreblanche op cit note 3 at 337.

<sup>159</sup> Section 13 of the EEA. Designated groups are listed in s 1 of the EEA as: black people, women, and people with disabilities.

Empowerment Act<sup>160</sup> is a further piece of legislation which offers evidence that the country believes races are so unequal that legislative measures are required to assist in remedying the problem. In addition, Mokgoro J, in the *Minister of Finance and Others v Van Heerden*<sup>161</sup> judgment, states that during Apartheid the majority of wealth was systematically set aside for the minority white population – and Apartheid so deeply entrenched the disadvantage of black persons that the majority of the country's wealth remains to this day in the hands of the minority.<sup>162</sup>

The history of South Africa, read with the statements and measures initiated to undo the effects of racial inequality, serve as clear indications that the prevailing knowledge of the country favours an economic interpretation that black persons are not given the opportunity to earn on an equal level to white persons.

(bb) Acknowledgement of Systemic Gender Inequality

The situation in South Africa concerning the discrimination of women is often somewhat overlooked or viewed as not critical. It is suggested that this is partly due to always living in the shadow of the overwhelming discrimination against black persons in South Africa.<sup>163</sup> However, the lack of equality for women in many areas of life, but specifically the workplace, should not be ignored.<sup>164</sup>

The core of the harm suffered by women appears to derive from the fact that we still live in a patriarchal society – where the ideal worker is perceived to be a male with no family responsibilities.<sup>165</sup> This societal prejudice affects all types of women. Women that, nevertheless, fit comfortably within the ideal worker mould are still viewed under the prejudice when applying for a job. And, following this, women who do have family responsibilities are viewed as not being suitable for the workplace due to their need for flexibility.<sup>166</sup> It is trite that, historically, women did not participate in traditional forms of work and were not well-educated. Perhaps since this era was

---

<sup>160</sup> Broad-Based Black Economic Empowerment Act 53 of 2003.

<sup>161</sup> *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC).

<sup>162</sup> *Ibid* at para 73.

<sup>163</sup> Gillian Loveday 'Gender Discrimination in the Workplace' (1997) 2 *Journal of South African Law* 256 at 256.

<sup>164</sup> Terreblanche op cit note 3 at 383-384.

<sup>165</sup> Loveday op cit note 163 at 256.

<sup>166</sup> *Ibid*.

so long ago there is a perception that no evidence remains in the present economy. It may be true that we have come a very long way and the idea that a woman will not be educated or allowed to work seems archaic; however, the very definition of what is required of an employee was defined in those years when women did not work and only held family responsibilities.<sup>167</sup> It is in that definition where South Africa has not changed. Therefore, when holding a woman up to the standard that has been entrenched in our understanding of what it means to hold a job, she faces obstacles that men do not face. Criteria for what is lauded as a “good worker”, such as seniority or hours worked, can prevent women from advancing in the workplace.<sup>168</sup>

*President of the Republic of South Africa and Another v Hugo*<sup>169</sup> specifically states that women are still the primary care givers for their family, and these responsibilities are the main reason why women face obstacles in competing in the labour market.<sup>170</sup> Due to a woman with family responsibilities’ inherent need for flexibility or wages that allow for alternative family care, women have tended to be located in the self-employment or informal sectors.<sup>171</sup> Another issue faced by women is that certain jobs are perceived to be “female jobs” or “male jobs”.<sup>172</sup> Female jobs are generally those that include caring for people. These jobs are then viewed as simply an extension of what women ordinarily do and are, therefore, not valued highly in terms of wages.<sup>173</sup> The reason that some women are not getting the necessary education to pursue traditional and higher paid work also is substantially linked to family responsibilities.<sup>174</sup> Statistics show that in the age range of 14 years to 18 years, 16.5 per cent of surveyed female students reported not attending school because they were needed by their family – this compared to 1.1 per cent of males of the same age.<sup>175</sup> Furthermore, 11.7 per cent of females of the age range 19 years

---

<sup>167</sup> Ibid.

<sup>168</sup> Ibid at 266-267.

<sup>169</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

<sup>170</sup> Ibid at 727I-728B.

<sup>171</sup> Roseline Nyman “‘So Many Legislative Changes with Such Little Impact’ – A Gender Analysis of Labour Reform’ (1998) 2(2) *Law, Democracy and Development* 225 at 227.

<sup>172</sup> Ibid at 226.

<sup>173</sup> Ibid.

<sup>174</sup> The Minister in the Presidency Responsible for Women with the Development Policy Research Unit op cit note 122 at 36.

<sup>175</sup> Ibid.

to 24 years reported the same reason for not attending school – compared to 0.5 per cent of males of the same age.<sup>176</sup>

This results in the same conclusion. Substantial volumes of the hardship faced by women in the workplace derives from a patriarchal idea of an employee that has not been developed.

In addition, as mentioned above, “non-sexism” is a founding value of the Constitution.<sup>177</sup> This, again, expresses an acknowledgement that non-sexism was not necessarily a commitment by the country, previously, but shall be pursued in the future. Furthermore, the EEA obligates qualifying employers to institute affirmative action measures for designated groups, and section 1 of the EEA defines women to be a designated group. This can be interpreted as an acknowledgment, by the legislature, that women are not on equal footing in the workplace. The overwhelming consensus dictates that gender remuneration inequality has long been acknowledged by South Africa.

At the conclusion of this discussion, remuneration may still carry an appearance of neutrality. It is difficult to equate remuneration as a standard or measure necessarily disproportionately disadvantaging women and black persons. Perhaps it is because a person’s finances seem like they will always be relevant – so the distinction is necessary. However, the point is that, unless a person’s earning level is directly relevant and necessary, using remuneration will always create differentiation between races and genders.

Differentiation on the ground of remuneration inextricably gives rise to differentiation on the grounds of race and gender. Therefore, differentiation on the listed grounds of race and gender is established. The *Harksen* test dictates that unfair discrimination and inconsistency with the Constitution is now presumed and requires justification. Below, in Chapter IV and V, this dissertation will take the principles established above and apply them to the interpretations and text of a specific provision: s 194 of the LRA.

---

<sup>176</sup> Ibid.

<sup>177</sup> Section 1 of the Constitution.

## CHAPTER IV: THE CONSTITUTIONALITY OF QUANTIFYING COMPENSATION IN TERMS OF REMUNERATION

This section will seek to expand on the characteristics of the various approaches the courts have taken in interpreting how compensation should be quantified in employment disputes. As mentioned above, s 194 of the LRA only calls for compensation that is ‘just and equitable’; yet, it would seem that the courts have taken it upon themselves to interpret this requirement in manners likely never intended by the legislation. Applying the principles established in Chapter III, the conclusion that will be reached is that any interpretation on the part of the courts that imposes a measure in terms of remuneration on the meaning of “just and equitable” is unconstitutional.

### (a) *The Two Interpretations*

#### (i) *The Loss-Based Approach*<sup>178</sup>

One of the first cases to interpret s 194 of the LRA as intending the loss-based approach was *Harmsen v Alstom Electrical Machines (Pty) Ltd*.<sup>179</sup> This case involved the retrenchment of an employee. However, correct procedure was not followed by the employer and the employer did not offer sufficient evidence that the retrenchment was fair.<sup>180</sup> The applicant did not seek to be reinstated; therefore, the court began assessment of what compensation should be ordered. The judge in *Harmsen* initiated the evaluation by stating that the applicant had found subsequent employment immediately, but at a lower rate of remuneration.<sup>181</sup> This was taken to be a mitigating factor of the total harm suffered by the applicant. The court described statutory compensation as a discretionary remedy that was simply limited in the

---

<sup>178</sup> This terminology is adopted from Rochelle Le Roux. See Rochelle Le Roux ‘Getting Clarity: The Difference between Compensation, Damages, Reinstatement and Backpay’ (2011) 32 *ILJ* 1520. For case law that demonstrates the trend see *Harmsen v Alstom Electrical Machines (Pty) Ltd* (2004) 25 *ILJ* 338 (LC); *Minister for Justice and Constitutional Development and Another v Tshishonga* (2009) 30 *ILJ* 1799 (LAC). These cases are discussed in this section.

<sup>179</sup> *Harmsen v Alstom Electrical Machines (Pty) Ltd* (2004) 25 *ILJ* 338 (LC). Hereafter referred to as ‘*Harmsen*’.

<sup>180</sup> *Ibid* at para 35.

<sup>181</sup> *Ibid* at para 36.

quantum that may be awarded.<sup>182</sup> This statement supports the description of the loss-based approach where the award is determined independently, and thereafter the limitation is applied if necessary.

