

# The Law on Discrimination in Employment: A Review of The Zambian Industrial Relations Act and Employment Code Act

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## Abstract

Zambia has enacted two pieces of legislation that address discrimination in employment, namely, the Industrial and Labour Relations Act (1993) and the Employment Code Act (2019). Although the two pieces of legislation protect employees from discrimination in Zambia, this study argues that they may be applied to different extents, due to inconsistencies and gaps that have been identified in the two pieces of legislation. The study was qualitative and relied on secondary data sources, including statutes, case law, textbooks, and journal articles. The study recommends that the law on discrimination in Zambia should be reformed to make it clear by providing express definitions of direct and indirect discrimination. In addition, the sanctions that are imposed for employers who discriminate against an employee must be reconciled to avoid inconsistencies in their application. The study further recommends that the two pieces of legislation be consolidated to prevent the overlap in their application which currently exists.

## Keywords

Direct discrimination, Indirect discrimination, Employees, Law, Sanctions, Zambia

## Introduction

Zambia is a signatory to the International Labour Organisation (ILO) Discrimination (Employment and Occupation) Convention (1958). State parties to the convention, such as Zambia, adopted proposals for the protection of employees from discrimination in the workplace. In an attempt to address discrimination in the workplace, Zambia enacted the Industrial Relations Act (1993) and the Employment Code Act (2019). Section 108 of the Industrial and Labour Relations Act prohibits the discrimination of employees in the termination of employment and the imposition of penalties, whilst Section 5 of The Employment Code Act (2019) prohibits discrimination in the workplace. Although both pieces of legislation prohibit discrimination in employment and outline the grounds on which an employee may be deemed to be discriminated against, they are applied to different extents. This has resulted in inconsistency and grey areas in the application of the law on discrimination in employment in Zambia. The study, therefore, reviewed the provisions on discrimination in employment in Zambia, and suggest appropriate reforms to address the inconsistencies.

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## Discrimination (Employment and Occupation) Convention (1958)

One of the major objectives of the International Labour Organisation is equality of opportunity and treatment in matters of labour and employment. Every country that ratified the Discrimination (Employment and Occupation) Convention (1958) is under an obligation to design and promote a national policy that promotes the equality of opportunity and treatment in all kinds of employment and occupation by prohibiting discrimination. Article 1(1)(a) of the Discrimination (Employment and Occupation) Convention (1958) defines discrimination as, "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". Based on this provision, discrimination at work can be said to arise when an employee is treated differently based on one of their characteristics, such as political affiliation, race or sex, and this puts them at a disadvantage in the workplace or undertaking, when compared to other employees in the same situation (Tomei, 2003).

Additional grounds of discrimination are provided for in Article 1(1)(b) of Discrimination (Employment and Occupation) Convention (1958). It extends the definition of discrimination to "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies". Article 1(1)(b) of Discrimination (Employment and Occupation) Convention (1958) allows a state part to the convention to include discrimination on grounds that it has not listed in its national policy. However, additional grounds of discrimination may only be included in a national policy after tripartite consultations are carried out, but they need not be formally declared to the ILO.

The definition of discrimination reveals three elements; an objective element, a subjective element, and an element of effect. The objective element refers to the existence of a distinction, exclusion or preference that causes a difference in treatment of an employee when compared to other employees who are in the same situation (Nielsen, 1994), and the subjective element is the basis or ground on which the distinction, exclusion or preference is made. The element of effect is the nullification or impairment that an employee experiences as a consequence of the distinction, exclusion or preference.

