

**INDIRECT DISCRIMINATION IN THE WORKPLACE: A
COMPARISON BETWEEN SOUTH AFRICA AND THE UNITED
STATES OF AMERICA**

by

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DECLARATION

I declare that the Mini-dissertation hereby submitted to the University of Limpopo, for the degree of Master of Laws in Labour Law has not previously been submitted by me for a degree at this University or any other University, that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

Signed-----

Date-----

Majanku Jesaya Moifo

DEDICATION

I dedicate this research to:

My late parents, Nthoneng and Senkoane, whose parental love, guidance and wisdom are indelible in my life. I am greatly blessed and privileged to have been brought up by such loving, caring, selfless and dedicated parents. To both of you I say: *“Molo ‘a Malope and Hunadi ‘a Hlabirwa.”* Your words of advice, guidance and encouragement throughout are pillars of my strength.

Finally I would like to express a word of gratitude to my dear wife, Mandisa, my four daughters, Mangane, Siyanda, Hunadi and Machoshane, for their love, kindness, encouragement and moral support throughout my studies.

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ABSTRACT

Indirect discrimination is a concept which originated from the United States of America. The concept came about after the failure of anti-discrimination legislation to improve the position of Black Americans, particularly in the employment field. The legislature realized that there are structural practices and policies, in the employment field which affect certain racial groups negatively. These practices of discrimination were not clearly defined hence the meaning and interpretation of the concept was left to the administrative body, the Equal Employment Opportunity Commission (EEOC) and the courts.

The concept was imported into the South African jurisprudence after the inception of the government of National unity in 1994. The new government was committed to bring to an end all forms of discrimination which were in the past practiced against the Black community.

Section 9(3) of the Constitution of South Africa Act 1996 (Act 108 of 1996) proscribed direct and indirect discrimination. These sections served as the basis for sections 6(1) of the Employment Equity Act 1998 (Act 55 of 1998) which proscribes “unfair direct and indirect discrimination” in any employment policy or practice. Its scope is wide and allows Plaintiffs to prove their claims in jurisdictions where it could have been very difficult for them to do so.

While in the United States, statistical evidence is required to prove indirect discrimination, this is not the case in South Africa as seen in the landmark case of

Leonard Dingler Employee Representative Council v Leonard Dingler (PTY) LTD (1998) 19 ILJ 285 (LC). In this case when the Court gave its decision it simply relied on the facts of the case instead of complicated statistical evidence. Seemingly this will apply only in more obvious cases. In more complicated cases, Plaintiffs will still need to submit statistics to prove their claim.

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INDIRECT DISCRIMINATION IN THE WORKPLACE: A COMPARISON BETWEEN SOUTH AFRICA AND THE UNITED STATES OF AMERICA

CHAPTER 1

1. THE HISTORICAL BACKGROUND AND THE DEVELOPMENT OF THE CONCEPT OF INDIRECT DISCRIMINATION

1.1. Introduction

Indirect discrimination is a concept recently introduced to the South African law. Indirect discrimination occurs when the employer utilises an employment policy or practice that appears neutral at face value but disproportionately affects members of disadvantaged groups in circumstances where it cannot be adequately justified.¹ The concept of indirect discrimination originated from the United States primarily as a response to the labour market studies that suggested that the prohibition of direct discrimination had failed to significantly improve the socio-economic position of Black people.² The concept of indirect discrimination has had a considerable impact in the context of employment law, challenging a range of neutral requirements or conditions set by employers for employment, such as transfers, promotions, or other benefits due to employees.³

¹Dupper, O. C, Garber,C, Landman, A.A, Christianson, M, Basson, A.C, Strydom E.M.L. (ed) : Essential Employment Discrimination Law.(2007) at 31.

²Op Cit. at 39.

³Dupper, O. C. Proving Indirect Discrimination in Employment: A South African View. (2000) 21 ILJ 747 at 747.

The Constitution of South Africa (Act 108 of 1996) prohibits both direct and indirect discrimination. Section 9(3) of the Constitution provides that:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Section 9(5) states that “discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”. Section 9(4) of the Constitution further directs that “National legislation must be enacted to prevent or prohibit unfair discrimination.” It was on the basis of this directive that Section 6(1) of the Employment Equity Act,⁴ and Section 187(f) of the Labour Relations Act,⁵ were promulgated, and all these provisions prohibits both direct and indirect discrimination. The most important thing to note in the outset is to understand that all these provisions do not prohibit discrimination as such, but only prohibits discrimination which is unfair.⁶

1.2. Definition of the concept

At the heart of discrimination, lies differentiation.⁷ Differentiation in the employment context simply means that an employer treats employees or applicants for employment differently or the employer uses policies or practices that exclude certain groups of employees.⁸ Differential treatment could exist in the fact that one

⁴1998 (Act 55 of 1998).

⁵1995 (Act 66 of 1995).

⁶Dupper, O. C. Essential Employment Discrimination Law at 31.

⁷Ibid.at 33.

⁸Ibid.

applicant for the job is appointed, the others not; one employee is promoted, others not; or one employee is paid more than another; or one employee is transferred and others not. By the same token, many requirements, conditions, policies or practices laid down by an employer by their very existence serve to exclude applicants and existing employees from employment, promotion, benefits and other benefits.⁹ For instance, many employers will require certain educational qualifications for employment in a particular post, or require employees who want to be promoted to undergo a written test, or exclude part-time employees from certain benefits in the workplace. We should, however, also realise that employers often have compelling and very good reasons to treat employees differently or to implement these policies or practices.¹⁰ For instance, the employer will feel that it should appoint a specific applicant because he or she was the best qualified candidate and more experienced than the others; that it promoted an employee because of that employee's performance over a period of time; that it pays one employee more than another because of differences in the challenges and responsibilities associated with the job in question, or it transferred a specific employee because of its operational needs.¹¹

Differentiation is mostly a precondition for discrimination, but one could not simply equate differentiation with discrimination. Differentiation is a neutral term, in the sense that the mere fact of differentiation does not necessarily mean that the differentiation took place for a negative reason.¹² By contrast, discrimination has a negative connotation. What this means is that differentiation only becomes discrimination once that differentiation takes place for an unacceptable reason.¹³

⁹Ibid.

¹⁰Ibid.

¹¹Op Cit. at 34.

¹²Ibid.

¹³Ibid

These unacceptable reasons are, in fact, all the grounds of discrimination listed in the Constitution,¹⁴ the EEA,¹⁵ and the Labour Relations Act,¹⁶ such as race, sex, religion, disability etc. For instance, if the employer does not appoint an applicant because she is pregnant, does not promote an employee because he is Black, pay an employee less because she is a woman, the employer is not only differentiating between employees, the employer is also discriminating because the differentiation is linked to a ground of discrimination.¹⁷ It should be noted that the need to ground differentiation as the basis for any claim of unfair discrimination will inevitably result in a claim being categorised as either direct or indirect discrimination.¹⁸ Direct discrimination occurs when a person is treated less favourably simply on the ground of his or her race, sex, or other distinguishing features, or on the basis of some characteristics specific to that group.¹⁹ In South Africa direct discrimination is said to occur when people are not treated as individuals.²⁰ It occurs when characteristics, which are generalised assumptions about groups of people, are assigned to each individual who is a member of that group, irrespective of whether that particular individual displays that characteristic in question.²¹ Indirect discrimination on the other hand occurs when the employer utilizes any employment policy or practice that is facially neutral but disproportionately affects members of disadvantaged groups in circumstances where it cannot be adequately justified.²² For instance, when the employer utilises height and weight as requirements for employment as prison guards which disproportionately impacts on women, or a policy of excluding

¹⁴Section 9(3) of the Constitution of South Africa Act 1996 (Act 108 of 1996).

¹⁵Section 6(1) of the Employment Equity Act 1998 (Act 55 of 1998).

¹⁶Section 187(f) of the Labour Relations Act 1995 (Act 66 of 1995).

¹⁷Ibid.

¹⁸Op Cit. at 35.

¹⁹Ibid.

²⁰Op Cit. at 40.

²¹Ibid.

²²Op Cit at 41.

applicants with arrest records or criminal records which also disproportionately impacts on Blacks from consideration for employment.²³

1.3. The origin of the concept of indirect discrimination

The South African government learned from American experience, when it took over the reins of government from the apartheid regime in 1994, that anti-discrimination legislation only will not completely eliminate racial inequalities.²⁴ The legislature had realised that even equal treatment might produce unequal results particularly if the relevant subjects are socially unequal to begin with.²⁵ The legislature had therefore, promulgated the law which proscribed direct and indirect discrimination.²⁶ This law was aimed at the prevention of inequality and the behaviour which seemed neutral at face value but detrimentally affecting a particular group of people and which could not be justified.²⁷

The equality legislation originated in the United States of America. The United States Civil Rights Act 1964 proscribes discrimination on a number of grounds in a number of areas of public life.²⁸ Title VII of the Act covers discrimination in employment.²⁹ Section 703 (a) states that it shall be an unlawful employment practice for an employer:

- (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his (sic) compensation,

²³Op Cit. at 45.

²⁴Op Cit. at 46.

²⁵Ibid.

²⁶Section 8(2) of Constitution of South Africa Act 1993 (Act 200 of 1993).

²⁷Ibid. at 46.

²⁸Hunter, R. Indirect Discrimination in the Workplace (1992) at 105.

²⁹Ibid.

terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex or national origin; or (2) to limit, segregate or classify his (sic) employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex or national origin".³⁰

The section thus defines various employment practices as unlawful, but does not define the concept of "discrimination" itself.³¹ It is clear that when Title VII was passed, "discrimination" was viewed by the legislature as meaning simply disparate treatment.³² This was, however, left to the administrative body created by the Act, that is, the Equal Employment Opportunity Commission (EEOC), and ultimately the courts, to expound the meaning and scope of "unlawful employment practices" and "discrimination".³³

The concept of indirect discrimination was first set out in the EEOC's sex discrimination guideline issued in 1965.³⁴ The guideline stated that "discrimination" could be established by proof of differential treatment of two similarly situated people, or by proof of an adverse impact on a class of people.³⁵ This notion of adverse impact discrimination was accepted and elaborated by the United States Supreme Court in a 1971 race discrimination case, namely, *Griggs v, Duke Power Company*.³⁶ *The Griggs* case concerned a complaint by Black employees that their

³⁰The Civil Rights Act 1964.

³¹Op Cit. at 106.

³²Ibid.

³³ Ibid.

³⁴Ibid

³⁵Ibid.

employer's requirement of a high school diploma or the passing of a standardised general intelligence test as a condition of employment or transfer operated unfairly against them.³⁷ They showed that the intelligence tests used by the employer failed Blacks at a demonstrably higher rate than whites, while the high school diploma requirement would have a similar effect, since only 12 per cent of Black males compared to 34 per cent of white males in the state had completed high school.³⁸ The court held that Title VII proscribed not only overt discrimination, but also practices that are fair in form but discriminatory in operation, and that are not justified by business necessity.³⁹ Furthermore, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "build-in headwinds" for minority groups and are unrelated to measuring job capability".⁴⁰ Here the requirements clearly operated to exclude Blacks at a substantially higher rate than whites, and the employer was unable to show that either requirement constituted a "business necessity", since they had been adopted without any meaningful study as to their relationship with job performance.⁴¹

The EEOC, having enforcement responsibility, had in 1996 issued guidelines to permit only the use of job related tests when section 703(h) is interpreted.⁴² The Guidelines provide that:

"the Commission interprets 'professionally developed ability test as test which measures the knowledge or skills required by the particular job or class of jobs which the applicant

³⁶401 U S 424 (1971)

³⁷Dupper, O.C, Garbers, C, Landman A.A, Christiason, M, Basson, A.C, Strydom, E.M.L(ed): Essential Employment Discrimination Law (2007) at 44.