The judge in *Harmsen* determined the meaning of “just and equitable” to both parties to mean that the maximum an applicant should receive is the total loss suffered (which is ordinarily in the form of lost remuneration). However, the fairness of the context and the mitigating factors will determine whether the applicant can recover the full loss.<sup>183</sup> Utilising this reasoning, the court ruled that the appropriate compensation would be the difference between the annual remuneration the applicant received at his previous job and the lesser annual remuneration he received at the position he was forced to take after being retrenched.<sup>184</sup> This is a very strict version of the loss-based approach as loss is almost exclusively assumed to be remuneration. This point of departure for the loss-based approach is understandable as it is one of the first cases to develop the interpretation.

*Harmsen*'s very strict approach to the loss-based approach as well as what constitutes loss did not lend itself to being very helpful when a matter concerning an unfair labour practice came before the court – this is because without a dismissal, no remuneration was lost. Therefore, the loss-based approach was further developed by Davis JA in the Labour Appeal Court judgment of *Minister for Justice and Constitutional Development and Another v Tshishonga*<sup>185</sup> to be more inclusive of what can constitute loss. *Tshishonga* (LAC) involved an employee that made a protected disclosure and was subsequently subjected to occupational detriment for said disclosure. The employee was suspended and had a disciplinary enquiry instituted against him.<sup>186</sup> Section 186(2)(d) of the LRA describes an unfair labour practice to be an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act,<sup>187</sup> and due to the employee making a protected disclosure as defined in the PDA. The court found that the alleged protected

---

<sup>182</sup> Ibid at para 37.

<sup>183</sup> Ibid at para 38.

<sup>184</sup> Ibid at para 40.

<sup>185</sup> *Minister for Justice and Constitutional Development and Another v Tshishonga* (2009) 30 ILJ 1799 (LAC). Hereafter referred to as ‘*Tshishonga* (LAC)’.

<sup>186</sup> Ibid at paras 3-4.

<sup>187</sup> Protected Disclosures Act 26 of 2000. Hereafter referred to as the ‘PDA’.

disclosure and occupational detriment satisfied the ambit of the PDA; therefore, the conduct of the employer qualified as an unfair labour practice.<sup>188</sup>

Davis JA then continued to assess the appropriate remedy. The court lists a great deal of factors that could be taken into account to determine the appropriate remedy in this case; these ranged from the general ill treatment of the employee to the fact that he required the services of a trauma counsellor, and the extent of legal fees he incurred in the various processes.<sup>189</sup> Davis JA states that compensation under the LRA must encompass patrimonial as well as non-patrimonial loss. In addition, the statutory limitations placed on compensation in s 194 of the LRA only act to cap the total sum, not to assist in the measurement of the value.<sup>190</sup> Therefore, in this interpretation, the starting point of compensation quantification is the patrimonial loss suffered by the employee.<sup>191</sup> Davis JA then develops the loss-based approach by stating that the non-patrimonial loss assessment must be likened to that of a delictual claim for *actio injuriarum*.<sup>192</sup> Possible factors to consider when assessing non-patrimonial loss are: nature and seriousness of the *iniuria*, the circumstances of the harm, the behaviour or intention of the employer, the degree of emotional distress suffered, any exploitation or abuse of the relationship of the parties, and the employer's attitude subsequent to the transgression.<sup>193</sup> Davis JA continued by taking all relevant factors into account and determined that the considerable harm caused and behaviour of the employer warranted a substantial quantification of non-patrimonial loss. Davis JA awarded the employee the full value of patrimonial loss (R177 000) as well as R100 000 in non-patrimonial loss.<sup>194</sup>

The loss-based approach currently takes the form of viewing compensation that is 'just and equitable, to encompass patrimonial and non-patrimonial loss. Patrimonial loss will form the initial inquiry, and non-patrimonial loss will be evaluated as an *iniuria*. Section 194 of the LRA will only serve a purpose if the total sum of what is 'just and equitable' exceeds the equivalent of 12 or 24 months' worth of the

---

<sup>188</sup> Ibid at paras 12-14.

<sup>189</sup> Ibid at para 16.

<sup>190</sup> Ibid at para 15.

<sup>191</sup> Ibid at para 19.

<sup>192</sup> Ibid at para 18.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid at para 22.

employee's remuneration – depending on the case. Therefore, it can be seen that the loss-based approach makes no attempt to quantify compensation solely in terms of remuneration. Consequently, while this dissertation will conclude that the loss-based approach is not unconstitutional, the approach remains inconsistent with the intentions of the LRA. This will be discussed further in Chapter VI.

(ii) *The 'Sui Generis' Approach*<sup>195</sup>

This approach centres around the measure of unfairness. However, the trend that has emerged in cases that adopt the Sui Generis approach is to offer very little explanation or reasoning for the determination of the value of compensation awarded. The most common method of reasoning is to engage briefly with an assessment of how unfair all of the relevant circumstances were and follow it with a number between 1 to 12 (for ordinary dismissals and unfair labour practices) or 1 to 24 (for automatically unfair dismissals). This unfortunate tendency of the courts makes it difficult to predict outcomes of future or potential claims.

The case of *Cosme v Polisak (Pty) Ltd*<sup>196</sup> is an example of this abovementioned trend. This case involved an employee that was verbally abused by a manager, and made the decision to report the incident and demand an apology. Following this, the employer launched a process to have the employee's employment contract terminated due to his having reached the age of retirement.<sup>197</sup> However, there was no evidence of any such policy that employees must retire at the age of 65, nor was there any contractual term to that effect.<sup>198</sup> The termination of the employment contract was determined to constitute an automatically unfair dismissal.<sup>199</sup> The full extent of the reasoning offered by the judge in determining the award of compensation was:

---

<sup>195</sup> This terminology is adopted from Rochelle Le Roux. See Rochelle Le Roux 'Getting Clarity: The Difference between Compensation, Damages, Reinstatement and Backpay' (2011) 32 *ILJ* 1520. For case law that demonstrates the trend see *Cosme v Polisak (Pty) Ltd* (2010) 31 *ILJ* 1861 (LC); *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 *ILJ* 2010 (LC). These cases will be discussed in this section.

<sup>196</sup> *Cosme v Polisak (Pty) Ltd* (2010) 31 *ILJ* 1861 (LC).

<sup>197</sup> *Ibid* at paras 6-9.

<sup>198</sup> *Ibid* at para 36.

<sup>199</sup> *Ibid* at para 38.

“Having arrived at the conclusion that the dismissal of the employee was automatically unfair I see no reason in the circumstances of this case why he should not be awarded the maximum compensation as provided for in section 194(3) of the LRA.”<sup>200</sup>

The judge awarded the employee the equivalent of 24 months’ remuneration, but did not offer an explanation as to why the maximum compensation permitted was ordered. There were also no reasons put forward as to how the court evaluated the fairness of the circumstances.

The above case was also an example of the effect that the Sui Generis approach has on quantifying compensation; that is, to quantify in terms of months of remuneration. A case that demonstrates this aspect of the Sui Generis approach is the Labour Court judgment of *Nape v INTCS Corporate Solutions (Pty) Ltd*.<sup>201</sup> This case involved an employee of a labour broker working on the premises of a third party.<sup>202</sup> The employee committed an act of minor misconduct which took the form of sending an offensive email.<sup>203</sup> The third party no longer wanted the employee on their premises and demanded from the labour broker that the employee be removed.<sup>204</sup> The labour broker suspended the employee and initiated a disciplinary enquiry where it was determined that a final warning would be sufficient.<sup>205</sup> However, the third party refused to permit the employee to return to its premises.<sup>206</sup> The labour broker was unable to place the employee in another position and, thereafter, began procedures to retrench him.<sup>207</sup>

The employee suffered no financial loss as he immediately found new employment at an increased salary level; however, he still brought a claim as he believed that his dismissal was substantively and procedurally unfair.<sup>208</sup> The court determined that the dismissal was substantively unfair, but due to many mitigating

---

<sup>200</sup> Ibid at para 39.

<sup>201</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2010 (LC).

<sup>202</sup> Ibid at para 2.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid at para 3.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid at para 4.

<sup>208</sup> Ibid at paras 5-6.

factors, the dismissal was rendered probably as fair as an unfair dismissal could be. The equivalent of one month's remuneration was awarded.<sup>209</sup> Therefore, the judge chose to quantify the compensation in terms of the employee's remuneration instead of conducting an enquiry into what is 'just and equitable' for the infringement of the right to fair labour practices.

This case implies a concerning interpretation of s 194 of the LRA. Even if the following conditions are present: there has been little to no suffering by either party, both parties were guilty of some degree of wrongdoing, and the employee is in a better financial position after the dismissal, an employer is still ordered to pay. If the court wishes to make an award because the dismissal was indeed unlawful, the minimum award available is the equivalent to one month's remuneration of the employee because compensation is measured in terms of months of remuneration. Therefore, if an employee is in a highly paid position, the award ordered could be very generous despite the relative fairness of the circumstances.