Article 1(2) of the Discrimination (Employment and Occupation) Convention (1958) provides an exception to the rule against discrimination; distinction's, exclusions or preferences that are necessary to the inherent requirements of a job are not deemed to be discriminatory. This exception takes in to consideration factors such as sex and national extraction, which may be required to match the needs of a job. A distinction, exclusion, or preference is said to be necessary if it is proportionate to the aim pursued (Emir, 2012). A further exception to the rule against discrimination is in relation to distinctions, exclusions, or preferences that are necessary in the interests of state security. Measures that would otherwise be discriminatory may be applied against an individual who is suspected to be engaging in activities that are reasonably suspected to be prejudicial to the security interests of a member state of ILO. The suspected individual is granted a right to appeal against any distinction, exclusion, or preference that is applied to them in the interests of state security.

The convention recognises the importance of protecting categories of individuals that require special protection or assistance. Article 5.1 of the Discrimination (Employment and Occupation) Convention (1958) acknowledges special measures of protection or assistance that are provided for in other Conventions or Recommendations adopted by the International Labour Conference as exceptions to

the rule against discrimination in employment or occupation. In addition, Article 5.2 of the Discrimination (Employment and Occupation) Convention (1958) allows its state parties to develop and implement measures that are designed to meet the particular requirements of individuals who may require special assistance or protection “for reasons such as sex, age, disablement, family responsibilities or social or cultural status”.

## **Discrimination in Zambian Employment Law**

In order to help eliminate discrimination and achieve equality in the work place, state parties to the Convention have undertaken to enact legislation that will secure the acceptance and observance of the national policy discrimination in employment. Zambia has implemented this undertaking by enacting the Industrial and Labour Relations Act (1993), and the Employment Code Act (2019).

### **The Industrial and Labour Relations Act**

Section 108 of the Industrial and Labour Relations Act (1993) protects employees from discrimination by prohibiting the termination of employment or the imposition of a penalty or a disadvantage “on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of an employee”. The Industrial and Labour Relations Act does not expressly define discrimination in the context of employment matters. In the absence of an express definition, Article 23(3) of The Zambian Constitution (1996) may be relied on, and it defines "discriminatory" as follows:

“affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

Section 108 of the Industrial and Labour Relations Act (1993) adheres to the Convention by protecting employees who are in employment from differential treatment that is attributable to their descriptions during termination of employment and imposition of penalties. However, the application of Section 108 of the Industrial and Labour Relations Act (1993) is limited, as it does not expressly provide protection from discrimination for employees in matters that arise during their employment. This is addressed in the Employment Code.

### **Grounds of Discrimination as Interpreted in Case Law in Zambia; Sex, Social Status, Political Affiliation and Status**

Despite the limitation in its application, Section 108 of the Industrial and Labour Relations Act (1993) provides protection for employees and prospective employees from discrimination in the termination of employment and imposition of penalties, and Zambian courts have successfully interpreted and applied Section 108 of the Industrial and Labour Relations Act (1993) on a number of occasions. Litigation on the law on discrimination in employment was largely undertaken between 1984 and 1995 (Mwenda Sithole, 2004) and the courts have placed the burden of proving that employment was terminated on discriminatory grounds on the Litigant (Chileshe v Zambia Consolidated Copper Mines, 1996).

In *Post and Telecommunications Corporation Limited v Salim Jack Phiri* (1995), the Respondent was dismissed as a result of his failure to adhere to strict regulations in the procurement of typewriters and the acceptance of delivery of motor vehicle tyres, and this resulted in losses for the Appellant. However, two other employees were involved in the procurement process, but they were not dismissed. The Respondent contended that his dismissal was discriminatory on the grounds of social status and sex. On appeal, it was held that the Respondent was not discriminated against because he was not the only man who was involved in the procurement process; one of the other two employees was female. It can be seen that the court did not rule in favour of the Respondent because he did not adduce sufficient evidence to prove discrimination against him. In addition, the Court ruled that the Respondent was not discriminated against on the basis of his social status because the expression 'social status' refers to one's standing in society. The Respondent did not adduce evidence to prove that he was treated differently based on his standing in society.