³⁸Op Cit. at 424/5.

³⁹Op Cit. at 425.

⁴⁰Op Cit. at 432.

⁴¹Hunter, R. Op Cit. at 106

⁴²EEOC Guidelines on Employment Testing Procedures issued August 24, 1966

seeks, or which affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs".⁴³

The position of the EEOC has been elaborated in the new Guidelines on Employee Selection Procedures⁴⁴ which provides that "employers using the data must have available data demonstrating that the test is predictive of or significantly correlate with important elements of work behaviour which comprise or are relevant to the job or jobs for which candidates are being evaluated".⁴⁵ The United States Supreme Court, as a result, is usually the one credited with the first unequivocal recognition of the concept of indirect discrimination in employment.⁴⁶ When the American Legislature drafted and adopted this legislation they had in mind the intention to eradicate totally all forms of oppression in the economic, social and political spheres. The legislature also wanted to level the playing field to enable Blacks to advance on the economic, social and political ladders which had been denied them in the past.⁴⁷ The legislature, however, realised at a later stage that the equality legislation alone could not completely eradicate all forms of discrimination, particularly in the employment area. The legislature thus, enacted legislation⁴⁸ in order to achieve equality of employment opportunities and remove barriers that have operated in the past to favour an identifiable group of White employees over other employees.⁴⁹ Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to preserve the status quo of

⁴³ *Griggs v Duke Power Co.* 401 U.S.424 (1970) at 433.

⁴⁴ 29 CFR Section 1607, 35 Fed. Reg. 12333 August 1, 1970.

⁴⁵ *Ibid.*

⁴⁶ Naughton, R. Workplace Discrimination and the Law(1995) Centre For Employment and Labour Relations Law University of Melbourne at 42.

⁴⁷ Dupper, O.C. Op Cit. at 44.

⁴⁸ Title VII of the Civil Rights Act 1964.

⁴⁹ *Griggs v Duke Power Co.*401 U.S. 424 at 426.

prior discriminatory employment practices.⁵⁰ The main problem being that employers could introduce in the workplace policies or practices which seemed to be neutral in nature, that is, they could apply equally to all the employees, but only to find they have a detrimental effect on a disproportionate number of the protected group.⁵¹ The concept of indirect discrimination has been imported into South African law immediately after the fall of the apartheid regime. This was incorporated in the interim constitution, that is, the Constitution of South Africa 1993,⁵² and later into the Constitution of South Africa Act 1996.⁵³

1.4. The inability of formal equality legislation to address racial inequalities in the workplace

It was precisely the failure of civil rights law in The United States to alleviate the identifiable consequences of racism that led to the acknowledgement among members of the American civil rights movement of an alternative perspective on anti-discrimination law.⁵⁴ The realization brought about the fact that the disadvantaged position of Black Americans could not merely be ascribed to the personal prejudice of White people, but that there were structural and institutional constraints which traditional anti-discrimination law could not address adequately.⁵⁵

⁵⁰Ibid.

⁵¹Freedman, S. *Women and the Law* (1997) at 285.

⁵²Act 200 of 1993.

⁵³Act 108 of 1996.

⁵⁴Dupper, O.C. *Op Cit.* at 44.

⁵⁵Ibid.

The trend towards expanding the idea of discrimination beyond the limited idea of prejudiced direct discrimination eventually received recognition of the highest court in the United States.⁵⁶ It was in *Griggs* case that the court for the first time gave recognition to the notion of indirect discrimination. The employer required a high school diploma or passing of intelligence test as a condition of employment in or transfer to jobs at the plant.⁵⁷ These requirements were not directed at or intended to measure ability to learn to perform a particular job or category of jobs.⁵⁸ Section 703(h) of Title VII of the ACRA authorises the use of any professionally developed ability test, provided it is not designed, intended, or used to discriminate. The court held that, “the Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operates to discriminate on the basis of race, and, if, an employment practice that operate to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer’s lack of intent”.⁵⁹ The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job performance.⁶⁰ Thus, the *Griggs* judgment established the principle that when an employer relies on recruitment policies or testing devices which have an adverse effect on protected groups, a burden is imposed on the employer to justify the policy. If an employer fails to satisfy the test of “business necessity” and “job relatedness” the practice will be declared unlawful.⁶¹ *Griggs* and subsequent cases intended the test of business necessity to be strict.⁶² They required proof that the exclusionary requirement or condition was necessary for the business of the

⁵⁶Ibid.

⁵⁷*Griggs v Duke Power Co.* 401 U S, 424 (1971) at 424..

⁵⁸*Ibid*

⁵⁹Ibid at 429-433.

⁶⁰Ibid at 433-436.

⁶¹Naughton R. Op Cit 43.

⁶²Ibid.

employer or that it was essential to effective job performance.⁶³ The Court further held that, “even where an employer was able to establish the job relatedness of a test, the complainant must prove that there are alternatives that could serve the employer’s interests, without causing the same adverse effect”.⁶⁴ This was illustrated in *London Underground v, Edwards (No 2)*.⁶⁵ The employer in this case implemented a new flexible shift pattern, where duties were to begin at 4.45 am. Ms. Edwards, a single mother with a young child, had been working daytime hours so to be at home mornings and evenings. She objected to the new shift pattern and requested to continue working her daytime shift. Her employer refused and she resigned, claiming indirect discrimination. On the issue of justification, the evidence was that the employer could have accommodated her request but changed its mind following pressure from the predominantly male workforce. Accordingly the court held that the refusal was not justified.⁶⁶ The decision in *Griggs* can therefore be stated with confidence that the Court for the first time ushered in new avenues to the notion of indirect discrimination.⁶⁷

The South African legislature, when it drafted the interim constitution, it had in mind the American experience of the failure of the civil rights law to alleviate the ‘identifiable consequence of racism’ that led to the acknowledgement among members of the civil rights movement of an alternative perspective of anti-discrimination law. The realisation that the disadvantaged position of black Americans could not merely be ascribed to the personal prejudice of white people,

⁶³Freedman S. Op Cit 296.

⁶⁴401 U.S. 424 (1975) at 437.

⁶⁵(1997) I. R. L. R. 157.Para. 6-018.

⁶⁶Op Cit. at para. 6-018.

⁶⁷*Griggs Op Cit* 430.

but that there were structural and institutional constraints which traditional anti-discrimination law, in the form of outlawing only direct discrimination, could not address adequately. The South African legislature, thus, adopted the concept of indirect discrimination for use to challenge a range of seemingly neutral requirements or conditions set by employers for employment, transfer, promotion, or other employment benefits. This was incorporated in Section 8(2) of the Interim Constitution, and later into Section 9(3) of the final Constitution. The sections served as a basis for sections 6(1) of the EEA and section 187(h) of the LRA in the context of dismissal.

The Court in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,⁶⁸ stated that:

“it is insufficient for the Constitution to merely ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time, and even indefinitely. Like justice, ‘equality delayed is equality denied’.⁶⁹

1.5. South African legislative framework on indirect discrimination

⁶⁸(1998) 12 BCLR 1517 (CC).

⁶⁹Op Cit 1565H-1566A.

The concept of indirect discrimination was incorporated into the South African law through the following statutes:

a) The Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993).

Section 8(2) of the interim Constitution states that:

“no person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language”.

b) The Constitution of South Africa Act, 1996(Act 108 of 1996)

Section 9(3) of the Constitution of South Africa Act of 1996 states that:

- (1)
- (2)
- (3) “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.
- (4) “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).....
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

c) **The Employment Equity Act, 1998(Act 55 of 1998)**

Section 6(1) of the EEA has been formulated more or less on the same basis as Section 9(3) of the final Constitution. The section specifically prohibits discrimination in any “employment policy or practice”, and it includes concepts such as ‘family responsibility’, ‘HIV status’ and ‘political opinion’. Unlike other jurisdictions, “employment policy or practice” is specifically defined in the definition section of the EEA. Section 1 defines the phrase as including, but not limited to, the following:

“recruitment procedures, advertising and selection criteria, appointments and appointment process, job classification and grading, remuneration, employment benefits, terms and condition of employment, job assignment the working environment and facilities, training and development, performance and evaluation system, promotion, transfer, demotion, disciplinary measures other than dismissal, and dismissal”.

The legislature cast the net too wide, including both the obvious, and those criteria that have caused difficulties for plaintiffs in other jurisdictions⁷⁰. While it would, in a majority of cases, be fairly straightforward for an applicant to identify the employment policy or practice that had caused the disproportionate impact, the definition contained in section 1 also groups notoriously ‘difficult to separate’ criteria under one heading, thus easing the burden on applicants.⁷¹ For instance, applicants will be able to argue that the employer’s entire recruitment procedure, appointment process, job classification system or performance evaluation system has disparate impact on a

⁷⁰Dupper, O.C. Proving Indirect Discrimination In Employment op cit at 754.

⁷¹Ibid.

protected group without having to separate the various elements of such a system. This will be particularly relevant in those situations in which the employer has a number of objective requirements, such as length of service and performance output, and subjective requirements, such as presentation and enthusiasm for promotion, none of which is an absolute requirement.⁷² Even though the individual factors are capable of separation, the employee will be able to argue that the entire system has a disparate impact on women, Blacks, the disabled, etc. This means that applicants are not precluded from separating the various elements of a system to show that certain individual practices within the system have a disproportionate impact on the group. This would be the case when employers argue that the employment process itself does not have a disparate impact on a protected group, even though individual components may⁷³. The employee can in this respect be able to separate an individual element to prove his/her case.

d) The Labour Relations Act, 1995(Act 66 of 1995)

Section 187 (in the context of dismissal) was also formulated on similar basis as Section 9(3) of the Constitution. Subsection (f) states that:

“the employer may not unfairly discriminate against an employee on any arbitrary grounds, including, but not limited to race, gender, sex, ethnic or social origin, colour,sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family

⁷²Ibid.

⁷³Ibid.

responsibility”.

It should be noted that the South African legislature conveniently avoided giving a very complicated definition of the concept of indirect discrimination. The absence of a complicated legislative definition of the concept of indirect discrimination in South African law was intended to make it easier for applicants to prove a *prima facie* case of indirect discrimination, and for the courts to give meaning to it.⁷⁴ It should also be noted that South African legislation does not prohibit discrimination. The legislation expressly prohibits discrimination which is unfair by section 9 of the Final Constitution as well as by section 6(1) of the EEA and section 187 of the LRA (in the context of dismissals).⁷⁵

⁷⁴Dupper, O.C, Garbers, C, Landman, A.A, Christianson, M, Basson, A.C, Strydom, E.M.L. (ed) 2007. at 46.

⁷⁵Ibid.

CHAPTER 2

2. THE MEANING AND SCOPE OF INDIRECT DISCRIMINATION

2.1. Introduction

The United States courts in their definition of the concept of indirect discrimination have always been free to engage in a more straightforward, general enquiry.⁷⁶ For instance, an employment policy or practice can include inaction by an employer. In *Taylor v US Air*,⁷⁷ word of mouth system of recruitment where the employer's passive reliance on potential employees' hearing about vacancies was held to discriminate indirectly against Blacks. An employment policy or practice can comprise practices that affect conditions of employment, such as facilities.⁷⁸ In *Lynch v Freeman*,⁷⁹ unsanitary toilet facilities affecting the health of female employees more adversely than male employees was found to be indirectly discriminatory.