The sui generis approach can have the result of quantifying compensation by rating the unfairness on a sliding scale of 1 to 12 or 1 to 24 – thereby, valuing the employee's harm in terms of what he earns. There will be judges and commissioners that will not strictly adhere to a measurement of a 'month'. Awards of several weeks will likely be awarded in certain cases. However, the defining aspect of this approach is the employee having his or her harm suffered measured in terms of his or her earning ability.

### **(b) *The Extent of the Unconstitutionality***

This dissertation will make recommendations in chapter VI about a proposed approach to quantifying compensation that is more in line with the purposes of the LRA and the Constitution. However, as far as the unconstitutionality of using remuneration in the measure of compensation quantification is concerned, the Loss-based approach is not of concern. What is of concern is the Sui Generis approach.

---

<sup>209</sup> Ibid at para 107.

This approach directly makes use of an employee's earnings to quantify "just and equitable" compensation when he or she has been wronged by his or her employer.

The cases discussed in chapter II exposed how harmful remuneration, as a measure, can be when employees suffer similar harm, but are awarded drastically different sums due to their remuneration rate. Furthermore, chapter III clearly demonstrates the unconstitutional nature of utilising remuneration to differentiate between persons. Remuneration is inextricably linked to the discrimination of race and gender, and must be justified to be used lawfully. The Constitution dictates that when legislation is interpreted, the interpretation that gives the greatest effect to the Constitution and its Bill of Rights must be preferred.<sup>210</sup> This dissertation will elaborate in chapter VI as to the reason why the Loss-based approach is not the most legally correct. However, for the sake of proving the Sui Generis approach's unconstitutionality, it is submitted that there already exists an interpretation that better upholds the Constitution: the Loss-based approach. For these reasons, to the extent that 'just and equitable' compensation is interpreted to require a sliding scale measurement in terms of an employee's remuneration, it is unconstitutional and invalid. Therefore, the Sui Generis approach cannot be justified under the Constitution.

## **CHAPTER V: THE CONSTITUTIONALITY OF LIMITING COMPENSATION IN TERMS OF REMUNERATION**

This section seeks to demonstrate that the text of s 194 of the LRA is unconstitutional as far as it limits compensation awards to the equivalent of 12 or 24 months' remuneration (depending on the claim). Therefore, s 194 of the LRA will be found to be in violation of the Constitution, but as it is a law of general application, it receives an additional chance to be justified through a limitations analysis.<sup>211</sup> However, the analysis will conclude that the use of remuneration in limiting compensation awards cannot pass constitutional muster.

---

<sup>210</sup> Section 39(2) of the Constitution.

<sup>211</sup> Section 36 of the Constitution provides the 'limitations analysis'.

**(a) The Limitation under Section 194 of the LRA**

This chapter deals intensively with s 194 of the LRA; therefore, it serves to reproduce the provision:

**194 Limits on Compensation**

(1) The compensation awarded to an *employee* whose *dismissal* is found to be unfair because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of remuneration on the date of *dismissal*.

(2) ...

(3) The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the *employee's* rate of remuneration on the date of *dismissal*.

(4) The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' remuneration.

As discussed in the above section, the courts have offered interpretation of section 194 of the LRA and developed methods of approaching the quantification of compensation awarded to successful employees. However, the second problematic aspect of s 194 of the LRA is the text itself. The provision stipulates that compensation will be limited to the equivalent of 12 or 24 months' remuneration. In this respect s 194 of the LRA directly utilises remuneration as a means of differentiating between persons.

**(b) The Extent of the Unconstitutionality**

The cases discussed in Chapter II revealed that the limitations can have severe repercussions even in cases where the maximum is not awarded. This is seen where employees such as those in *Masondo* and *Mnomiya* are limited in their total claim by less than the employees in *Hibbert* and *Solidarity obo de Vries* would receive for one month. This is the reality created by the form of the limitation.

Applying the legal principles established in chapter III to s 194 of the LRA: to the extent that a law or practice makes use of remuneration as its measure, it is

unconstitutional unless justified. Section 194 of the LRA utilises remuneration specifically to measure the limit that will be placed on any individual entering a labour dispute forum. Differentiation on the ground of remuneration necessarily triggers a secondary differentiation on the grounds of race and gender. Therefore, it can be concluded that the limitation itself is not unconstitutional, it is rather the form which the limitation takes that is *prima facie* unconstitutional.

**(c) Using Remuneration to Limit Compensation Cannot Withstand a 'Limitations Analysis'**

When *prima facie* unfair discrimination is identified on a listed ground, the right to equality is being infringed. In this regard, if a law of general application is being challenged as the cause for the infringement, a 'section 36 limitations analysis' must be completed to establish whether the limitation is justified. All rights can be limited; however, to what degree, depends on the right and the circumstances in each individual case.

**(i) The Legal Position**

Section 36 of the Constitution states that only a law of general application may limit a right in the Bill of Rights.<sup>212</sup> Therefore, it must first be established that what is being challenged is considered a law of general application. This concept is not too complex. It is suggested that the challenged law must only be accessible, precise, and apply to the population generally.<sup>213</sup> If the law is found to not be of general application, no further enquiry is required as the right limitation cannot be justified. If the law is of general application, the enquiry moves forward. Ultimately, the analysis aims to assess whether such a limitation can be justified given the fundamental principles of our Constitution and our country.<sup>214</sup> In determining this objective, section 36 offers several factors that must be considered – however, it is not a closed list.

---

<sup>212</sup> Section 36(1) of the Constitution.

<sup>213</sup> Kevin Iles 'A Fresh Look at Limitations: Unpacking Section 36' (2007) 23 *SAJHR* 68 at 76.

<sup>214</sup> Section 36(1) of the Constitution.

The first factor to consider is the nature of the right that is limited.<sup>215</sup> Case law has suggested that this factor includes the importance of the right, but it has been argued that this is not necessarily a consideration that must be included.<sup>216</sup> At the very least, the nature of the right includes an enquiry into the extent of the right's ability to be limited.<sup>217</sup> The nature of a right also includes its permeability, in that rights may derive from or overlap with others.<sup>218</sup> Therefore, it may be necessary to analyse other rights. If the additional right cannot be limited in the given circumstances, then the original right being limited can only be limited in so far as it does not encroach on the additional right.

The second factor to consider is the importance of the purpose of the limitation.<sup>219</sup> This factor recognises that for a limitation to be justified, the limitation must fulfil a substantial state interest.<sup>220</sup> It also recognises that there will be circumstances where a purpose behind a limitation is more important than the specific infringement it creates.

The third factor is the nature and extent of the limitation.<sup>221</sup> This includes the manner in which the limitation actually limits the right and to what degree the limitation limits the right.<sup>222</sup>

The fourth factor is the relation between the limitation and its purpose.<sup>223</sup> Essentially, this factor introduces a rationality test into the limitations analysis.<sup>224</sup> This factor also creates a threshold standard that there must be a rational connection between the limitation and its purpose for the enquiry to continue.<sup>225</sup> Consequently, it is submitted that a limitation on a right can never be justified if it is irrational.

---

<sup>215</sup> Section 36(1)(a) of the Constitution.

<sup>216</sup> *Iles op cit* note 213 at 77-78.

<sup>217</sup> *Ibid* at 80.

<sup>218</sup> *Ibid* at 81.

<sup>219</sup> Section 36(1)(b) of the Constitution.

<sup>220</sup> *Iles op cit* note 213 at 82.

<sup>221</sup> Section 36(1)(c) of the Constitution.

<sup>222</sup> *Iles op cit* note 213 at 83.

<sup>223</sup> Section 36(1)(d) of the Constitution.

<sup>224</sup> *Iles op cit* note 213 at 83.

<sup>225</sup> *Ibid*.

The final factor for consideration is whether less restrictive means are available to achieve the same purpose.<sup>226</sup> This factor requires the person assessing the enquiry to step into the shoes of the legislature and explore possible policy alternatives.<sup>227</sup> It should be noted that this does not necessarily call for the assessor of the limitations analysis to substitute a policy he or she deems less infringing than the current policy under challenge. Rather, what is important is simply to determine that the current policy is not satisfactory by engaging with policy alternatives. If the policy were to be declared unconstitutional, as the limitation is not justified, only then is an independent enquiry is conducted into what should be done to remedy the circumstances.

It is important to note is that the factors are each one of many and not necessarily determinative of anything in and of itself.<sup>228</sup> All factors must be weighed along with any other relevant factor in the circumstances to come to a conclusion whether the right in question is justifiably limited given the foundational principles of the Constitution.

