

Hate the Sin and Not the Sinner: Addressing Unfair Discrimination Against Ex-Convict Job Applicants in Kenya and Insights From International Law

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SUMMARY

The Kenyan criminal justice system is founded on the principle of restorative justice, which serves as an instrument for societal transformation aimed at fostering positive change in individuals. In this context, the primary goal of incarceration is to facilitate the rehabilitation process of individuals, thus improving and enabling them to reintegrate into society in a morally acceptable manner. However, securing work after reintegration remains a significant challenge for ex-convicts, given the criminal record tagged on them. In most cases, employers are under the impression that individuals with criminal histories are not trustworthy and so employing them would create a hazardous work environment. While several efforts have been made to improve workplace equality in Kenya, various forms of discrimination are becoming increasingly common and widespread. The mandatory requirement for all job applicants to submit a Certificate of Good Conduct (CGC) from the Directorate of Criminal Investigations (DCI) before consideration for employment is an example of ongoing discrimination in Kenyan workplaces. The consequence is that this practice selectively singles out only job applicants who have been previously convicted and subjects them to differential treatment on grounds linked to their CGC, even though these applicants have arguably been rehabilitated through successfully serving a prison sentence and reintegration into the labour market. Kenyan employers need to ensure that they promote equal opportunities for all job applicants as stipulated in the Employment Act. This would ensure effective competition and inclusion for all members of society, provided they possess the requisite qualifications. One way to do so is by protecting them against indirect discriminatory practices perpetuated by employers during the recruitment process, particularly the mandatory requirement that all job applicants must submit a CGC from the DCI before employment. The article concludes by highlighting that Kenya should follow the approach of South African legislation and the International Labour Organization Convention, where the deciding criterion for employment hinges on the inherent requirement of the job.

KEYWORDS: Discrimination, ex-convicts, inherent requirement of the job, criminal record, arbitrary grounds

1 INTRODUCTION

The society we live in is rife with crime and offences. Upon being arrested, those found guilty are sentenced and obliged to spend a period of incarceration. Once they are released from prison, the hope is that they will assume the role of exemplary citizens and seamlessly integrate into the fabric of society.¹

Employers in Kenya have adopted the practice of requiring job applicants to submit a Certificate of Good Conduct (CGC) issued by the DCI when seeking employment.² This document is usually publicly available through online repositories and is accessible to employers and other interested individuals.³ The certificate is generated based on past criminal records as determined by the existence of an archived fingerprint database.⁴ Its history dates back to the colonial period, when suspected offenders would have their fingerprints taken and archived by colonial authorities.⁵ The subsequent Kenyan regimes continued this practice in the post-colonial period, whereby someone's history in relation to conflict with the law could be archived and retrieved in case of any need.⁶ In addition, the CGC is based on the Constitution and other legislative frameworks⁷ that govern the criminal justice system,⁸ especially when there is a need to establish a previous

¹ In 1911, the Kenya Prison Services was established under the Ministry of Home Affairs, Heritage and Sports to keep offenders in safe custody, rehabilitate and reform offenders, facilitate the administration of justice and promote prisoners' opportunities for social reintegration as mandated by the Kenya Prisons Act (Cap 90 of the Laws of Kenya) and the Public Service Commission Act 19 of 2023. See also Otiato *Collateral Effects of Incarceration and Navigation of the Obstacles to Employment of Ex-Convicts: A Case of Kakamega County* (master's thesis, University of Nairobi) 2014 43.

² Kenya Police Records "Police Clearance Certificate for Citizen" (January 2023) <https://dci.ecitizen.go.ke/> (accessed 2024-03-17) 2–17.

³ Clear, Rose and Ryder "Incarceration and the Community: The Problem of Removing and Returning Offenders" 2007 47(3) *Crime & Delinquency* 335–351. See also Tenibiaje "Counseling for Productive Employment of Prison Inmate" 2010 2(3) *European Journal of Educational Studies* 1946–6331.

⁴ Pager "The Mark of a Criminal Record" 2003 108(5) *American Journal of Sociology* 937–975.

⁵ Directorate of Criminal Investigations (DCI), Police Clearance Certificate (Certificate of Good Conduct) <https://www.cid.go.ke/index.php/services/police-clearance-certificate> (accessed 2025-09-30); Ombati "How Employers Use Police Clearance Certificates to Screen Job Seekers" *The Standard* (Nairobi, 15 August 2021) <https://www.standardmedia.co.ke/> (accessed 2025-09-30); Kenya National Police Service, Criminal Records Office (2020) 12 and Anderson *Policing and Colonial Rule in Kenya, 1902–1963* (2011) 44.

⁶ Otiato *Collateral Effects of Incarceration* 7–22.