The employment policy or practice must be neutral, that is, it must be one that applies to all employees concerned, irrespective of their membership of a class or group protected in terms of the prohibited grounds of discrimination. The nature of indirect discrimination is such that the employment policy or practice should be one that discriminates in its effect only; therefore it must be shown that its application is neutral in respect of any of the prohibited grounds.⁸⁰ The central distinguishing

⁷⁶Pretorius, J.L, Klinck, M.E, Ngwenya, C.G. Employment Equity Law (2009) at 4-23.

⁷⁷56 FEP 357, 365 (WD Pa 1991).

⁷⁸Ibid.

⁷⁹817 F2d 380 (6th Cir 1987).

⁸⁰Peyton, D. Sex and Race Discrimination Law (1997) Blackstone Press Ltd London at 52.

element of indirect discrimination involves the requirement that an employment policy or practice detrimentally affects a substantially higher proportion of members of a protected group or class. This requirement is directed at discovering whether the policy or practice affects people of the same status as the complainant more harshly than people of a different or opposite status.⁸¹

In order to determine whether a practice affects one group more disadvantageously than another, the proportions of the groups negatively affected by the practice has to be established. This requires in the first place the identification of the pool from which the numbers from each group have to be drawn. To ensure that the discriminatory effect of an employment policy or practice is assessed correctly, the group of affected persons that will form the basis of the comparison must be identified correctly.⁸² Once the pool is selected, the persons in the pool of the complainant's group provide the numbers for the one side of the proportion calculation, and the person in the pool of the comparator group provide the numbers for the other side of the proportion calculation.⁸³ Establishing a case of indirect discrimination may depend on how wide or narrow the boundaries of the pool is drawn.⁸⁴ For instance, in *Pearse v City of Bradford Metropolitan Council*,⁸⁵ applications for a teaching position were restricted to full-time lecturers employed by the teaching authority. The complainant alleged indirect sex discrimination, because only 21.8 per cent of the female staff employed by the authority was full-time, as

⁸¹Hunter, R. *Indirect Discrimination in the Workplace* (1992) at 202.

⁸²Clarke, L. *Discrimination* (1995) Institute of Personnel and Development. London at 11.

⁸³Hunter Op Cit 207.

⁸⁴Zimmer, M.J, Sullivan, C.J, White, R.H, *Cases and Materials on Employment Discrimination* (1994) Little Brown Company Boston at 379.

⁸⁵(1998) *IRLR* 379 (EAT) at 381.

opposed to 46.7 per cent of the male academic staff. The Employment Appeal Tribunal held that the calculation was made on the basis of an incorrect pool of comparison. The proportion of women and men affected by the requirement of full-time status should not be established on the basis of the entire academic staff of the authority. The pool should be restricted to those numbers of the academic staff who possessed the appropriate qualification for the vacant position. In the first instance, it is enough to demonstrate that the practice has a disadvantageous impact on the female teaching staff. In the second instance the practice is evaluated in a narrower, particularised context, that is, to those members of the academic staff who are in possession of the appropriate qualification for the vacant position. The above illustration shows how policy choices on the extent of indirect discrimination determine the appropriate pool of comparison. The South African Courts should therefore be careful when they establish the appropriate pool for comparison. The notion of substantive equality espoused by the Constitutional Court would require employers to eliminate the disadvantage caused to members of the protected group by unnecessary barriers to employment opportunity.⁸⁶

2.2. Establishing critical areas in indirect discrimination

In *City Council of Pretoria v Walker*⁸⁷ Sachs J commented that “the concept of indirect discrimination.....was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not covertly intended to

⁸⁶Dupper, O.C. Op Cit. 44-45.

⁸⁷1998 3 BCLR 257.

prejudice them”.⁸⁸ For instance, a minimum height requirement can be an apparently neutral requirement that put women at a disadvantage. An age limit can operate in the same way, disadvantaging woman who have or wish to have children. Another apparently neutral requirement that can have a disparate impact upon women is that of working full-time.⁸⁹ In other words, a claim of indirect discrimination can be established by demonstrating that a particular practice has adversely affected a particular group that is protected by the civil rights law regardless of whether the particular results were intended or desired by the decision-maker.⁹⁰ As noted, the theory of indirect discrimination has played its strongest role in the area of employment discrimination, and in fact, initially arose in the famous employment case of *Griggs v Duke power Co.*, as already outlined in the preceding paragraphs. In *Griggs case*, the Duke Power Company required that certain of its employees possess a high school diploma, and pass a written test, in order to obtain desirable jobs in the company. The Duke Power Company was located in North Carolina, a Southern state with a long history of segregated and deficient education for African Americans, and as a result of the educational policies a far greater number of African Americans than whites did not possess high school diplomas and were thus ineligible for many of the preferred jobs. Importantly, the plaintiffs in the case did not claim that the company intended its policies to discriminate against African Americans, and instead rested their claim on the effect of the practice.⁹¹ The Court unanimously decided that the policy could be challenged under the Civil Rights Act of 1964 based on the effects of the practice.⁹² Importantly, this theory was a judicial

⁸⁸Op Cit at para. 115.

⁸⁹Dupper, O. C. 454-45.

⁹⁰Selmi, M. “Indirect Discrimination: A Perspective from the United States” in TitiaLoenen: Non-Discrimination Law: Comparative Perspectives (1999) at 213.

⁹¹Ibid at 214.

⁹²Ibid.

creation rather than a theory that was explicated in the statutes – indeed, the statutory provision the court relied on was, at best, quite ambiguous as to a requirement of intent, and it was the court’s effort to give broad meaning to Congress’ intent that created the theory.⁹³

The indirect discrimination theory has been progressively refined in the course of many United States cases. However, the factors that allow for expansive interpretation by the Supreme Court of the United States also permit the Court to adopt a more conservative approach to interpretation.⁹⁴ The Supreme Court with the passage of time limited the scope of action in indirect discrimination cases.⁹⁵ Some years after handing down judgment in *Griggs* the Supreme Court restricted the theory of indirect discrimination realm, that is *Section 703 of Title VII of the Civil Rights Act of 1964*. In the matter of *Washington v. Davis*,⁹⁶ decided just three years after *Griggs* case, the Supreme Court reversed the decision held in *Griggs* and held that intent was the element of constitutional claims under the equal protection clause of the Fourteenth Amendment, a decision that has long been sharply criticised as limiting the effectiveness of the constitutional protection against discrimination.⁹⁷ Requiring intent as an element of a constitutional claim rendered much discrimination beyond the reach of the law, as proving intent is so often an extremely difficult venture. This criticism carries particular force given that discrimination in the

⁹³Ibid.

⁹⁴ Bloch, F. *Antidiscrimination Law and Minority Employment: Recruitment Practices and Regulatory Constraints*. University of Chicago Press (1994).at 29.

⁹⁵Selmi, M. *Op Cit.* at 214.

⁹⁶426 U.S. 229 (1976).

⁹⁷Ibid.

United States has become more subtle over time as overt discrimination has generally receded.⁹⁸

The Supreme Court over time has become more conservative and increasingly hostile to the notion of indirect discrimination and in a series of decisions following the *Davis* case, the court limited the scope of the cause of action.⁹⁹The Court's efforts culminated in the notorious decision of *Ward Cove Packing Co. v Antonio*,¹⁰⁰ where the Supreme Court made it much more difficult to prove claims of indirect discrimination by rendering it easier for businesses to justify policies that had a disparate impact. Although the theory has not been rejected, cases of indirect discrimination were never easy to establish, and always accounted for a small percentage of employment discrimination cases that were filed in any given year.¹⁰¹ At the same time, the cases and the theory generated an inordinate amount of controversy, as reflected in Congressional efforts to overturn the *Ward Cove* decision.¹⁰²

Immediately following the *Wards Cove* decision, Congress began efforts to overturn the decision in order to restore the scope of the original statutory claim. This proved difficult to accomplish as the business community pressed legislators to preserve the Supreme Court's decision, arguing that even though the disparate impact cases were infrequent, their costs were so substantial as to create pressures to establish quotas in order to fend off potential lawsuits. Rather than risk being sued, employers argued that they were compelled to hire African Americans and women through what they called 'invisible quotas'. The employers' argument was both clever and

⁹⁸Ibid.

⁹⁹Ibid.

¹⁰⁰*Ward Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

¹⁰¹Selmi, M. Op Cit at 215.

¹⁰²Ibid.

influential as this managed to bring the argument within the realm of affirmative action, which in the United States is often a signal of anti-meritocratic policies that hinder business efficiency and is always controversial.¹⁰³ The employer's argument was as such, quite successful, despite the fact that it was very lacking in empirical data to support the claim.¹⁰⁴ They ultimately managed to persuade the President to veto the ACRA,¹⁰⁵ primarily as a result his concern with the disparate impact provision of the bill.¹⁰⁶ Following the Presidential veto the Congress attempted to craft a bill which would garner sufficient support to override a Presidential veto, and this, ultimately, culminated in the passing of the Civil Rights Act of 1991, which for the first time explicitly included the disparate impact theory safely within the scope of Title VII, an essential protection given the substantial possibility that the Supreme Court may have eliminated the theory altogether if given the opportunity.¹⁰⁷

2.3. The role of statistics in indirect discrimination litigation

In the United States, the approach to establishing a *prima facie* case of indirect discrimination is heavily dominated by the use of statistical evidence.¹⁰⁸ For the applicant to prove his/her claim, he/she will have to tender a statistical evidence to show the disparity in numbers between the protected and non-protected groups who can comply with the policy or practice.¹⁰⁹ This statistical evidence is in effect, elevated to scientific proof of discrimination. In this regard statistical evidence typically plays two roles: to show the link between a seemingly neutral policy or practice and the effect on a protected group, i.e. the impact, and to show that the

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ America Civil Rights Act 1990.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ *Democratic Party v Minister of Home Affairs 1999 6 BCLR 607 (CC) at 608.*

¹⁰⁹ Semi, M. Op Cit. at 216.

effect on that group is disproportionate, i.e. big enough to constitute discrimination.¹¹⁰ This in turn gives rise to two further issues, viz. what is the appropriate pool for comparison between the protected and the unprotected groups and what does disproportionate mean?¹¹¹ To find out what the appropriate pool for comparison is, we are now to confront the central issue of the availability and quality of statistics to support our indirect discrimination claim.¹¹²

In general, the appropriate pool for comparison should primarily depend on the nature of the requirement or condition imposed and the employment policy or practice at stake. Bearing this in mind, it is convenient to distinguish between cases concerning recruitment and selection, as opposed to employment policies and practices affecting existing employees.¹¹³ As far as recruitment and selection are concerned, two types of data are typically used in indirect discrimination cases: the so called stock data (demographic or population statistics), which is used to create a hypothetical pool of candidates removed from the employer's reality and applicant flow data (which describes the employer-specific actual pool of candidates). An example of the use of stock data would be where an employer requires an educational qualification for appointment to a specific post, but national statistics show that only 20 per cent of Black people between the ages of 18 and 65 have this qualification, as opposed to 70 per cent of White people of the same ages. An example of applicant flow data would be where applicants for employment are

¹¹⁰Dupper, O.C. Op Cit. at 46.

¹¹¹Ibid.

¹¹²Ibid.