(ii) *Evaluating the Infringement of the Right to Equality*

The LRA is an easily accessible public document and, as a whole, applies to all employees generally. In addition, s 194 of the LRA is precise in conferring the limitations on compensation awards. As a provision within a public statute, s 194 can easily be said to be a law of general application. Therefore, a limitations analysis will be necessary.

The first factor is the nature of the right that is limited. The right that is limited is the right to equality. Given the history of our country, this right is utterly fundamental to be upheld as far as is possible.<sup>229</sup> However, the law does recognise the right's ability to be limited. For example, in the *Masondo* case, the commissioner stated that the unfair discrimination on the ground of family responsibility may have been

---

<sup>226</sup> Section 36(1)(e) of the Constitution.

<sup>227</sup> *Iles* op cit note 213 at 84.

<sup>228</sup> *Ibid.*

<sup>229</sup> The achievement of equality is a founding value of the Constitution. See s 1 of the Constitution.

defendable if it was done out of business necessity.<sup>230</sup> It is fair to say that the right to equality may be limited in certain circumstances, but given the right's link to the fundamental principles of the Constitution, infringements should be rare and shallow. The right to equality also significantly overlaps with the right to dignity.<sup>231</sup> This is portrayed in the definition of what it means to discriminate – which is to infringe the right to equality by treating persons unequally based on a characteristic that has the ability to impair their fundamental dignity.<sup>232</sup> Therefore, the infringement of the right to equality that is discussed in this dissertation is precisely where the rights interlink. It would appear that this factor would count against the justifiability of the right's limitation unless governmental necessity were found.

The second factor to consider is the importance and purpose of the limitation. The purpose of s 194 of the LRA was articulated in the case of *Kroukam v SA Airlink (Pty) Ltd*.<sup>233</sup> The court stated that the purpose of the limitations to the compensation awards available is to limit the financial risk of the employer in an unfair dismissal or unfair labour practice claim.<sup>234</sup> The implementing of a limit was also a necessary tool of the negotiations surrounding the drafting of the LRA.<sup>235</sup> The employee representatives agreed to have a limitation on employers' liability if reinstatement would be the primary remedy in unfair dismissal cases.<sup>236</sup> It should be noted, the limitation of liability was the purpose of s 194 of the LRA – this did not mandate the limitation taking the form of being measured in terms of remuneration. It is the measurement in terms of remuneration that limits the right to equality, not the actual limiting of compensation. However, the current form of the provision does serve the important purpose of maintaining the agreement struck in negotiations. This is a persuasive factor in favour of the limitation's justification.

The third factor is the nature and extent of the limitation. The manner in which the limitation actually limits is concerning. Remuneration indirectly discriminates against black persons and women by disproportionately advantaging the previously

---

<sup>230</sup> Supra note 11 at 178.

<sup>231</sup> Supra note 76 at para 46.

<sup>232</sup> Supra note 67 at para 46.

<sup>233</sup> *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC).

<sup>234</sup> *Ibid* at para 124.

<sup>235</sup> *Ibid*.

<sup>236</sup> *Ibid*.

advantaged. In amplification, this is occurring when women and black persons are mistreated by their employers, and wish to be compensated for such harm. This is a perpetuation of South Africa's biggest systemic problem. Racial and gender inequality is a reality in South Africa, and this form of limitation of the right to equality only serves to aggravate those inequalities. This is in violation of the fundamental principles of the Constitution and this factor strongly acts against the justification of the limitation.

The fourth factor to consider requires assessing a rational connection between the limitation and its purpose. The limitation served to fulfil the agreement negotiated in the drafting of the LRA regarding the limiting of the liability of employers should compensation be awarded. This purpose is achieved. The rationality of the limitation is in favour of justification.

The final factor considers whether there are less restrictive means to achieve the purpose. This dissertation will fully engage with suitable alternatives when recommendations are made in Chapter VI; however, this factor can be analysed by assessing if there could be any alternative at all. It is important to begin by noting that the current limitation to the right to equality is not always a particularly effective way to achieve the purpose. Making use of an employee's remuneration to measure the limitation on compensation can dictate potentially excessive awards for highly paid employees. An employee such as the one discussed in the *Solidarity obo de Vries* case earned R46 000 per month. In his case he would have been limited by the equivalent of 12 months' remuneration which equates to R552 000 – R552 000 is not a great limitation on the financial risk to an employer for an ordinary unfair dismissal. However, it is perhaps too effective in the case of low paid employees. The employee in the case of *Mnomiya* was limited to the equivalent of 24 months' remuneration as her case involved unfair discrimination which equates to R15 890 – R15 890 would be unlikely to act as a deterrent to a private individual, let alone a large corporation.

The measurement of the limitation to compensation being in terms of remuneration was simply instituted to fulfil the purpose of limiting the financial risk of employers. This could be achieved by any other form of limitation – it does not

necessarily require including remuneration as the measure. Setting a monetary limit on the various compensations would achieve the same purpose without limiting the right to equality.<sup>237</sup> Therefore, the final factor adds great weight to the unreasonableness of the limitation to the right to equality.

Weighing all of the various factors discussed on a balance of probabilities, there appears to be less evidence in support of the limitation to the right to equality. It is safe to conclude that the limitation to the right to equality cannot be justified given the fundamental principles of our Constitution. The form that the limitation takes in s 194 of the LRA is unconstitutional.

## **CHAPTER VI: RECOMMENDATIONS**

It has been established in the above Chapters IV and V that the current interpretation and version of s 194 of the LRA are unconstitutional. However, this argument is strengthened when it is shown that there are achievable alternatives to our current position. Possible constitutionally valid solutions will be explored below. A new interpretation of s 194 of the LRA will be proposed in the hope that it will be adopted in practice. Regarding the variations to the form of the limitation that will be recommended, this dissertation seeks to implore upon the legislature to amend all text which further entrenches South Africa's systemic inequality.

### **(a) *A New Constitutionally-Sound Interpretation***

As mentioned in Chapter I, the text of s 194 of the LRA only mandates that compensation be "just and equitable". It is admitted that this does not provide a defined path for judges and commissioners to follow in their quantification of an award. However, as established in Chapter IV, to the extent that "just and equitable" is interpreted to intend the 'Sui Generis' approach, the interpretation is unconstitutional. The provision must be given an interpretation that the text is capable of intending and that is not inconsistent with the Constitution. The interpretation of any legislation must promote the spirit, purport and objects of the Bill

---

<sup>237</sup> This solution will be discussed further in Chapter VI.

of Rights.<sup>238</sup> It is trite that the Bill of Rights cannot be promoted when the interpretation of the legislation is the cause of the infringement to the Bill of Rights. The inconsistency with the Constitution only arises from the use of remuneration as the measure for quantification of compensation. This measure of relying on a person's earning ability was established in Chapter III to be problematic in the economic status quo of South Africa. Davis JA, in *Tshishonga*, correctly found that s 194 of the LRA is capable of an interpretation that gives no regard to remuneration unless the limitation on the award becomes relevant.<sup>239</sup> Therefore, what is the solution?

This dissertation will not be proposing the use of the Loss-based approach. It is submitted that this approach is not correct by default, simply because it is the only practiced alternative. The Loss-based approach is a relaxed adaption of delictual law that could not have been intended for the purposes of the LRA. The LRA was designed with the goal in mind of creating faster resolution of labour disputes.<sup>240</sup> A strict adherence to the concepts of patrimonial and non-patrimonial loss is not in keeping with the idea of not requiring sophisticated evidence from employees.<sup>241</sup> In addition, the delictual ethos of a heavy focus on the restitution of every cent of loss that can be proved is contrary to the concept of compensation.<sup>242</sup> Compensation and damages are often used in speech synonymously; however, their technical meanings are in no way synonymous.<sup>243</sup>

The interpretation that this dissertation will propose is an expansion of an interpretation by Rochelle Le Roux, in her article discussing issues within employment law remedies.<sup>244</sup> The key aspect of the new interpretation is that remuneration should play no role in the quantification of compensation.<sup>245</sup> Second, compensation must not be viewed in the way envisioned in delictual or contractual law where the objective is to restore the wronged party, as far as possible, to the

---

<sup>238</sup> Section 39(2) of the Constitution.

<sup>239</sup> Supra note 185 at para 15

<sup>240</sup> Rochelle Le Roux 'Getting Clarity: The Difference between Compensation, Damages, Reinstatement and Backpay' (2011) 32 *ILJ* 1520 at 1527.

<sup>241</sup> Dupper op cit note 88 at 767.

<sup>242</sup> CCMA Guidelines on Misconduct Arbitration GN R224 in *GG* 38573 of 17 March 2015 at para 132.