Similarly, in *Edith Solomon v Duncan Gilbey and Matheson Zambia Limited* (1985), the Complainant claimed that her dismissal was discriminatory based on her marital status. The court dismissed her complaint because she was not able to adduce evidence to prove this. However, it was satisfied that the Complainant's dismissal was lawful because it was able to prove that the work performance of the Complainant was unsatisfactory even after she had been sent for professional training for the position that held.

In contrast, in *Zambia National Broadcasting Corporation Limited v Penias Tembo, Edward Chileshe Mulenga and Moses Phiri* (1995), the Respondents were dismissed, and they claimed discrimination on the basis of their political affiliation contrary to Section 108 of the Industrial and Labour Relations Act (1993). The Supreme Court upheld their claim because the evidence that the Respondents adduced was sufficient to prove that their dismissal was as a result of their political affiliation. Their support for the opposition political party was evidenced from their partial reporting in favour of UNIP in the period leading to the General Elections, and the court held that this is what led to their dismissal.

## The Employment Code

Section 108 of the Industrial and Labour Relations Act (1993) makes it mandatory for all employers in Zambia to eliminate discrimination in undertakings and promote equal opportunities in employment. It provides that 'An employer shall promote equal opportunity in employment and eliminate discrimination in an undertaking.' Section 3 of the Employment Code Act (2019) defines an undertaking as a company, firm, trade, business, an industry or any other kind of enterprise, a statutory body or corporation or a local or public authority or a branch or division of the local or public authority. Thus, the prohibition against discrimination applies to every type of workplace in Zambia.

In comparison, Section 108 of the Industrial and Labour Relations Act (1993) and Section 5 (1) of the Employment Code Act (2019) are similar because they both prohibit discrimination in the recruitment of employees and termination of employment contracts. Despite this similarity, Section 5 of the Employment Code is more progressive than Section 108 of the Industrial and Labour Relations Act, because it also provides for the protection of employees from discrimination in their places of work in general. This is seen in Section 5(2)(b) of the Employment Code Act (2019), which has extended the prohibition of discrimination to include its prohibition in the promotion and training of employees, terms and conditions of employment, and any other matters that may arise out of employment.

In addition, Section 5 of the Employment Code (2019) has restated the grounds on which discrimination is prohibited in employment in Section 108 of the Industrial and Labour Relations Act (1993), the grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or social status namely. It has also extended the grounds on which discrimination is prohibited to include the prohibition of discrimination on the grounds of gender, pregnancy, marital status, ethnicity, family responsibility, disability, health, culture, and economic grounds.

Furthermore, Section 5 of the Employment Code (2019) has broadened the concept of discrimination in employment to include both direct and indirect discrimination. It does not define direct and indirect discrimination, and the Zambian Constitution is also silent. Direct discrimination arises when a law or policy is facially discriminatory, whilst indirect discrimination arises when a law or policy does not appear to be discriminatory on the face of it, but discrimination arises after it is applied implicitly (Currie & Waal, 2010). The Zambian courts have equally not addressed the concept of direct and indirect discrimination in the cases alluded to above, as they took a narrow approach, by only addressing direct discrimination. This will create a challenge in the application of Section 5 of the Employment Code when the need to do so arises, as it appears that the meaning of direct and indirect discrimination in the context of Zambian employment law has been left to the courts to develop.

It is notable that generally, employment law in modern times reflects similar ideals across the globe because of the influence of international institutions such as the International Labour Organisation (ILO) and other such ancillary institutions where they exist. However, an examination of the Employment laws of The United Kingdom revealed that the concepts of direct and indirect discrimination are addressed in a slightly different manner than Zambia.

In the United Kingdom, Sections 13(1) and 19(1) the Equality Act (2010) respectively define direct discrimination and indirect discrimination. Direct discrimination occurs when a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others, whilst indirect discrimination occurs when person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. The definitions, however, appear to be general in application and they do not apply directly to Employment Law unless via interpretation.