¹¹³Ibid.

required to write a test, and of those who actually write the test, only 20 per cent of Black people, as opposed to 60 per cent of White people successfully complete the test.¹¹⁴ Obviously the latter type of evidence is stronger than the former, but the problem of the availability and reliability of statistical evidence remains.¹¹⁵

The use of statistics, in disparate impact cases, plays a vital role. In most disparate impact or indirect discrimination cases, statistics are often the only proof available to a Plaintiff who claims that a neutral employment practice has an adverse impact on a protected class of workers.¹¹⁶ Thus, statistical significance ensures that the disparity is not simply due to chance.¹¹⁷ In the *Democratic Party v Minister of Home Affairs*,¹¹⁸ the Democratic Party challenged the provision of the Electoral Act which although facially neutral constituted indirect discrimination against discrete vulnerable groups on the ground of race, age, residence, belief, conscience or political affiliation. This finding was based on the fact that a greater proportion of white potential voters, rural potential voters, and younger potential voters are without a green bar-coded identity documents. The information relied upon was gathered in opinion poll conducted by the Human Science Research Council and the organisation which produced Opinion 99 during the period between August and October 1998 prior to any of the periods during which potential voters were given the opportunity of registering on the national voters roll.¹¹⁹

On the assumption that the opinion expressed in the HSRC and Opinion 99 reports were correct, there was no evidence as to which category of persons referred to

¹¹⁴Dupper, O.C. Op cit. at 47.

¹¹⁵Ibid.

¹¹⁶Dupper, O.C. Proving Indirect Discrimination in Employment op cit at 756.

¹¹⁷Fredman, S. Op Cit (1997) at 295.

¹¹⁸1999 6 BCLR 607 (CC).

¹¹⁹*Democratic Party v. Minister of Home Affairs* 1990 6 BCLR 607 at 611.

therein might be among the millions South Africans, who after the promulgation of the Electoral Act applied for and were issued with the necessary documents, and as a result were able to register on the national voters roll. In the absence of evidence showing that the impugned provisions have had the effect suggested by the DP the Constitutional Court dismissed the claim. It seems that, in the normal course of events, the threshold standard of a substantial disparity in the way the practice affects different groups is – from an evidentiary point of view – necessary to establish that the disparity is actually group-based. Small differences may not as persuasively point to group-related disadvantage or rule out statistical coincidences.¹²⁰ For example in *EEOC v Greyhound Lines Inc*¹²¹ the complainant, suffering from a skin condition that affects only Black males, challenged the employer's policy of not appointing anyone with a beard. The complainant's skin condition made shaving painful and in some cases dangerous. However, in the absence of evidence demonstrating that a significant number of Blacks suffer from the condition, the court dismissed the claim of indirect race discrimination, because it was not proved that the no-beard rule adversely affected Blacks as a class.¹²² Thus the Supreme Court of America has required a “grossly” discriminatory impact in situations where statistics are not “fine-tuned”, but adopts a more lenient standard where statistics are drawn from a pool about which no doubt as to its appropriateness exists.¹²³ In *Contreras v City of Los Angeles*¹²⁴ the court stated that statistics based on small sample groups are not trustworthy when minor numerical

¹²⁰Pretorius, J. L, Klinck, M.E, Ngwenya, C.G. at 4-42.

¹²¹635 Fd2 188 (3rd Cir 1980).

¹²²See also *Livingstone v Roadway Express inc*802 F2d 1250 (10th, Cir 1986): a maximum height requirement affecting a few males but virtually no females, held not to be indirectly discriminatory because it was not an employment barrier to men as a class.

¹²³Pretorius et al at 4-43.

¹²⁴656 F2d 1267 (9th Cir 1981) at 1273.

variations produce significant percentage fluctuations. In *Yartzoff v Oregon*¹²⁵ the court ruled that comparison of five or six individuals does not establish adverse group impact of a subjective selection system.¹²⁶ No universally applicable statistical formula exists to determine what in the circumstances will support an inference of substantial group-related disadvantage. Courts ordinarily consider more than statistical evidence and in one case a statistically insignificant difference may combine with collateral evidence to make a convincing case of discrimination, while in another case a stronger statistical finding might be overcome by contrary evidence pointing to fair and non-discriminatory practices.¹²⁷

¹²⁵ 745 F2d 557 (9th Cir 1984).

¹²⁶ See also *Harper v Trans World Airlines Inc* 525 F2d 409 (8th Cir 1975): a nepotism practice that affected only five couples was too small to be statistically significant.

¹²⁷ Hunter, R. Op Cit 264.

CHAPTER 3

3. THE APPROACH OF COURTS TO THE CONCEPT OF INDIRECT

DISCRIMINATION

3.1. The approach of Courts in the United States of America

As already indicated the trend towards expanding the idea of discrimination beyond the limited idea of prejudiced (direct) discrimination eventually received recognition of the highest Court in the United States in the landmark case of *Griggs v. Duke Power Company*.¹²⁸ The United States Supreme Court in this case upheld the plaintiff's claim, and for the first time gave recognition to the notion of indirect discrimination by holding that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to maintain the *status quo* of prior discriminatory practices".¹²⁹

In *Watson V Fort Worth Bank & Trust*,¹³⁰ the Plaintiff, a Black female sued her employer, a bank, in Title VII of the Civil Rights Act alleging that she had been denied promotion to positions that were eventually awarded to White employees. The bank had relied upon the subjective evaluation made by supervisors who were acquainted with the candidates. The issue before the Court was whether *Griggs'* disparate impact analysis applied to subjective criteria. The Court was unanimous in holding that it does.¹³¹

¹²⁸ 401 US 424 (1971).

¹²⁹ McColgan, A. Discrimination Law: Text, Cases and Materials 2nd Ed (2005) at 170.

¹³⁰ 487 US 977 (1988).

¹³¹ McColgan A Op Cit at 176.

In *Connecticut v Teal*,¹³² the court held that every individual, and not just classes, are protected against indirectly discriminatory practices.¹³³ The case concerned a written test for promotion that disqualified Blacks at a higher rate than Whites. In terms of an affirmative action policy, however, the employer promoted proportionally more Blacks that passed the initial test than Whites, so that the overall end-result of the selection process was more favourable to Blacks as a group than to Whites.¹³⁴ The question to decide was whether this racially balanced end-result was a defence against the claim that the initial test indirectly discriminated against individual Black complainants who failed to pass the test. The majority of the court concluded that Title VII of the ACRA prohibits practices that would deprive or tend to deprive any individual of employment opportunities. The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. A racially balanced workforce cannot immunise an employer from liability for specific acts of discrimination.¹³⁵ The statute does not allow an employer to discriminate against some employees because of race or sex merely because he/she treats other members of the employee's group favourably.¹³⁶

In *Teamsters v United States*,¹³⁷ the applicants brought statistical evidence to prove that the employer's employment policy and practice was skewed in favour of White

¹³²457 US 440 (1982) at 455-456.

¹³³See also *Craig v Alabama State University* 804 F2d 682 (11th Cir 1986) at 686, where the court rejected the contention of the respondent university that disparate impact analysis is inappropriate as to individual, rather than class claims.

¹³⁴The ultimate selection rate for the initial Black applicants was 22.9% and 13.5% for the initial White applicants.

¹³⁵Ibid.

¹³⁶Ibid.

¹³⁷431 US 324 (1977).

employees. It was also proved that a great majority of Blacks (83%) and Spanish-surnamed Americans (78%) who did work for the company held the lower paying city operations and serviceman jobs, whereas only 39% of the White employees held jobs in those categories. This statistical evidence was also bolstered by Blacks and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that Whites were considered and hired.¹³⁸

The minority employees who wanted to transfer to line-driver jobs encountered similar difficulties.¹³⁹ The evidence in this case showed in no uncertain terms that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination was a disputed issue. The *Teamsters* case was a disparate treatment practice case, but the court had endorsed the use of statistical evidence as an important evidentiary tool in employment discrimination cases generally. Statistical evidence is critically important in disparate impact cases because they focus on statistical disparities and on competing explanations for those disparities, rather than on specific incidents of intentional discrimination.¹⁴⁰

The Supreme Court in *Hazelwood School District V United States*¹⁴¹ was correct in that a proper comparison was between the racial composition of *Hazelwood's* teaching staff and the racial composition of the qualified public school teacher

¹³⁸ McColgan, A Op Cit at 180.

¹³⁹ Ibid.

¹⁴⁰ McColgan, A. Op Cit. at 182-3.

¹⁴¹ 433 U.S. 299 (1977).

population in the relevant labour market. The issue which was in dispute was that Hazelwood and several of its officials were engaged in a pattern or practice of employment which was discriminatory against the Black community. In arriving at its judgment the Court correctly made a comparison between the percentage of Blacks on the employer's work force and the percentage in the general area of White population and made a ruling that the applicant has proved its case. The court in this case also held in favour of the use of statistical evidence in discrimination cases.

In Ward Cove Packing Co. v Antonio,¹⁴² three practices were identified. The company recruited its skilled workers using its offices in Washington and Oregon. Second, there was no promotion from the unskilled to the skilled positions; all skilled jobs were filled solely through the Washington and Oregon offices (many unskilled workers testified that they possessed the necessary skills to fill some of the skilled jobs). Third, the skilled and unskilled workers were accommodated in separate dormitories and mess halls. The statistics showed that the skilled workers were mainly White and the unskilled workers were mainly Filipino and native Alaskans. The case of indirect discrimination was brought by non-white unskilled workers, heavily based on statistics. A bare majority of the Supreme Court rejected the claim holding that it was necessary to isolate each specific employment practice and show it caused disparity, something the claimants could not do.¹⁴³ The decision of the Court was confusing because the majority argued that an alternative result would mean that any employer with a racially imbalanced workforce could be "haled into court" to justify the situation.¹⁴⁴ The Congress acted swiftly to clarify this confusion

¹⁴² 490 U.S. 642 (1989).

¹⁴³ *Ward Cove Packing Co. v Antonio* 490 U.S. 642 (1989) at 657.

¹⁴⁴ 490 U.S. at 652.

by passing Section 105 of the Civil Rights Act 1991, which endorsed *Ward Cove* by providing that complainants must show that “each particular challenged employment practice causes a disparate impact...” but also qualified it by stating that where the decision-making process is not capable of separation for analysis, it may be treated as one employment practice.¹⁴⁵ A good example provided by the Act was in *Dothard v Rawlinson*.¹⁴⁶ In this case height and weight were used as requirements designed to measure strength in the recruitment of prison officers and this discriminated against women. According to the exception, these requirements could not be separated for analysis and so could be taken as a whole when linking them to the adverse impact.¹⁴⁷

According to the approach of the Courts in the United States of America it is very clear that statistical evidence plays a prominent role for the courts in handing down their decisions in cases of indirect discrimination.

3.2. Jurisprudence in the South African Courts

The South African legislature did not give a comprehensive definition of the concept of indirect discrimination. This was intended to make it easier for applicants to prove a *prima facie* case of indirect discrimination, and for the Courts to give meaning to it. It should be born in mind that indirect discrimination as opposed to direct discrimination is an inherently statistical concept.¹⁴⁸ In principle a complainant in an indirect discrimination claim must be in a position to tender statistical evidence to show that a seemingly neutral policy or practice has a disproportionate impact on a

¹⁴⁵Connoly, M. Op Cit. at 138.

¹⁴⁶433 U.S. 321 (1977).

¹⁴⁷Connoly, M. Op Cit. at 138.

¹⁴⁸Dupper, O.C, Garbers, C, Landman, A.A, Christianson, M, Basson, A.C, Strydom, E.M.L (ed) at 46.

protected group. In South Africa the complainant in a claim of indirect discrimination need just to prove a *prima facie* case to show that a seemingly neutral policy or practice has adverse effect on him/her. He/she need not tender any statistical evidence to prove his/her claim.¹⁴⁹ The onus then rested on the employer to show that the object of the practice or policy was legitimate and that the means used to achieve it were rational and proportional.¹⁵⁰

Early indications are that the South African Courts will not follow the American example and, instead, will build on a common sense, factual case-by-case approach to the question of whether or not indirect discrimination exists.¹⁵¹ A good example of the approach of the South African Courts was handed down in *Leonard Dingler Employee Representative Council v Leonard Dingler (PTY) LTD & Others*.¹⁵² This was the first case of indirect discrimination to reach the Labour Court. In this case Black employees have instituted a claim of indirect discrimination against their employer. The applicants argued that the restriction of the Staff Benefit Fund (one of the Pension Funds) to monthly paid employees had a disparate impact on Black employees. Evidence revealed that of the approximately fifty (50) monthly paid employees, only four (4) were Black. The Court was on that basis quick to find that by interpreting the rules of the Staff Benefit Fund so as to limit membership to monthly paid staff the employer had indirectly discriminated against its Black employees. The employer was unable to provide adequate justification for the

¹⁴⁹ *Ibid* at 48.