<sup>243</sup> Le Roux op cit note 240 at 1531.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid at 1539.

position he or she was in before the harm occurred. Instead, compensation should be viewed as remedying the infringement of a constitutional and statutory employment right.<sup>246</sup> Compensation is not delictual or contractual damages, where the aim is more to reimburse for full proven loss. The crux of a delictual or contractual claim is harm of person or breach of contract. Whereas, labour law compensation vindicates a constitutional and statutory right by considering all relevant factors involved in the infringement – it is in no way a guarantee of recovering loss suffered as a result of the infringement.<sup>247</sup>

The point of departure for the assessment of compensation should not be patrimonial loss or fairness, but rather it should be what is “just and equitable” in the circumstances. ‘Just and equitable’ is the full extent of the mandate under s 194 of the LRA concerning quantification. Compensation should not be an award specifically for patrimonial loss, non-patrimonial loss, or even fairness – these factors are merely relevant in the consideration of what is ‘just and equitable’ in the circumstances of the right infringement.<sup>248</sup> This assessment will require a balancing act of the fairness of the infringement, the loss the employee was forced to suffer, but also the employer involved and his or her concerns.<sup>249</sup> Compensation should never intend to punish the employer, but his conduct will influence the fairness of the circumstances of what is ‘just and equitable’.<sup>250</sup> Assessing compensation should uphold the established purpose of the LRA in creating an environment where disputes can be resolved quickly and the employee is not required to present complex evidence. Le Roux proposes, that the most important factor is that the employee can establish that loss was suffered, not the full extent of the loss.<sup>251</sup>

The defining characteristic of this approach is to weigh all relevant factors in compensating an employee for the violation of their right to fair labour practices. This approach is a compromise approach as it draws on aspects of both established interpretations. The compromise approach takes from the loss-based approach its view to have no regard to remuneration in its compensation quantification, as well as

---

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

its consideration of all forms of loss. From the sui generis approach, the compromise approach takes the emphasis on assessing fairness. However, the compromise approach is the only approach which gives consideration to the purposes of the legislation from which it derives. This compromise approach is, in the opinion of this dissertation, the most correct under current labour law and our Constitution.

The practical application of the compromise approach to the quantification of compensation would be achievable. The remuneration earned by each employee bringing a claim would still be very relevant to the assessment of the award. Currently, there are many factors that are considered to evaluate the fairness of the infringement, but this fairness is then rated on a scale of months of remuneration. Employees are having the infringement to their right to fair labour practices measured in terms of what they are capable of earning – no regard is given to whether an employee was systemically denied opportunities to earn even a liveable wage.

Going forward, remuneration should only be considered when assessing remuneration loss (only one form of loss an employee may suffer). It is admitted that remuneration loss will be a sizeable factor in any case of dismissal and some unfair labour practices. For this reason, high earning employees, such as the white men discussed in the cases of *Hibbert* and *Solidarity obo de Vries*, will likely always be awarded far larger sums than low earners, such as the black women discussed in *Masondo* and *Mnomiya*. However, under the compromise approach, the high earning employees may be awarded less and the low earning employees may be awarded more – relative to the current state of affairs.

Compensation under s 194 of the LRA is not intended to restore all lost remuneration, and the legislation's true intentions will be perpetuated under the compromise approach. With the focus shifted to the extent that the right to fair labour practices has been infringed (and the compensation being just and equitable in the circumstances), high earning employees will not benefit as much as they have been by virtue of their capability to earn. Complementing this, low earning employees will not be as disadvantaged by virtue of the systemic obstacles determining their low wages. What should be noted from this is that employers should not be concerned

by the change. Higher paid employees will likely recover a small portion less compensation and lower paid employees will likely recover a small portion more compensation – a balance is struck. The balance has the effect of ensuring that the value any given employer would expect to pay in a specified period would vary negligibly.

**(b) *Alternative Limitation Solutions from Foreign Jurisdictions***

It is important when developing the law to give consideration to foreign jurisdictions that are relevant to South African law. This is true whether it is because they are similar in nature or South African law partially derived its current form from the other jurisdiction. However, it should be acknowledged from the start that South African labour law will always be markedly different from foreign jurisdictions as we are one of the only countries to have a constitutional right to fair labour practices in addition to a constitutional supremacy.<sup>252</sup> This section will attempt to ascertain the manner in which foreign jurisdictions limit compensation in employment claims, in the hope that such foreign insights will be viable for adoption into our law.

**(i) *United States***

The United States of America has a notably different labour law system to South Africa. South African laws offer greater protection to the employee. For example, the United States has a form of employment termed “at will” employment.<sup>253</sup> This form of employment permits the dismissal of any employee for any reason – the employer need only not make the decision on illegal grounds. However, this foreign jurisdiction is always beneficial to compare with our own law given their constitutional supremacy.<sup>254</sup> The challenge with which this dissertation engages is one of constitutional relevance and, therefore, the United States is an important jurisdiction to consider.

---

<sup>252</sup> Dhayanithie Pillay “The Constitutionalisation of Labour Rights in South Africa” A paper presented to the South Africa Group of New York Law School on 19 November 2004’ (2006) at 1. Accessible at <http://www.law.seattleu.edu/Documents/news/archive/2006/pillaylabourlaw.pdf> [Accessed 29 February 2016].

<sup>253</sup> Charles J. Muhl ‘The Employment-at-will Doctrine: Three Major Exceptions’ (2001) January *Monthly Labour Review* 3 at 3. Accessible at <http://www.bls.gov/opub/mlr/2001/01/art1full.pdf> [Accessed 2 March 2016].

<sup>254</sup> Article VI of the United States Constitution.

The labour law of the United States does not derive from a single document or even a few based on the protection they provide. Rather there is approximately a statute for every category of person the law seeks to protect. However, these are mostly compiled into a single federal document called the United States Code. This dissertation will only be referring to the majority of the federal statutes that regulate labour law – this dissertation will not engage with state legislation. This is due to the nature of the law in the United States: labour laws will differ between states as the states can expand on federal law, but federal legislation shows the minimum laws applicable to the entire country.<sup>255</sup>

The first two statutes this dissertation will discuss are the Age Discrimination in Employment Act of 1967 and the Civil Rights Act of 1964.<sup>256</sup> The ADEA and CRA both provide for unlimited awards to employees, but introduce an interesting distinction that differentiates between intentional and unintentional conduct.<sup>257</sup> The purpose of the ADEA is to prohibit age discrimination against persons 40 years and older. Section 626 provides the various remedies available for a court to order in the circumstances of a discrimination claim. The remedies available are not unusual – they include: compelling employment, reinstatement or promotion; or enforcing the liability for sums of money deemed to be unpaid; and damages.<sup>258</sup> An interesting distinction arises in only permitting damages as a remedy to employees whose employer *wilfully* discriminated against them on the ground of age.<sup>259</sup> Therefore, when the employer conducts himself *bona fide*, the law follows a traditional restitution approach restoring the employee to the position he or she was in before the harm. The complementary perspective is that when an employer's actions are *mala fide*, the liability is greater without being punitive. Therefore, the ADEA places no limits on the compensation that can be awarded, but does make provision for diminishing the liability of *bona fide* employers.

---

<sup>255</sup> 'About the United States Code: The Compilation of US Federal Laws' (2015). Accessible at <http://usgovinfo.about.com/od/rightsandfreedom/a/About-The-United-States-Code.htm> [Accessed 2 March 2016].

<sup>256</sup> Hereafter referred to as the 'ADEA', and the 'CRA', respectively.

<sup>257</sup> Section 626(b) of the ADEA. Section 626 of the current legislation is the equivalent of section 7 from its original publication form.

<sup>258</sup> Section 626(b) of the ADEA.

<sup>259</sup> *Ibid.*

The CRA provides a general prohibition of discrimination to employees on the grounds of race, colour, religion, sex, or national origin by making it an unlawful employment practice to use such a ground in the decision-making process.<sup>260</sup> In this legislation the distinction of intentional or unintentional conduct determines whether there is a remedy at all. The employer must have intentionally committed an unlawful employment practice by discriminating in order for the employee to access the remedies available.<sup>261</sup> If the employer is found to have acted intentionally, the remedies available are reinstatement or re-employment, with or without back pay, and there is no limitation.<sup>262</sup> This offers great protection to a *bona fide* employer as they will have no liability.

Second, this dissertation will discuss another two statutes that offer similar remedies: the Americans with Disabilities Act of 1990 and the Immigration Reform and Control Act of 1986.<sup>263</sup> The IRCA intends to, amongst many purposes, offer some protection to employees from discrimination on the ground of their immigration status. Specifically, when an employer is guilty of wrongful employment practices based on the employee's immigration status, the remedies available are reinstatement or re-employment, with or without back pay.<sup>264</sup>

The ADA is designed to protect disabled employees from being discriminated against in the workplace. The statute states that any just remedy may be ordered to correct the wrong done to a disabled employee, but specifically lists reinstatement and re-employment, with or without back pay, as options.<sup>265</sup> Interestingly, there is no limitation placed on the total sum of compensation an employee may be awarded under either statute; however, there is a limitation inserted into both pieces of legislation which limits the time in which back pay can accrue. The ADA and the IRCA stipulate that the maximum time period for which back pay can be considered is two years.<sup>266</sup> This serves to limit the employer's liability by not allowing the court to

---

<sup>260</sup> Section 703 of the CRA.