## **Exceptions to the Rule Against Discrimination in Zambia**

Section 5(3) of the Employment Code (2019) provides for exceptions to the rule against discrimination in employment as follows;

‘For the purposes of this Act, it is not discrimination to —

- (a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in an undertaking;
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;
- (c) restrict employment to citizens or in accordance with section 65; or
- (d) restrict access to limited categories of employment where it is necessary in the interest of state security.’

The permissible exceptions to the rule against discrimination in Zambia are in conformity with Article 1(2) of the Discrimination (Employment and Occupation) Convention (1958). Notably the Employment Code does not define “affirmative action” measures within the meaning of Section 5(3)(a). It is equally not addressed in the Zambian constitution. Thus, when the need arises for the courts to apply Section 5(3)(a) of the Employment Code, it will be left to the Court to develop a definition of affirmative action within the context of discrimination in employment in Zambia.

## **Sanctions Imposed for Discriminatory Practices in Employment**

Both Section 108 of the Employment Code (1993), and Section 5 of the Employment Code (2019), provide for recourse for aggrieved employees who allege that they have been discriminated against. In terms of Section 108 of the Employment Code, an employee who has reasonable cause to believe that his employment contract was terminated on discriminatory grounds, or that he suffered any other penalty or disadvantage, may lay a complaint before the High Court after he has exhausted the administrative channels that are available to him. Where a court finds in favour of an aggrieved employee, he may be compensated for damages for loss of employment or reinstated by the court, depending on the gravity of the circumstances of the case.

In contrast, Section 5(5) of the Employment Code Act makes it an offence that is punishable with a fine for a person (an employer) to discriminate against employees on the any of the grounds that are prohibited on Section 5(2) of the same Act. This has created an inconsistency in the clauses that provide for enforcement of discriminatory conduct in the two pieces of legislation. On the one hand, an employee may commence a civil action if he has reasonable cause to believe that he was discriminated against in recruitment for a position, or when his employment was terminated or a sanction was imposed against him. On the other hand, he may file a complaint with the Police Service if he is aggrieved because he has reasonable cause to believe that he was discriminated against in recruitment for a position, or when his employment was terminated or a sanction was imposed against him pursuant to Section 5(2) of the Employment Code Act. It is not clear why the legislator made the same matter an offence in one statute, and the subject matter for a legal suit in other, when both pieces of legislation seek to serve the same purpose.

## **Recommendations**

Given the foregoing which has revealed the absence of the definition of both direct and indirect discrimination, it is recommended that a clear and concise set of regulations and standards be effected so that we have accurate as well as relevant information that exemplifies what amounts to direct and indirect discrimination in respect to employment law in Zambia, while giving room for a wide interpretation of both concepts.

It is further suggested that a code of conduct be created to exemplify the basic minimum standards to be adhered to in any circumstance in which there is need to determine whether or not discrimination has arisen in places of work. In addition, the sanctions penalties which have been imposed in both Acts need to be reconciled; as opposed to the current position where non-compliance with law on discrimination in the Employment Code may result in the commission of a criminal offence, while non-compliance with a similar provision in the Industrial Relations Act merely results in a civil claim being brought by the injured party. The Employment code Act and the Industrial relations acts should be consolidated to remove all the ambiguities and inconsistencies of found in Section 5 and Section 108 respectively, as well as other areas.

## Conclusion

This paper attempted to highlight the current legal framework for discrimination in employment law in Zambia; particularly Section 108 of the Industrial and Labour Relations Act, and Section 5 of the Employment Code Act. It further identified that despite the two concepts of direct and indirect discrimination being included in Section 5 of the Employment Code Act, these concepts are not defined in any way within the Act, and the Industrial Relations Act does not address them at all. At international level, ILO documents do not provide for the two-pronged definition of discrimination. In terms of sanctions it appears that the two Zambian statutes are at odds with one another, one Act prescribes the penalties for the breach of the particular section as a criminal breach, whilst the older Act prescribes that any breaches of the section will be dealt with under civil law actions.

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