¹⁵⁰ *Ibid*

¹⁵¹ *Ibid*.

¹⁵² (1998) 19 ILJ 285 (LC).

practice, and the Court concluded that this amounted to unfair indirect discrimination.¹⁵³

The historically disadvantaged status of the group concerned is a relevant factor to take into account in South Africa when considering the fairness discrimination, but indirect discrimination is not confined to such groups only.¹⁵⁴ The Constitutional Court in *City Council of Pretoria v Walker*,¹⁵⁵ stated that “the doors of the courts must be open to all South Africans, irrespective of their positions. Processes of differential treatment which bring about equality should not be applied to offend and marginalise persons who previously enjoyed advantage. Thus persons who have benefited from systemic advantage in the past and who continue to enjoy such benefits today should not be excluded from the protection offered by the Constitution.”¹⁵⁶ It is true, however, that indirect discrimination will more often than not concern instances of systemic discrimination, where conditions favouring dominant groups have become the norm.¹⁵⁷

The Constitutional Court in *Walker case above*, therefore, simply accepted that townships are still overwhelmingly Black, and municipalities whose residents were historically White are still overwhelmingly White, and as a result, the Court found that differentiation on the basis of geography constituted indirect discrimination on the ground of race.¹⁵⁸ This rather cavalier attitude by South African courts may work well in obvious cases such as *Walker*, and a robust approach to numbers may work in

¹⁵³ Ibid at .

¹⁵⁴ Pretorius, J.L. et al at 4-8.

¹⁵⁵ 1998 3 BCLR 257 (CC) at par 123.

¹⁵⁶ Freedman, S. (1997) at 125.

¹⁵⁷ Ibid.

¹⁵⁸ *City Council of Pretoria v. Walker Op Cit* at 258.

relatively greater number of cases such as *Dingler*, but sophisticated statistical evidence may sometimes be required to identify and prove more subtle forms of discrimination. For example, indirect discrimination may not only be found in a considerable disparity, but also in those cases where statistical evidence reveals a lesser but persistent and relatively constant disparity over a long period of time. Because of institutional constraint on the development of statistics as a tool to prove indirect discrimination, it is unlikely that South Africa will reach a high level of sophistication in respect of such evidence.¹⁵⁹

Like the United States Supreme Court in *Griggs*, the Court in *Dingler* was very permissive with respect to proving the disproportionate impact of the neutral practice, that is, restriction of membership of the benefit fund to monthly-paid employees. The Court in *Dingler* made no attempt either to identify the appropriate base group or to calculate the proportions of Black employees and White employees who could comply with the condition.¹⁶⁰ The Court was, therefore, faced with the situation in which the observed disparity was sufficiently large not to be considered trivial or minimal. The Court, therefore, found it unnecessary to engage in a detailed statistical analysis to determine whether the disparity was substantial.¹⁶¹ The Court adopted a flexible approach to the matter, and probably it will continue to do so in future. However, as the more obvious displays of discrimination disappear from the South African workplaces, Courts will be faced with more obscured, and less obvious forms of discrimination, precisely the sort that the concept of indirect discrimination is meant to address. In order to address this in a meaningful way in the future,

¹⁵⁹Dupper, O.C. Op Cit. at 48.

¹⁶⁰Ibid.

¹⁶¹Op Cit at 49.

applicants, judges and arbitrators will have to adopt a more sophisticated approach to statistical analysis.¹⁶²

When one looks at cases such as *SADTU obo Makua v Mpumalanga Education Department*,¹⁶³ it becomes very clear that statistical evidence is very essential in cases of indirect discrimination. In this case the applicant, a Black man, had instituted a civil claim against the department alleging that he had been indirectly discriminated against because of the priority placed on the ability to coach in sport, particularly rugby, a sport which was not popular among Blacks given South Africa's past history and the area in which the school was situated, that is, in Groblersdal. Rugby had never been a popular sport among Blacks in that area. Due to lack of statistical evidence, the applicants failed to convince the arbitrator that the governing body of Ben Viljoen High School included rugby and athletics in its short-listing criteria (for a teaching job at the school) merely to exclude Black candidates. The arbitrator concluded that rugby and athletics not only played a major part in the pupils' activities, but also provided much of the school's funding.¹⁶⁴ He further indicated that while emphasis on sporting knowledge as a selection criterion might have a discriminatory effect on certain groups, including women and the disabled, it could not be inferred that the governing body had emphasized this criterion merely in order to exclude Black candidates. The department was accordingly entitled to make its selection from the existing shortlists.¹⁶⁵ The arbitrator ruled that there would be no indirect discrimination as long as the employer excluded everybody except White males, and provided that there is no specific intention to exclude a specific group.

¹⁶²Dupper, O.C. Op Cit. at 50.

¹⁶³(1999) 5 BALR 638 (IMSSA).

¹⁶⁴*SADTU obo Makua v. Mpumalanga Education Department (1999) 5 BALR 638 (IMS) at 641.*

¹⁶⁵OP Cit at 644.

This view illustrates a fundamental confusion between direct, and indirect discrimination, and between discrimination and unfair or unjustified discrimination. Direct discrimination involves direct differentiation between two groups of people on the basis of a prohibited ground of discrimination, namely race or sex, while indirect discrimination involves seemingly neutral employment practices which adversely affect members of a certain racial groups in circumstances which cannot be justified. Discrimination on the other is not prohibited by the constitution. The Constitution only prohibits discrimination which is unfair. The evidence indicates that rugby had never been a popular sport among the Black community. The requirement of the ability to coach rugby in sport could have the effect of indirect discrimination on the basis of race. The arbitrator, however, could have based his findings on the adverse impact the ability to coach rugby was going to have on protected and the unprotected groups. Secondly intention is not a requirement when a claim of indirect discrimination is considered.¹⁶⁶

In *Adriaanse v. Swartklip Products*,¹⁶⁷ the Commissioner found that indirect discrimination was present in the requirement of Standard 8 qualification, because, firstly, fewer than half of the applicants had this qualification. Secondly, the employer could not show the requirement “was sufficiently relevant to the workplace needs”. There is no doubt that the requirement of a certain qualification could have the effect of an indirect discrimination; for example on the basis of race. However, a finding to that effect depends on a comparison between the protected and unprotected groups, to evaluate their relative ability to comply with the requirement. The protected groups are groups which were previously disadvantaged by law in the past like blacks in South Africa under the apartheid system. Unprotected groups are groups which

¹⁶⁶ Ibid.

¹⁶⁷ (1999) 6 BALR 649 (CCMA).

enjoyed the privilege of economic and social benefits under the previous regime, like whites, particularly in the employment field. Should the difference in compliance rate be found to be too big the requirement is discriminatory.¹⁶⁸ None of these were even considered in *Adriaanse matter*. In *Louw v. Golden Arrow Bus Service*,¹⁶⁹ the applicant, a Black employee, had instituted action against his employer allegedly for indirectly discriminating against him by paying him less than what he paid his colleague for equal work on the basis of his race. The applicant unfortunately failed to provide evidence to prove that he was indirectly discriminated against. The Court indicated that it is not an unfair labour practice to pay different wages for equal work or work of equal value. It is, however, an unfair labour practice to pay different wages for equal work or for work of equal value if the reason or motive is direct or indirect discrimination on arbitrary grounds or on the grounds listed in the definition.¹⁷⁰ The confusion which occurred in *SADTU* case still occurred in this case. Again the court refers to the reason or motive of paying different wages to arrive at its decision instead of making a comparison between the protected and the unprotected groups.

Judges and arbitrators are not entirely to blame for failing to deal adequately with claims of indirect discrimination. In most cases, particularly, the *SADTU*, *Swartklip* and the *Louw* cases, applicants failed to provide any proof to substantiate their claims.¹⁷¹ If an applicant alleges indirect discrimination then he should identify the basis for the claim; that is, race, sex, etc. Since indirect discrimination is in essence a statistical concept the applicant should provide the Court or arbitrator with some figures to bolster his argument.¹⁷² It is maintained that in a number of cases in which

¹⁶⁸Dupper, O.C. Op Cit. at 50.

¹⁶⁹(2000) 3 BLLR 311 (LC).

¹⁷⁰(2000) 3 BLLR 311 (LC).at 312.

¹⁷¹Dupper, O.C. Op Cit at 51.

¹⁷²Ibid.

the Court did not employ the concept of indirect discrimination it could have done so. While the result in all the cases may have been the same, it would nevertheless have forced the Courts to begin to grapple with the important but as yet undervalued concept of indirect discrimination. Greater awareness of indirect discrimination may also lead to a situation in which some employers may voluntarily amend their employment practices so as not to infringe legislative provisions.¹⁷³

The problem of securing statistical data may not be a bar to establish indirect discrimination cases.¹⁷⁴ Claimants may, however, fail to prove their cases in Court due to lack of statistical evidence. The Courts in South Africa should adopt a very lenient approach towards cases of indirect discrimination to enable victims of the alleged practice to establish at least a *prima facie* case.¹⁷⁵ In *FAWU v South African Breweries*,¹⁷⁶ the applicant union had instituted action against South African Breweries for adopting unfair selection criteria in retrenching its members. Although the Court handed down judgment in their favour this was a clear case of indirect discrimination because the majority of the affected employees were Blacks who were never exposed to proper education in the past. Before embarking on the issue of introducing ABET qualification as selection criteria the company was aware that some of the employees to be affected by the intended retrenchment were incapable of benefiting from the training courses to enable them to work in the proposed new structure. This was also supported by McLean, an expert representing the union and the employees. According to McLean, ABET unit standards were generic in nature. They were not designed for specific work-place related requirements.¹⁷⁷ For example

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Dupper, O.C. Op Cit. at 50-51.

¹⁷⁶ *FAWU V. SA Breweries Ltd (2004) 25 ILJ 1979 (LC)*.

¹⁷⁷ *FAWU v SA Breweries. Op Cit at 2015*.

an employee who has an experience in a particular context, is likely to be familiar with the contextual cues that are available to aid interpretation or calculation in relation to literacy and numeracy. So, the core thinking in both literacy and numeracy and in mathematics is that ordinary people perform very complex calculations or read very complex tests, better in context than they do in a decontextualised piece of paper. Therefore, if these employees have a fair amount of experience on the production lines they are not likely to be able to perform as successfully on a written test of schooling numeracy and schooling literacy's as they are to perform on the basis of a test which tested workplace numeracy.¹⁷⁸

3.3. Availability of reliable statistics in South Africa

In the United States since *Griggs v Duke Power Co.*¹⁷⁹ statistical evidence has played a crucial role in determining the existence of disparate impact discrimination.¹⁸⁰ Statistics in United States cases has often remained the only proof available to a plaintiff who claims that a neutral employment practice has an adverse impact on a protected class of workers. The acceptability of statistical evidence in South Africa has never been questioned as can be seen in cases such as *Leonard Dingler Employee Representative Council v Leonard Dingler*,¹⁸¹ *SADTU obo Makua v Mpumalanga Education Department*¹⁸² and *Louw v Golden Arrows Bus Service*.¹⁸³ The Court in these cases arrived at a conclusion without requiring plaintiffs to tender any statistical evidences to prove their cases. Given the current situation in South Africa, it is doubtful whether the level of statistical sophistication and detail will ever

¹⁷⁸ *Ibid.*

¹⁷⁹ 401 U S 424(1971).