<sup>261</sup> Section 706(g) of the CRA.

<sup>262</sup> Section 706(g) of the CRA.

<sup>263</sup> Hereafter referred to as the 'ADA' and the 'IRCA', respectively.

<sup>264</sup> Section 274B(g)(2)(B)(iii) of the IRCA.

<sup>265</sup> Section 12117(a) of the ADA read with the United States Code, Title 42, Chapter 21, Subchapter VI, Section 2000e-5(g)(1).

<sup>266</sup> Section 274B(g)(2)(C) of the IRCA; and section 12117(a) of the ADA read with the United States Code, Title 42, Chapter 21, Subchapter VI, Section 2000e-5(g)(1).

consider a time period for back pay longer than two years, following the filing of the claim. However, the employee is not limited in additional remedies, such as damages.

The last three statutes put forward the use of any remedy without any limit or qualification: the Equal Pay Act of 1963, the Whistleblower Protection Act of 1989, and the Consumer Product Safety Improvement Act of 2008.<sup>267</sup> The WPA and the CPSIA both offer protection to employees that make protected disclosures and, thereafter, are subjected to adverse treatment. The WPA protects publicly employed employees and the CPSIA protects privately employed employees making disclosures on the safety of products. Both statutes state that reinstatement is the primary remedy, with re-employment as the secondary choice if necessary.<sup>268</sup> It is implied that if dismissal occurred, one of the above remedies must be awarded. Furthermore, the WPA and the CPSIA permit the award of any reasonably foreseeable harm and costs, and there is no limit to these awards.<sup>269</sup>

Lastly, the EPA has the purpose of making the difference in pay of employees performing the same or similar work in the same workplace a blanket wrongful act. The statute then specifies the grounds on which an employer can increase an employee's remuneration over another – all grounds are performance-based. The statute also gives grounds that will always be illegal if they are the basis of remunerating employees differently. The remedy provision stipulates that when a claim is found to have merit, an employee earning less for similar work based on that employee's gender (for example), the difference in earnings is payable to the disadvantaged employee for the entirety of the wrongful differentiation.<sup>270</sup> This award is only limited by the length of time the illegal practice was in place.

The United States tends towards offering a full range of remedies for all employment claims. There is also a trend of putting little to no limits on these

---

<sup>267</sup> Hereafter referred to as the 'EPA', the 'WPA', and the 'CPSIA', respectively.

<sup>268</sup> United States Code, Title 5, Part II, Chapter 12, Subchapter III, Section 1221(g)(1)(A)(i) (WPA); United States Code, Title 15, Chapter 47, Section 2087(b)(4)(A) (CPSIA).

<sup>269</sup> United States Code, Title 5, Part II, Chapter 12, Subchapter III, Sections 1221(g)(1)(A)(ii) and 1221(g)(1)(B) (WPA); United States Code, Title 15, Chapter 47, Sections 2087(b)(4)(B) and 2087(b)(4)(C) (CPSIA).

<sup>270</sup> United States Code, Title 29, Chapter 8, Sections 206(d)(1) and 206(d)(3).

awards. However, there is also an emphasis on predominantly only awarding the employee what would have been owed to them were the wrong not to have occurred.

(ii) *Canada*

The Canadian legal system is one of the most similar to our own. This foreign jurisdiction will always be beneficial to use for comparison to South African law. Again, as with the United States of America, Canada has a well-developed and extensive Constitution which all laws must promote.<sup>271</sup> A country with such similarity in this respect to South Africa will always lend itself to being a useful comparator in statutory developments based on constitutional infringements.

This dissertation will only discuss various sections of a single piece of legislation from Canada, as it is the primary source of law for employment matters and is applicable to the entire country. As with the United States, there are further laws created by the lower governmental bodies from each of the different regions within Canada, but these are not nationally applicable. Canada's primary statute for labour related matters is called the Canada Labour Code.<sup>272</sup>

From sections 94 to 98 of the Code, the legislation makes provision for unfair practices relating to trade union involvement. This includes everything from an employer treating an employee unfavourably (due to his or her trade union involvement) to a trade union preventing an employee's membership. Section 99 then provides the remedies for each of the various unfair practices. The different remedies permitted by the Code for different circumstances are: requiring the employer to pay compensation to the employee, not exceeding what the employee would have earned in the time passed, were it not for the unlawful practice; reinstatement with back pay limited to what the employee would have earned were the unlawful practice not to have occurred; re-employment, continue to employ, or allow to return to previously held duties along with a compensatory payment to the

---

<sup>271</sup> Section 52 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

<sup>272</sup> Canada Labour Code, R.S.C., 1985, c. L-2. Hereafter referred to as the 'Code'.

employee of what they would have earned were it not for the unlawful practice; to immediately rescind any disciplinary action in addition to a compensation payment made to the employee equal to the value of any penalty that may have been imposed; and the reinstatement of any benefits taken away under an unlawful practice.<sup>273</sup>

Sections 240-241 of the Code govern the laws relating to the prohibition on unjust dismissal. Section 242 of the Code then provides the possible remedies available to an employee that have been found to have been unjustly dismissed. The remedies are: the payment of compensation to the unjustly dismissed employee, but limited to the remuneration the employee would have received were it not for the dismissal; the reinstatement of the employee; or any other award that is equitable to order of the employer so to remedy or counteract the damage caused by the dismissal.<sup>274</sup> No limit is placed on the latter remedy. However, it is likely that it can be assumed to take similar form to the Code as a whole and the other remedies – that is, it would be limited to the deficit that was caused to the employee by the dismissal.

What can be concluded from the selection of Canadian remedies available is the law only seeks to place the employee in precisely the same position as he or she was in before the wrongful conduct of the employer. There is a specific focus on the loss suffered by the employee. Only for unjust dismissals is there a possibility of perhaps compensation greater than simply financial loss. For example, if the conduct caused the employee harm, this remedy could offer a creative solution or an additional monetary sum.

*(iii) United Kingdom*

Given the history of South Africa being so closely linked to the United Kingdom at one point in time, our country has adopted many aspects of English law throughout our legal system. Therefore, despite the fact that our separation of powers and sovereign authority notably differ, the United Kingdom is always influential on South African law when there is call for development.

---

<sup>273</sup> Sections 99(1)(a), 99(1)(b.2), 99(1)(c)(i)-99(1)(c)(iii), and 99(1)(c.1) of the Code..

<sup>274</sup> Section 242(4) of the Code.

The United Kingdom is similar to Canada in that they have opted for a single primary labour law statute that is comprehensive across most employment-related issues. The statute is titled the Employment Rights Act 1996.<sup>275</sup> This dissertation will refer to several sections which create a picture of the type of remedies the United Kingdom offers.

Most unlawful acts by an employer are remedied or have the option to be remedied with a compensation payment to the employee.<sup>276</sup> In the case of dismissals there are also the traditional remedies of reinstatement or re-employment.<sup>277</sup> Therefore, the remedies are not unique to the United Kingdom, but what is interesting about remedies is the specific limitations placed on some of the compensation awards.<sup>278</sup>

In certain cases, mainly pertaining to when an employee discharges a duty that is in a representative capacity of other employees, and is dismissed for fulfilling such duties, there is a minimum compensation award that must be ordered by the court. Such cases include when an employee carries out duties to implement health and safety measures or when an employee performs the function of a trustee on an occupational pension scheme.<sup>279</sup> In these cases, the court is obligated to give a minimum award of £14250.<sup>280</sup>

Apart from a few exceptions, all unfair dismissals carry a maximum monetary award limitation of £78335.<sup>281</sup> There is a further limitation placed on unfair dismissals that works in combination with the monetary maximum, a limitation of 12 months' remuneration – whichever is the lower applies.<sup>282</sup> The exceptional cases carry no

---

<sup>275</sup> Hereafter referred to as the 'ERA'.

<sup>276</sup> For examples see sections 49(1)(b), 63J(1)(b), 80I(1)(b), and 112(4) of the ERA.

<sup>277</sup> Section 113 of the ERA.

<sup>278</sup> These values are subject to change by the United Kingdom government, the values discussed are the latest at the time of research. See Morton Fraser Attorneys 'Employment Tribunal Awards'. Available at <http://www.morton-fraser.com/knowledge-hub/employment-tribunal-awards> [Accessed 3 January 2016].

<sup>279</sup> Section 120 of the ERA.

<sup>280</sup> Section 120 of the ERA.

<sup>281</sup> Section 124 of the ERA.

<sup>282</sup> For current applicable limits to compensation awards see Morton Fraser Attorneys 'Employment Tribunal Awards'. Available at <http://www.morton-fraser.com/knowledge-hub/employment-tribunal-awards> [Accessed 3 January 2016].

limitation and are of a serious nature: cases involving health and safety issues and cases involving protected disclosures.<sup>283</sup> Therefore, the United Kingdom employs monetary minimums and maximums in certain cases, as well as a limit in terms of months of remuneration.

**(c) *Replacing the ‘Remuneration’ Cap with a ‘Monetary’ Cap***

The United Kingdom is the only foreign jurisdiction of the three discussed above which employs the same limitation measure as South Africa – the limit in terms of months of remuneration. For the most part, the foreign jurisdictions place either very little limitation on compensation or none at all. As discussed in Chapter V, in South Africa we have a need for some form of limitation to lessen the potential liability of employers (should compensation be awarded) because of the agreement reached when drafting the legislation.<sup>284</sup> However, there are some ideas worth considering from the United States and the United Kingdom. Canada will not be considered given its practice is not to limit compensation awards.

The United Kingdom was the only foreign jurisdiction to impose limitations onto its compensation awards. One of the limits was in terms of the employee’s remuneration – this is clearly not viable as it is consistent with our current law which was shown to be unconstitutional in Chapter V. This jurisdiction uses another limitation, however. The United Kingdom limits certain compensation claims with a maximum recoverable monetary value. It is this solution that this dissertation will seek to adopt.

Section 194 of the LRA could substitute the “equivalent of 12 months’ remuneration” and “equivalent of 24 months’ of remuneration” for pre-determined monetary values. If this solution were to be accepted by the legislature, it would be upon them to determine the appropriate values for insertion, with regard to the South African context.

---

<sup>283</sup> Section 124 of the ERA.

<sup>284</sup> Supra note 233 at para 124.

A further variation of this solution could be to differentiate limiting values for business size. Adjusting the application of laws based on the size of a business is commonplace within South African commercial law – and especially labour law. The LRA, for example, differentiates between business size when a business decides to retrench employees. Businesses with over 50 employees will need to adhere to more onerous processes than those that have 49 or less.<sup>285</sup> A further example, from the EEA, is that only businesses with a minimum specified turnover are subject to the affirmative action provisions within the statute (the turnovers vary depending on the sector the business operates within).<sup>286</sup>

The legislature could opt to simply substitute monetary values in place of the current text limiting by the equivalent of 12 or 24 months' remuneration. However, the common choice in statutory drafting, if a monetary value is involved, is to state that the value is to be determined by the Minister of Labour and will be published in the Government Gazette. Whether caused by a shift in the economy that influences employment trends, or caused by basic economic fluctuations of inflation, the real value of money shifts over time. This method of setting various applicable monetary values is useful as it allows the values to change as necessary. An example of where this is used is in the Basic Conditions of Employment Act.<sup>287</sup> Section 6 of the BCEA discusses the limited application of the relevant chapter. Section 6(3) of the BCEA makes use of the abovementioned method in limiting the chapter's application by stating that:

'[t]he Minister [of Labour] must, on the advice of the Commission, make a determination that excludes the application of this Chapter or any provision of it to any category of employees earning in excess of an amount stated in that determination.'

The current determination provides the threshold value at R205 433.30.<sup>288</sup> In 2012, it was determined to be R183 008.00.<sup>289</sup> Therefore, it is an effective method of drafting more permanent legislation while allowing it to stay appropriate and relevant through

---

<sup>285</sup> Sections 189 and 189A of the LRA.

<sup>286</sup> Section 12 read with Schedule 4 of the EEA.

<sup>287</sup> Basic Conditions of Employment Act 75 of 1997. Hereafter referred to as the 'BCEA'.

<sup>288</sup> Basic Conditions of Employment Act 75 of 1997: Determination: Earnings Threshold Government Notice 531 Government Gazette 37795 of 1 July 2014.

<sup>289</sup> Basic Conditions of Employment Act 75 of 1997: Determination: Earnings Threshold Government Notice R429 Government Gazette 35404 of 1 June 2012.

use of subordinate legislation. Another example of this method of placing monetary values into legislation is in the recent amendments to the LRA.<sup>290</sup> Section 198A(2) of the LRA provides that the various sections regulating the different forms of temporary employment only apply to employees that earn less than the threshold value determined in terms of s 6(3) of the BCEA.<sup>291</sup> Therefore, this is a practice used currently by the legislature.

This method of limiting the compensation awardable in employment matters with a maximum monetary value would fulfil the purpose of s 194 of the LRA and still provide a limitation on the potential financial risk of employers. It could also be easily achieved by allowing the value to be determined by the Minister of Labour, as the Minister already does this for other statutes. Furthermore, it would allow the limit to increase or decrease in value, depending on the trends or needs that arise within the economy – without any additional drafting of legislation. The most important factor of this solution is that by instituting a monetary value that applies to all employees equally, there is no differentiation in terms of an employee's earning capabilities.

The alternative form of limiting compensation that is proposed would be very similar in practical effect to what our law currently provides. There will only be another form of limitation. Except the new limitation would not unfairly discriminate against any employee bringing an employment dispute. Furthermore, the alternative recommendation would give an employer a better idea of the potential liability he or she may incur. The remuneration an employer allocates to an employee should not be synonymous with his or her potential financial risk – this can only discourage employers from allocating more generous wages than necessary to keep the employee.

#### ***(d) Capping by Applying a Form of Prescription***

The United States provides for a limitation to the period for which back pay may be claimed. Back pay is not relevant in this discussion; however, the concept of limiting

---

<sup>290</sup> The LRA as amended by the Labour Relations Amendment Act 6 of 2014, specifically, sections 198, 198A, 198B, 198C, and 198D.

<sup>291</sup> Sections 198-198D of the LRA are subject to this limitation on protection.

by applying a form of prescription is an interesting possibility that will be explored below.

The method of limiting compensation awards with a monetary sum is submitted as the optimal solution in the opinion of this dissertation. However, there is another plausible approach to limiting employers' potential financial risk without creating inconsistency with the Constitution. It is conceivable that when the drafters of the LRA formulated s 194 of the LRA to be capped in terms of 12 or 24 months' remuneration, they were attempting, amongst other intentions, to limit the period for which the employee could claim. However, the wording reaches further than this. The purpose of s 194 of the LRA could be achieved by placing a limitation on the time period which may be considered when the judicial officer is assessing a claim. Therefore, if further harm were to occur after the passing of a certain period, it cannot be considered within the assessment of the factors of fairness or loss. Only conduct or loss occurring within the specified period would be relevant to the dispute. This adaption of the United States approach would limit the potential liability of employers by ensuring that they are never liable for remote or far-reaching harms and losses which are a result of the infringement to the right to fair labour practices. This dissertation advances the opinion that this approach would also assist the interpretive element of s 194 of the LRA. The emphasis would be placed on the recent events that were the actual cause of the right infringement, and remove the focus from the total loss suffered by the employee. This approach also causes no differentiation between employees on the basis of their remuneration, it simply limits the extent of what may be considered by the judicial officer.

## **CHAPTER VII: CONCLUSION**

South Africa's historical and current economic reality is that of entrenched racial and gender inequality. For this reason, our Constitution was founded on concepts of eradicating inequality and pursuing substantive equality.<sup>292</sup> No legal provision or practice which aggravates the systemic racial and gender disadvantage can validly function in this constitutional context. Common sense dictates that we recognise the

---

<sup>292</sup> Section 9(2) of the Constitution; See *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) at para 27.

disadvantages that black persons and women face in the workplace every day. However, the statistics compound this knowledge to reveal that every effort of, and call for, affirmative action for designated groups is justified. South Africa is simply entombed in the consequences of our history.<sup>293</sup> Until it can be proven that inequality in South Africa is no longer coloured by a racial and engendered divide, remuneration must not be utilised as a measure without subsequent justification. Unless a person's remuneration is directly applicable to the use of remuneration differentiation, remuneration will always unfairly indirectly discriminate on the grounds of race and gender. Essentially, the moment remuneration as a measure or standard is invoked, it will trigger a *prima facie* case of unfair indirect discrimination.

South Africa's economic status quo may change in future, but as can be seen from the statistics discussed in Chapter III, the discrimination caused by remuneration differentiation will not be removed in the near future.