¹⁸⁰ Hunter, R. *Indirect Discrimination in the Workplace* (1992) at 212.

¹⁸¹ (1998) 19 ILJ 285 (LC).

¹⁸² (1999) 5 BALR 638 (IMSA).

¹⁸³ (2000) 3 BLLR 311 (LC)

match that required in the United States. If the current cavalier attitude adopted by South African Courts remains unchanged, then the Courts will often take judicial notice of certain social facts (such as the one taken in *City Council of Pretoria* that townships are predominantly Black and municipalities whose residents were historically White are still overwhelmingly White), and rely on general knowledge and experience to determine disparate impact without requiring the necessary statistical data and analysis.¹⁸⁴ See again the judgment in Leonard Dingler's case where the court was quick to find that where only eight Black employees out of a total of fifty were paid on monthly basis, restriction of membership of a staff benefit fund to monthly paid employees constituted indirect discrimination. Given the increasing number of women and Black judges appointed to the Bench, one would expect South African Courts to appreciate better "social facts" than British tribunals which are predominantly staffed by White lay members.¹⁸⁵

In the first indirect discrimination case decided by the Constitutional Court, it relied on "social facts" to decide the matter in the absence of any statistical proof. In *City Council of Pretoria case*, the Constitutional Court accepted, without any statistical evidence that townships have historically been Black to date, and that municipalities whose residents have been historically white are still overwhelmingly White.¹⁸⁶ The court held that differentiating between the treatments of residents on the basis of geographical location constituted indirect discrimination on the ground of race.¹⁸⁷ In

¹⁸⁴Dupper, O. C. *Essential Employment Discrimination Law*(2007) at 48.

¹⁸⁵Dupper,O.C. *Proving Discrimination In South Africa: A South African View* 2000 21 ILJ 747 at 752.

¹⁸⁶*City Council of Pretoria v Walker Op Cit at 287.*

¹⁸⁷*Ibid.*

addition, in cases where statistical analysis is required, South African Courts will not require applicants to produce sophisticated and elaborate statistical analysis.¹⁸⁸

In Dingler's case the Labour Court held that the restriction of one of the company's pension funds to monthly paid employees had a disparate impact on the basis of race because, of the approximately 50 monthly paid employees, only four were Black.¹⁸⁹ The Court considered a ratio in the order of 50:4 to be so obviously disproportionate that no specific figures or analysis of the differential was necessary *in casu*.¹⁹⁰ It is, however, believed that statistical analysis in South Africa will become more sophisticated with the passage of time. Lack of accessible and reliable statistical data is bound to hamper applicants' claims in South Africa.¹⁹¹ Currently there is no pressure on employers to make and keep records relevant to the determination of whether or not unlawful employment practices have been or are being committed as required by the American legislation.¹⁹²

What might assist certain applicants, however, is the obligation placed on "designated employers" in terms of Section 13 read with Section 19 of the EEA,¹⁹³ to conduct an analysis of its employment policies, practices, procedures and the working environment in order to identify employment barriers which adversely affect Black people, women, and the disabled.¹⁹⁴ It is further argued that the South African legislation, such as the EEA and the LRA,¹⁹⁵ is "plaintiff friendly, because the concept of "indirect discrimination" is not defined. The legislature wanted to prevent the Courts from becoming entangled in highly technical debates along similar lines

¹⁸⁸Dupper, O.C at 50.

¹⁸⁹*Leonard Dingler Employee Representative Council v Leonard Dingler Op Citat* 289.

¹⁹⁰Dupper, O.C. Op Cit at 49.

¹⁹¹Dupper, O.C. Op Cit. at 752.

¹⁹²Dupper, O.C. Op Cit. at 753.

¹⁹³Act 55 of 1998.

¹⁹⁴Dupper, O.C. Op Cit at 754.

¹⁹⁵*Ibid*.

as are engaged in by the United States, Britain and Australian tribunals and Courts.¹⁹⁶ Like the United States Supreme Court held in *Griggs*' case, the Court in *Dingler* found it unnecessary to engage in a detailed statistical analysis to determine whether or not the disparity was substantial.¹⁹⁷ The Labour Court adopted a flexible approach to the matter, and it is appropriate to continue to do so in future.¹⁹⁸ However, as the more obvious displays of discrimination disappear from South African workplaces, Courts will be faced with more subtle, and, less obvious forms of discrimination – precisely the sort of problem that the concept of indirect discrimination is meant to address.¹⁹⁹ In order to address this in a meaningful way in future, applicants, judges and arbitrators will have to adopt a more sophisticated approach to statistical analysis.²⁰⁰

As far as the application of the concept of indirect discrimination is concerned, it should be noted that since the landmark decision in *Griggs*, the United States Supreme Court has delineated its scope in a restrictive fashion.²⁰¹ The Courts have resorted to strict statistical analysis to arrive at their decisions.²⁰² This, however, could not be the case within South Africa. Indirect discrimination is a new concept in the South African jurisprudence. No wonder that the Courts are very generous in the interpretation of the concept. Lack of sophisticated statistics is also a problem. This is a problem not only faced by victims of indirect discrimination, but also by judges and arbitrators.²⁰³

¹⁹⁶Dupper, O.C. op cit at 755.

¹⁹⁷Ibid.

¹⁹⁸Ibid.

¹⁹⁹Ibid.

²⁰⁰Dupper, O.C. Op Cit. at 50.

²⁰¹Selmi, M. "Indirect Discrimination: A Perspective Form the United States" in Loenen, T. Non-Discrimination Law: Comparative Perspectives.(1999). At 215.

²⁰² Ibid.

²⁰³Dupper, Op Cit. at 51.

As mentioned in the preceding paragraphs, arbitrators have fared badly on this count. In *Adriaanse v. Swartklip Products*,²⁰⁴ the Commissioner found that indirect discrimination was present in the requirement of a Standard 8 qualification, because, firstly, fewer than half of the applicants had this qualification and, secondly, because the employer could not show that the requirement “was sufficiently relevant to the workplace needs”.²⁰⁵ There is no doubt that the requirement of a certain qualification could have an indirect discriminatory effect (for example on the basis of race). However, a finding to that effect depends on a comparison between the protected and the unprotected groups, to evaluate their relative ability to comply with the requirement, and finding that the difference in compliance rate is big enough for the requirement to qualify as discriminatory.²⁰⁶ None of this was considered in *Adriaanse*.²⁰⁷ Similarly, the arbitrator rejected all allegations of indirect discrimination in the *SADTU* case.²⁰⁸ He was not convinced that the governing body of Ben Viljoen High School included rugby and athletics in its short-listing criteria merely to exclude Black candidates.²⁰⁹ As indicated earlier, judges and arbitrators are not entirely to blame for failing to deal adequately with cases of indirect discrimination. In most cases, applicants fail to provide the requisite proof.²¹⁰ In *Democratic Party v Minister of Home Affairs*²¹¹ the Constitutional Court required that the applicant had to produce evidence that the impugned requirement affected protected groups disproportionately, without giving any indication of what degree of disproportionality

²⁰⁴(1999) 6 BALR 649 (CCMA).

²⁰⁵*Op Cit. at 658 para.G-H.*

²⁰⁶Dupper, O.C. *Op Cit.* at 50.

²⁰⁷Dupper, O.C. *Op Cit.* at 51.

²⁰⁸*SADTU obo Makua v Mpumalanga Education Department Op Cit. at 647E.*

²⁰⁹*Op Cit. at 647F.*

²¹⁰Dupper, O.C, *Op Cit.* at 51.

²¹¹*Democratic Party v Minister of Home Affairs 1999 6 BCLR 607 (CC).*

would suffice.²¹² The *Swatklip* and *SADTU* cases are prime examples in which applicants failed to provide statistical evidence to prove their claims. They could not provide statistics to convince the Court that they were indirectly discriminated against.²¹³ If an allegation of indirect discrimination is made, then the applicant needs to identify the basis for the claim and, given that indirect discrimination is in essence a statistical concept, provide the Court or the arbitrator with a statistical proof.

²¹²Op Cit. at 613G.

²¹³Dupper, O.C. at 50.

CHAPTER 4

4. A COMPARATIVE OVERVIEW OF USA, BRITAIN, AUSTRALIA AND SOUTH AFRICA

4.1. Introduction

Discrimination is not an easy concept, particularly where there is no comprehensive theory of equality.²¹⁴ It is, therefore not surprising, that there are particular problems with what is called “indirect discrimination” – a term which may indicate that our notion of what constitute equal treatment have travelled but a short distance beyond the concept of undifferentiating or uniform treatment.²¹⁵ It is therefore, generally accepted that principles directed to ensuring equality of opportunity are vital in any society in which there is economic, cultural or social disadvantage.²¹⁶ The principles adopted in the anti-discrimination legislation in South Africa are mostly derived from the United States and British jurisprudence.²¹⁷ It is also important to examine the relevant law in Canada and Australia, which have similar origins to the American law.²¹⁸

4.2. The United States of America

Title VII of the Civil Rights Act 1964 declares several employment practices unlawful, but does not define the concept of discrimination. Section 703(a) states that “it shall

²¹⁴Hunter, R. *Indirect Discrimination in the Workplace*(1992) at vi.

²¹⁵*Ibid.*

²¹⁶*Ibid.*

²¹⁷*Ibid.*

²¹⁸*Op Cit.* at 105.

be unlawful employment practice for an employer (i) to fail to or refuse to hire or discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex or national origin; or (ii) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex or national origin". It was, therefore, left to the administrative body created by the Act, that is, the Equal Employment Opportunity Commission, and ultimately the courts to expound the meaning and scope of unlawful employment practices and discrimination.²¹⁹

The EEOC first referred to indirect discrimination in its Guidelines on Sex Discrimination.²²⁰ The guidelines stated that discrimination could be established by proof of differential treatment of two similarly situated people, or by proof of an adverse impact on a class of people.²²¹ This body and the Courts were entrusted with the duty to expound the practical meaning and scope of "unlawful employment practices" and "discrimination". The notion of adverse impact discrimination was ultimately accepted and elaborated upon by the United States Supreme Court in 1971 in a race discrimination case, namely, *Griggs v Duke Power Company*. The Court, in its judgment, held that Title VII proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation, and that are not justified by business necessity.²²² When the Congress enacted Title VII of the Civil

²¹⁹Hunter op cit at 16.

²²⁰Ibid.

²²¹Ibid.

²²²*Griggs v. Duke Power Co.* 401 U.S. 424 (1971) at 432.

Rights Act 1964 its aim was to achieve equality of employment opportunities and to remove barriers that had operated in the past to favour an identifiable group of White employees over other employees.²²³ In the *Griggs* case the Court identified an employment criterion with racially disproportionate results as causing actual harm to Black employees, even though, from the employer's point of view, the harm may have been unintended.²²⁴ It decided that where such disproportionate results were shown to exist, they could not be allowed to stand without justification by the employer.²²⁵ It is interesting to note that as far as the application of the concept of indirect discrimination is concerned since the landmark case of *Griggs*, the United States Supreme Court has delineated its scope in a restrictive fashion.²²⁶

Rather than expand the application of indirect discrimination analysis, Courts in the Unites have instead looked for ways of restricting or eliminating it.²²⁷ Therefore, the Courts have, either restricted the application of indirect discrimination analysis to a specific grounds covered by some statutes, or excluded its application entirely from other pieces of legislation.²²⁸ The concept of indirect discrimination has, therefore, now been made more difficult for applicants to establish their cases.²²⁹ A good example was the decision handed down in *Ward Cove Packing Co. v. Antonio*,²³⁰ where the Supreme Court rejected the claim holding that it was necessary to isolate each specific employment practice and show that it caused disparity,

²²³Dupper, O. C. Op Cit at 49.

²²⁴Op Cit. at 436.

²²⁵ Ibid.

²²⁶Selmi, M. Op Cit at 214.

²²⁷ Ibid.

²²⁸Dupper, O.C. op cit. at 49.

²²⁹Selmi, M. at 215.

²³⁰ 490 US 642 (1989).

something the claimants could not do.²³¹ As a result of this decision it is now very difficult for applicants in the United States of America to establish claims of indirect discrimination in Courts.²³²

4.3. Britain

The concept of indirect discrimination in the British legislation was introduced in 1975 and it appeared in s 1 (2) (b) of the British Sex Discrimination Act 1975 (UK SDA). The Act was one of the first legislative attempt to translate the *Griggs* principles into a statutory formula.²³³ The Act (as amended) defines the proscription thus:

“A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if “he applies to her a provision, criterion or practice which he applies or would apply equally to a man but-

- (i) Which is such that it would be to the detriment of a considerably larger proportion of women than of men, and
- (ii) Which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
- (iii) Which is to her detriment.”

The same definition appears *mutatis mutandis* in the Race Relation Act 1976 (as amended).The British definition of indirect discrimination is not a direct transcription from the formulation of adverse impact discrimination in *Griggs*. In particular, the employer’s defence of “business necessity” or “job relatedness” has become a defence of “justifiability irrespective of sex”. The British government decided as a matter of policy to widen the defence allowed in *Griggs*: something not strictly

²³¹ *Ward Cove Packing Co v. Antonio*, 490 U.S. 642 (1989) at 651.

²³² Hunter, R. *Indirect Discrimination in the Workplace*. (1992). at 107.

²³³ Hunter, *op cit.* at 21.

necessary may still be justifiable.²³⁴ In *Clarke v Eley (IMI) Kynoch Ltd*²³⁵ Browne-Wilkinson J remarked that “the legislation provides no guidance as to the relative priorities to be accorded to the elimination of discriminatory practices on the one hand and the profitability of a business on the other”.²³⁶ According to Freedman, this has resulted in a range of judicial formulas, reflecting the whole spectrum of value judgments.²³⁷ For instance in *Price v. Civil Service Commission*,²³⁸ the Employment Appeal Tribunal realised that an age bar of 28 for entry into the civil service discriminated against many women who raised young children during their twenties. The Tribunal, nevertheless, held that, the fact that this was of her own choice and thus as many women as men could theoretically comply with the requirement makes no difference.²³⁹ Thus, Courts and Tribunals have on occasion seen their way open to accept as justifiable indirectly discriminatory employment practices that are merely of marginal advantage to the employer.²⁴⁰

The additional issue of detriment because of inability to comply with the “requirement or condition” was inserted to ensure that the legislation could be invoked only by genuine victims, and not by mere “concerned citizen”.²⁴¹ The applicants had to identify the “requirement or condition” that caused the disparate impact in order to prove their claims. British Courts have generally adopted a broad approach to the

²³⁴ Hunter, Op Cit. at 22.

²³⁵ (1982) IRLR 482 (EAT), (1983) ICR 165 (EAT) at 174-175.

²³⁶ Op Cit. at 175.

²³⁷ Hunter, Op Cit at 23.

²³⁸ (1977) IRLR 291 (EAT).

²³⁹ Op Cit at 296.

²⁴⁰ See *Kidd v DRG (UK) Ltd (1985) IRLR 190 (EAT)*, where the advantage concerned in making part-time workers redundant before full-time workers, included fewer uniforms to launder and fewer administrative duties such as change-over briefings and recording of employees’ details.

²⁴¹ Hunter, op cit. at 112.

construction of the phrase “requirement and condition”.²⁴² Industrial Tribunals and Employment Appeal Tribunals in Britain have displayed great flexibility in construing particular practices as “requirement or conditions “even where they have not been distilled by the employers into formal rules.²⁴³ Part-time workers were initially unsuccessful in convincing the Courts and tribunals that working full-time is a “requirement or condition” for the purposes of the Sex Discrimination Act.²⁴⁴ However, this trend was reversed when the Courts and tribunals began to construct the phrase in a less technical and more purposive manner.²⁴⁵ For instance, in *Meeks v. National Union of Agricultural and Allied Workers*,²⁴⁶ the employer discriminated against part-time workers by paying them less than full-time workers. The Tribunals rejected the employer’s argument that a differential in pay could never come within the ambit of a “requirement or condition”. Instead it agreed with the employee’s submission that the statutory words could be satisfied by formulating a requirement of “you must work 36 hours per week or else you will get a lower hourly rate of pay”.²⁴⁷

In most cases the requirement or condition will be fairly obvious. However, in those cases where it is not transparent, the complainant may need to reformulate the policy in terms that express a relevant “requirement or condition” that then enables a comparison to be made between the success rates of different groups.²⁴⁸

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Dupper, O.C. Proving Indirect Discrimination in Employment: A South African View (2000) 2 ILJ 747 at 754.

²⁴⁵ Ibid.

²⁴⁶ (1976) IRLR 198 (IT).

²⁴⁷ Dupper, O.C. op cit. P 54.

²⁴⁸ Ibid.

4.4. Canada

The notion of indirect discrimination in Canada was endorsed by the Supreme Court of Canada in 1985. This was the time when the Supreme Court made two decisions in two Supreme Court cases, namely, the *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*²⁴⁹ and *Binder and Canadian Human Rights Commission v Canadian National Railway Co.*²⁵⁰ The *O'Malley* case concerned a Seventh Day Adventist whose religious obligations made it impossible for her to work on Friday evenings and Saturdays, as a consequence of which she lost her full-time sales position and was assigned to part-time work. The case was brought under s 4(1)(g) of the then *Ontario Human Rights Code*, which provided that:

“No person shall...discriminate against any employee with regard to any term or condition of employment, because of the race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee.”

The Court developed its test of “adverse effect” discrimination (indirect discrimination), based on the general intent of the code.²⁵¹ The Court realised the aim of the Human Rights Code was to proscribe discrimination and therefore its approach was to provide relief to the victims of discrimination rather than to punish perpetrators of discrimination.²⁵² In this context, the result or effect of the action was more significant than the motive for the action. The Court rejected the necessity to prove intent and the unequivocal adoption of the idea of “adverse effect

²⁴⁹(1985) 2 SCR 536.

²⁵⁰(1985) 2 SCR 561.

²⁵¹*Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd* (1985) 2 SCR 536. at 547.

²⁵²Hunter, R. Op Cit at 108.

discrimination” as the result of a commitment to the purposive interpretation of human rights legislation.²⁵³

Therefore, Canadian Supreme Court defined adverse effect discrimination as arising:

“where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristics the employee or group, obligations, penalties, restrictive condition not imposed on other members of the workforce”.²⁵⁴

It is very interesting to note that the Court never mentioned that indirect discrimination could be justified by employers by reference to “business necessity” or “job relatedness”.²⁵⁵ This, in actual fact, meant indirect discrimination could occur even where the rule or standard complained of had been adopted for “genuine business reasons”.²⁵⁶ The Court went further to state that where the rule or standard complained of is connected to the performance of the job, the employer is not required to justify it, but he/she can rather show that he had taken such reasonable steps to accommodate the employee’s position as are open to him/her without undue hardship.²⁵⁷ The onus of showing that reasonable accommodation has been offered rests with the employer.²⁵⁸ If the employer cannot discharge this burden, then it has

²⁵³ Ibid.

²⁵⁴ *Ontario Human Rights Commission and O’Malley v. Simpson Sears Ltd* (1985) 2 SCR536 at 551.

²⁵⁵ Hunter, R. Op Cit at 109.

²⁵⁶ Ibid.

²⁵⁷ *Ontario Human Rights Commission and O’ Mally v Simpson-Sears Ltd* (1985) 2 SCR 536 at 558-9

²⁵⁸ Hunter, R. op cit. at 109.

failed to establish a defence to the charge of discrimination. In such a case, the claimant succeeds, but the standard itself always remain intact.²⁵⁹

In *Bhinder's* case the complainant had also suffered discrimination as a result of his inability to comply, for religious reasons, with working conditions imposed by the employer.²⁶⁰ Although the case was brought under the *Canadian Human Rights Act 1976*, the Court found that the aim and purpose of that Act were similar to those of the *Ontario Human Rights Code*. The Court therefore applied the same principles regarding indirect discrimination as it applied in *O'Malley's* case. Subsequent to the *O'Malley* case, Ontario enacted a new *Human Rights Code 1981* which included a definition of "constructive discrimination" which was intended to codify the United States Supreme Court's decision in *Griggs*. This legislation has now introduced in Ontario the possibility of justifying as reasonable and *bona fide*, policies that have adverse effects.²⁶¹

Recently, however, the Supreme Court in a landmark decision of *British Columbia Public Service Employee Relations Commission v BCGSEU*²⁶² adopted a novel and innovative approach, challenging the conceptual basis and legal significance of the conventional distinction between direct and indirect discrimination.²⁶³ The court held that the conventional approach of categorising discrimination as direct or "adverse effect" discrimination should be replaced by a unified approach.²⁶⁴ The case concerned a complaint regarding the minimal fitness standard for British Columbia

²⁵⁹ Ibid.

²⁶⁰ *Bhinder v Canadian National Railway Co. Op Cit at 590.*

²⁶¹ *Hunter, R. op cit. at 110.*

²⁶² (1999) 176 DLR (4th) 1.

²⁶³ Ibid.

²⁶⁴ Op Cit at 183.

forest fire fighters.²⁶⁵ The test required that forest fire fighters weigh less than 200 pounds (with their equipment), complete a shuttle run, an upward rowing exercise and a pump carrying/hose dragging exercise within stipulated times. The complainant, a female fire fighter, passed three of the tests but failed to complete the 2.5 kilometre run within the required time. The court accepted evidence which demonstrated that owing to physiological differences, most women have a lower aerobic capacity than most men and that, unlike men, most women cannot increase their aerobic capacity enough with training to meet the required standard. In addition, no credible evidence showed that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest fire fighter safely and efficiently.²⁶⁶

McLachlan J highlighted a number of difficulties with the conventional approach that attest to the desirability of simplifying the guidelines that structure the interpretation of human rights legislation in Canada.²⁶⁷ The thrust of her argument concerned the legitimacy of having different tests for the justification of direct and indirect discrimination. Potential remedies may also differ depending on whether the discrimination is classified as either direct or indirect. If an employer cannot justify a directly discriminatory standard as a *bona fide* occupational requirement, it will be struck down in its entirety.²⁶⁸ However, if the rule is characterised as a neutral one that adversely affect a certain individual, the employer need only show that there is a rational connection between the requirement and the performance of the job and that

²⁶⁵ Op Cit. at 176.

²⁶⁶ Pretorius, J.L. et al Op Cit at 4-14.

²⁶⁷ British Columbia Public Service Employee Relations Commission op cit at par 27-49.