The two approaches to quantifying compensation that we currently have in our law are both severely lacking – neither approach embodies the intentions and purposes of the LRA. The 'Sui Generis' approach was established in Chapter IV to unfairly indirectly discriminate on the grounds of race and gender by quantifying compensation in terms of months of remuneration. For this reason, any further use of this approach should cease to occur due to its infringing the Constitution. The Loss-based approach does not unfairly discriminate and, therefore, its continued use would not offend the Constitution. However, it does not promote the intentions of the LRA. The correct approach to compensation quantification is the compromise approach. Compensation must, most importantly, not be quantified in terms of an employee's remuneration. Secondly, compensation must remedy the infringement of the employee's right to fair labour practices by having the award be "just and equitable".

The limitation on compensation under s 194 of the LRA is unconstitutional in its remuneration-based limitation of the potential value of an employee's award. If black persons and women are systemically denied access to the same employment

---

<sup>293</sup> Supra note 161 at para 73.

opportunities as white persons and men, a statistically significant number of persons from protected groups are disadvantaged by having their compensation capped in terms of their earning ability. However, as it is necessary to have some form of limitation placed on the potential liability of employers for compensation awards, a maximum monetary value is the most appropriate solution.

The case law analysed and the statistics collected in researching this dissertation demonstrate that these concepts are not merely theoretical. Parliament has clearly accepted this notion by pursuing reassessment of its legislation's adverse impacts.<sup>294</sup> Reassessment of the consequences of post-1994 laws is necessary and welcomed in the present atmosphere of South Africa. In order to pursue the goals of our Constitution of reaching a state of equality between all persons, any law or practice that seeks to overlook, preserve, or even aggravate inequality must be addressed and reviewed.

---

<sup>294</sup> Gqirana op cit note 1.

## BIBLIOGRAPHY

### Primary Sources

#### **Domestic Cases**

- Brink v Kitshoff NO* 1996 (4) SA 197 (CC).
- Cosme v Polisak (Pty) Ltd* (2010) 31 ILJ 1861 (LC).
- Ekhamanzi Springs (Pty) Ltd v Mnomiya* (2014) 35 ILJ 2388 (LAC).
- Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).
- Harmsen v Alstom Electrical Machines (Pty) Ltd* (2004) 25 ILJ 338 (LC).
- Hibbert v ARB Electrical Wholesalers (Pty) Ltd* (2013) 34 ILJ 1190 (LC).
- Hoffmann v South African Airways* 2001 (1) SA 1 (CC).
- Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC).
- Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC).
- Masondo v Crossway* (1998) 19 ILJ 171 (CCMA).
- Minister for Justice and Constitutional Development and Another v Tshishonga* (2009) 30 ILJ 1799 (LAC).
- Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC).
- Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2010 (LC).
- President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).
- Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC).
- Solidarity on behalf of de Vries and Denel (Pty) Ltd t/a Denel Land Systems* (2009) 30 ILJ 2210 (BCA).

#### **Foreign Cases**

- Briggs v North Eastern Education & Library Board* 1990 IRLR 181.
- City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).
- Gaston County, North Carolina v United States* 395 U.S. 285 (1969).
- Griggs et al v Duke Power Co.* 401 U.S. 424 (1971).
- Perera v Civil Service Commission (No 2)* [1983] ICR 428.
- Watson v Fort Worth Bank & Trust* 487 U.S. 977 (1988).

#### **Domestic Legislation**

- Basic Conditions of Employment Act 75 of 1997.
- Basic Conditions of Employment Act 75 of 1997: Determination: Earnings Threshold
- Government Notice 531 Government Gazette 37795 of 1 July 2014.

Basic Conditions of Employment Act 75 of 1997: Determination: Earnings Threshold  
Government Notice R429 Government Gazette 35404 of 1 June 2012.

Broad-Based Black Economic Empowerment Act 53 of 2003.

CCMA Guidelines on Misconduct Arbitration GN R224 in GG 38573 of 17 March 2015.

Employment Equity Act 55 of 1998.

Interim Constitution of the Republic of South Africa Act 200 of 1993.

Labour Relations Act 66 of 1995.

Labour Relations Amendment Act 6 of 2014.

Promotion of Equality and Prevention of Discrimination Act 4 of 2000.

Protected Disclosures Act 26 of 2000.

The Constitution of the Republic of South Africa, 1996.

Workmen's Compensation Act 30 of 1941.

### ***Foreign Legislation***

Age Discrimination in Employment Act of 1967.

Americans with Disabilities Act of 1990.

Canada Labour Code, R.S.C., 1985, c. L-2.

Civil Rights Act of 1964.

Consumer Product Safety Improvement Act of 2008.

*Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

Employment Rights Act 1996.

Equal Pay Act of 1963.

Immigration Reform and Control Act of 1986.

United States Code.

United States Constitution.

Whistleblower Protection Act of 1989.

### Secondary Sources

#### ***Books***

Currie, Iain & de Waal, Johan *The Bill of Rights Handbook* 5ed (2010) Juta, Cape Town.

Terreblanche, Sampie *A History of Inequality in South Africa 1652-2002* 1ed (2002) University of Natal Press, Pietermaritzburg.

## Articles

'About the United States Code: The Compilation of US Federal Laws' (2015). Accessible at <http://usgovinfo.about.com/od/rightsandfreedom/a/About-The-United-States-Code.htm> [Accessed 2 March 2016].

Botha, Henk 'Human Dignity in Comparative Perspective' (2009) 2 *Stellenbosch Law Review* 171.

Deane, Tameshnie 'Understanding the Need for Anti-Discrimination Legislation in South Africa' (2005) 11(2) *Fundamina* 2.

Dupper, Ockert 'Justifying Unfair Discrimination: the Development of a 'General Fairness Defence' in South African (Labour) Law' in *Equality Law: Reflections from South Africa and Elsewhere* (S Jagwanth and E Kalula, eds.) (Juta 2002) 147.

Dupper, Ockert 'Proving Indirect Discrimination in Employment: A South African View' (2000) 21 *ILJ* 747.

Gqirana, Thulani, News24 'Parliament to Review Impact of Post-1994 Laws' (2016). Available at <http://www.news24.com/SouthAfrica/News/parliament-to-review-impact-of-post-1994-laws-20160119> [Accessed 2 March 2016].

Iles, Kevin 'A Fresh Look at Limitations: Unpacking Section 36' (2007) 23 *SAJHR* 68.

Loveday, Gillian 'Gender Discrimination in the Workplace' (1997) 2 *Journal of South African Law* 256.

Morton Fraser Attorneys 'Employment Tribunal Awards'. Available at <http://www.morton-fraser.com/knowledge-hub/employment-tribunal-awards> [Accessed 3 January 2016].

Muhl, Charles J. 'The Employment-at-will Doctrine: Three Major Exceptions' (2001) January *Monthly Labour Review* 3 at 3. Accessible at <http://www.bls.gov/opub/mlr/2001/01/art1full.pdf> [Accessed 2 March 2016].

Nyman, Roseline "'So Many Legislative Changes with Such Little Impact" – A Gender Analysis of Labour Reform' (1998) 2(2) *Law, Democracy and Development* 225.

Pillay, Dhayanithie "'The Constitutionalisation of Labour Rights in South Africa" A paper presented to the South Africa Group of New York Law School on 19 November 2004' (2006) at 1. Accessible at <http://www.law.seattleu.edu/Documents/news/archive/2006/pillaylabourlaw.pdf> [Accessed 29 February 2016].

Rycroft, Alan 'Inherent Requirements of the Job' (2015) 36 *ILJ* 900.

Rycroft, Alan 'Unfair Discrimination in Employment' (1990) 1 *South African Human Rights Yearbook* 371.

Statistics South Africa 'Earnings and Spending in South Africa, 2006-2011' (2015) Report no. 01-11-02 p 13. Accessible at [http://www.statssa.gov.za/?page\\_id=1854&PPN=Report-01-11-02](http://www.statssa.gov.za/?page_id=1854&PPN=Report-01-11-02) [Accessed 21 February 2016].

Statistics South Africa 'Quarterly Labour Force Survey: Quarter 3: 2015' 27 October 2015 p vi. Accessible at [http://www.statssa.gov.za/?page\\_id=1854&PPN=P0211&SCH=6255](http://www.statssa.gov.za/?page_id=1854&PPN=P0211&SCH=6255) [Accessed 17 January 2016].

The Minister in the Presidency Responsible for Women with the Development Policy Research Unit 'The Status of Women in the South African Economy' August 2015 at p 56. Accessible at <http://www.gov.za/documents/status-women-south-african-economy-9-aug-2015-0000> [Accessed 17 January 2016].

Vettori, S 'The Role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals' (2012) 15(4) *Potchefstroom Electronic Law Journal* 102/231.

Wilson, Francis 'Historical Roots of Inequality in South Africa' (2011) 26(1) *Economic History of Developing Regions* 1.