²⁶⁸ Pretorius, J.L. et al Op Cit at 4-14.

it cannot further accommodate the claimant without experiencing undue hardship.²⁶⁹ The general requirement, however, remain in effect. In the court's view, it is difficult to justify conferring different degrees of protections on a claimant and others who share his or her characteristics, depending only on how the discriminatory rule is phrased.²⁷⁰

The court, however, referred on the artificiality of the distinction. The distinction between a requirement that is discriminatory on its face and a neutral requirement that is discriminatory in its effect is difficult to justify, simply because there are few cases that can be so neatly characterised.²⁷¹ For example, a rule requiring all workers to appear at work on Fridays or face dismissal may plausibly be characterised either as directly discriminatory (because it means that no workers whose religious beliefs preclude them from working on Fridays may be employed there), or as a neutral rule that merely has an adverse effect on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays). Given the vague boundaries of the categories, an adjudicator may unconsciously tend to classify the impugned requirement in a way that fits the remedy that he or she is contemplating, be that striking down the requirement itself or requiring only that the claimant's differences be accommodated.²⁷² The court, thus, suggests that the difference between direct and indirect discrimination lies only in the way a discriminatory requirement is framed.²⁷³ The effect of a discriminatory requirement, however, does not substantially change depending on how it is expressed. No legal

²⁶⁹ Ibid.

²⁷⁰ *Pretorius, J.L. et al Op Cit* at 4-14.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid. at 4-15.

significance ought therefore to be attached to the classification of discrimination as either direct or indirect. The court did, however, rightly caution on the practical application of the proportion analysis because the judgment does not seem to offer insights that would suggest a change in conventional indirect discrimination analysis.²⁷⁴

4.5. Australia

The Australian state legislation and the federal Sex Discrimination Act of 1984 initially followed the British model, with minor variations in wording.²⁷⁵ Indirect discrimination was established by application of a statutory formula, involving the conventional British requirements.²⁷⁶ There had to be a requirement or condition, which impacts more harshly on people of the same status as the complainant than it does on people of a different or opposite status, and which is unreasonable in the circumstances.²⁷⁷ The Act simply specifies that a requirement or condition must have, or be likely to have, the effect of disadvantaging persons because they have a particular attribute.²⁷⁸ The amended Sex Discrimination Act 1995 has, however, introduced a novel and more simplified approach designed to avoid the interpretative complications of the detailed and technical definitions of the other states' Acts.²⁷⁹ Indirect discrimination based on sex, marital status, pregnancy or potential pregnancy or family responsibilities occurs when the discriminator imposes or proposes to impose a condition, requirement or practice that has, or is likely to have

²⁷⁴ Ibid at 4-16 to 4-17.

²⁷⁵ *Naughton, R.* Op Cit at 44.

²⁷⁶ *Hunter, R.* Op Cit at 24 to 25.

²⁷⁷ Ibid.

²⁷⁸ Op Cit at 43.

²⁷⁹ *Hunter, R.* Op Cit at 42 to 43.

the effect of disadvantaging persons of the same class as the aggrieved person.²⁸⁰ The requirement that a substantially higher proportion of persons of a different race, sex, religion or sexual orientation than the aggrieved person, can comply with, has been left out of the definition. This ensures that many of the interpretative problems surrounding the statutory definition of indirect discrimination are avoided. This also seems to simplify proof of indirect discrimination by obviating the need to establish, through appropriate statistical comparisons, that the treatment in question affects different comparative groups in a disproportionate way.²⁸¹ This was illustrated by the decision in *Waters v. Public Transport Corporation*,²⁸² where the Corporation's withdrawal of the services of conductors from the tram service imposed a requirement or condition that travellers should be able to use the tram service without the assistance of conductors. The Victorian Equal Opportunity Board was, however, overwhelmed with evidence as to the disadvantages the new public transport ticketing system would visit upon people with disabilities. In response to this aspect of the complainant's case, the Board had no hesitation in finding without reference to statistics that a substantially higher proportion of non-disabled persons than of people with disabilities would be able to comply with the various requirements being introduced by the respondents.²⁸³

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² (1991) 103 ALR 513.

²⁸³ Hunter Op Cit at 197.

4.6.South Africa

Section 6 of the Employment Equity Act, 1998,²⁸⁴ proscribes unfair discrimination as follows:

- (1) “No person may unfairly discriminate, directly or indirectly, against any employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status...etc”.

The reference to “policy or practice” seems wider than the phrase “requirement or condition” as used in the British and Australian definitions. Section 1 of the Employment Equity Act,²⁸⁵ defines “employment policy or practice” as including, but not limited to:

“Recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal; and dismissal”.

The legislature had cast too wide a net in the definition of “employment policy or practice” to include both the obvious and those criteria that have caused difficulties for plaintiffs in other jurisdictions to prove their claims. While it would, in majority of cases, be fairly straightforward for an applicant to identify the employment policy or practice that had caused the disproportionate impact, the definition contained in section 1 of the EEA groups notoriously ‘difficult to separate’ criteria under one

²⁸⁴ Act 55 of 1998.

²⁸⁵ Act No.55 of 1998.

heading, thus easing the burden on applicants. For instance, applicants will be able to argue that the employer's entire "recruitment procedure", "appointment process", "job classification system" or "performance evaluation system" has a disparate impact on a protected group without having to separate the various elements of the system.²⁸⁶ This will be particularly relevant in those situations in which the employer has a number of objective requirements (such as length of service and performance output) and subjective requirements (such as presentation and enthusiasm) for promotion, and none of which is an absolute requirement,²⁸⁷ Even though the individual factors are capable of separation, the employee will be able to argue that the entire system has a disparate impact on women, Blacks, the disabled, etc.

The definition of "employment policy or practice" as contained in the EEA is not exhaustive.²⁸⁸ This means that applicants are not precluded from separating the various elements of a system to show that certain individual practices within the system have a disproportionate impact on the group.²⁸⁹ This would be the case when employers argue that the appointment process itself does not have a disparate impact on a protected group, even though individual components thereof may be. In the United States, it is referred to as the "bottom-line defence",²⁹⁰ In *Connecticut v Teal*, the United States Supreme Court considered the employer's multi-component selection process for promotion.²⁹¹ The first component was a scored test constituting a "pass/fail barrier" to further consideration for the relevant supervisory positions. Although the test had a disparate impact on the plaintiff's minority group,

²⁸⁶Dupper, O.C.: Proving Indirect Discrimination in Employment: A South African View (2000) 21 ILJ 747 at 754.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ *Connecticut v. Teal. Et al* at 460.

the final overall result or the “bottom-line result” of the selection process was that disproportionately more Black applicants than White applicants were promoted. The Supreme Court rejected the bottom-line defence advanced by the employer, and held that the disparate impact theory focused on requirements that create a discriminatory bar to opportunities and not on the overall number of minority employees or females actually hired or promoted.²⁹²

It is submitted that this is the approach that our Courts should adopt as it would better reflect the purpose of the legislature in importing the concept of indirect discrimination into the South African law. The reason for the inclusion of the concept of indirect discrimination in the legislation is to identify and eliminate those practices that have a disproportionate impact on protected groups and are not justifiable on any grounds.²⁹³ Allowing employers to offset the impact of an individual requirement against the overall result of the entire process would shelter the specific discriminatory requirement from attack, and leave those employees disadvantaged by it without any recourse. This would defeat the purpose of the legislation.²⁹⁴ In the first reported employment discrimination decision handed down by the new South African Labour Court, that is, the *Dingler* case, the Court did not spend any time on the question of what constituted a “policy or practice” for the purpose of the case. Undoubtedly this was due in large part to the fact that the “policy or practice” that allegedly had a disparate impact in the case was easily identifiable.²⁹⁵ Nevertheless, there are a number of reasons why the identification of the ‘policy or practice’ is unlikely to be a contentious aspect of the plaintiff’s *prima facie* case. The first is the fact that the South African legislator decided to use the wider terminology of

²⁹²Op Cit. at 462.

²⁹³Dupper, O.C. op cit. at 755.

²⁹⁴Ibid.

²⁹⁵Dupper, O.C. op cit. at 755.

‘employment policy or practice’ as opposed to the narrower requirement or condition’ that has caused British plaintiffs, in particular, so much difficulty. Secondly, the fact that the definition of ‘employment policy or practice’ includes references to entire employment ‘systems’ such as ‘recruitment procedures’, ‘the appointment process’ and ‘performance evaluation systems’ ensures that applicants in South Africa, unlike their counterparts in the United States, Australia and Britain, will not be required to identify with any precision the element that caused the disparate impact.²⁹⁶ If the entire appointment process has a disparate impact on women, the ‘policy or practice’ under scrutiny would be the process as a whole, without the applicant first having to demonstrate that the various elements of the process ‘are not capable of separation for analysis’.²⁹⁷ Courts in South Africa are unlikely to adopt a very technical approach to this particular element of the applicant’s prima facie case. This will certainly be in keeping with the general approach underlying South Africa’s anti-discrimination provisions, which is to make it as effortless as possible for applicants to establish a *prima facie* case of indirect discrimination.²⁹⁸

5. Conclusion

From the overview above it appears that in definitional terms, there is almost universal consensus on what indirect discrimination means. The basic tenets of the *Griggs* understanding of adverse effect discrimination have found general favour in the legislation and jurisprudence of the countries considered.²⁹⁹ However, when the focus shifts to the details of the requirements for indirect discrimination, the picture

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Pretorius et al op cit at 4-20.

changes. Some jurisdictions apply different tests in respect of justification for direct and indirect discrimination. It should, however, be noted that neither Constitution nor the Employment Equity Act has explicitly followed the example elsewhere of prescribing different requirements for justification of direct and indirect discrimination.³⁰⁰

The effectiveness of anti-discrimination legislation largely depends upon the ease with which victims of discrimination are able to prove that their rights have been violated.³⁰¹ If complainants are required to bear too great a burden, not only will they fail in their attempts, but their lack of success may also discourage others from seeking help through the Courts and tribunals.³⁰² The South African legislature in an attempt to ease the burden of proof from victims of discrimination has enacted Section 11 of the Employment Equity Act which provides that:

“Whenever unfair discrimination, is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair”.

Section 9(5) of The Constitution of the Republic of South Africa Act 1996,³⁰³ also shift the onus of proof in equality cases to the person against whom the allegation of discrimination is made.³⁰⁴

The absence of a complicated legislative definition was intended to make it easier for applicants to prove a *prima facie* case of indirect discrimination before the Courts. It has already been indicated that complainants in a number of indirect discrimination cases in South Africa failed to prove their cases before the courts as they could not

³⁰⁰ Ibid.

³⁰¹ Dupper, O.C. op cit. at 756.

³⁰² Ibid.

³⁰³ Act 108 of 1996.

³⁰⁴ Ibid.

provide statistical evidence in their claims. In South Africa we are presently faced with a problem of lack of reliable statistics. If the South African Courts could adopt the approach handed down in *Leonard Dingler* case, then, applicants in indirect discrimination cases will not be required to tender statistical evidence in order to identify the specific elements that caused disparate impact with the same precision as plaintiffs do in other jurisdictions.

It appears statistics will play an important role in the future litigation of indirect discrimination cases in South Africa. It is unlikely that the requirement will reach the same level of sophistication and detail as has been the case in the United States of America. In South Africa applicants are likely to be impeded by lack of accessible and reliable statistical data, and Courts are therefore unlikely to insist on such data.³⁰⁵ Courts in South Africa should, however, adopt a flexible approach towards the use of statistics, more along the lines adopted by Courts and tribunals in the UK and Australia. Therefore South African Courts should not be rigid on this approach as experience from the United States suggests that where the relevant data are available or can be inferred from appropriate research, statistical techniques can play an important role in assessing the extent and possible causes of the disparities which indirect discrimination seeks to address. A flexible and non-technical approach may be appropriate in certain cases, but in others characterised by more subtle forms of indirect discrimination, it may be necessary for applicants to engage in more precise and sophisticated statistical analysis.³⁰⁶

³⁰⁵Dupper.O.C. op cit. at 45.

³⁰⁶Dupper.O.C. po cit. at 46.

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