⁷ These include the Judicial Service Act 1 of 2011 and policies like the Sentencing Policy, and Bail and Bond Policy, among others.

⁸ These include Penal Code Cap 63, the Criminal Procedure Code Cap 75 and the National Police Service Act 11 of 2011.

conviction during sentencing.⁹ The DCI under the National Police Service maintains historical data on past offenders, which is used to determine the entries to be included in the CGC.¹⁰ This practice effectively distinguishes between law-abiding citizens and lawbreakers in the eyes of potential employers. The outcome is that having a criminal history in Kenya comes with severe consequences, particularly when searching for job opportunities.¹¹ This article examines this practice, arguing that it amounts to unfair discrimination and creates a significant barrier to the societal reintegration of ex-convicts.

Although it is reasonable and logical for employers to prefer job applicants with no criminal history over ex-offenders, this creates a generally permanent social exclusion of ex-convicts from job opportunities in particular. Those who have been released from incarceration experience challenges in securing employment and integrating into the Kenyan job market because employers demand that all job applicants submit evidence of their criminal record.¹² A research survey shows that only 40 per cent of employers are willing to recruit individuals with criminal backgrounds.¹³

In light of the above, this article argues that mandatory criminal record checks create unfair discrimination against ex-offender job applicants. In doing so, the article explores South African law and international law while critically examining the provisions of section 5(3)(a) of the Employment Act¹⁴ to demonstrate that compelling applicants for employment to submit CGCs before employing them constitutes unfair discrimination. The article presents important recommendations that, if implemented, could address the existing gap in section 5(3)(a) of the Employment Act.

⁹ Omboto "The Challenges Facing Rehabilitation of Prisoners in Kenya and the Mitigation Strategies" 2013 2(2) *International Journal of Research in Social Sciences* 39–43.

¹⁰ S 55 of the National Police Service Act.

¹¹ Couloute and Kopf "Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People" 2018 *Prison Policy Initiative* 23.

¹² *GBM Kariuki v Director of Criminal Investigations* [2016] KEHC 3560 (KLR). See also Stoll and Bushway "The Effect of Criminal Background Checks on Hiring Ex-Offenders" 2008 7(3) *Criminology & Public Policy* 371–404.

¹³ Obatusin and Ritter-Williams "A Phenomenological Study of Employer Perspectives on Hiring Ex-Offenders" 2019 5(1) *Cogent Social Sciences* 157–1730. See also Riley "Would You Hire Them? An Interpretative Phenomenological Analysis of How Employers Make Sense of Hiring Ex-offenders" (doctoral dissertation, Northeastern University) 2022. See also Smith "Exploring the Employability of Ex-Offenders: Employer Perspectives" (doctoral dissertation, Walden University) 2021 and Wiafe "Willingness of Employers to Employ Ex-Convicts Among Selected SMEs in the Western Region of Ghana" 2021 7(1) *Cogent Social Sciences* 186–8670; Holzer "Collateral Costs: The Effects of Incarceration on the Employment and Earnings of Young Workers" 2007 *Inst for the Study of Labor (IZA)* Discussion Paper No 3118; Harris and Keller "Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions" 2008 21(1) *Journal of Contemporary Criminal Justice* 6–30; Holzer, Raphael and Stoll *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and their Determinants* Institute of Business and Economic Research, University of California, Berkeley, Working Paper No W01-005, October 2001. See also Metcalf, Anderson and Rolfe "Barriers to Employment for Offenders and Ex-Offenders" 2001 *Research Report No 155, Department for Work and Pensions* 110–113.

¹⁴ Employment Act 11 of 2007 (Employment Act).

2 THE LEGAL FRAMEWORK OF THE PROTECTION AGAINST UNFAIR DISCRIMINATION

2 1 International law

2 1 1 *Discrimination (Employment and Occupation) Convention 1958 (ILO111)*

On 7 May 2001, Kenya ratified Convention 111. The Convention defines “discrimination” in employment as:

“(a) Any distinction, exclusion or preference made on the basis of ... [criminal record] ... (b) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”¹⁵

Convention 111 further requires all countries that are parties to it:

“declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”¹⁶

While the Convention outlines certain non-discrimination grounds such as “race, colour, sex, religion, political opinion, national extraction or social origin”,¹⁷ it still leaves room for parties to add further grounds of non-discrimination. Convention 111 has a provision that allows for an exception to the general grounds, referred to as the inherent requirements, which stipulates that: “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.”¹⁸

Kenya has also ratified other international human rights agreements that affirm the principle of non-discrimination. On 1 May 1972, Kenya became a party to the International Covenant on Civil and Political Rights (ICCPR). Later in 1990, Kenya ratified the Convention on the Rights of the Child (CRC), and in January 2002, the country ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three treaties explicitly prohibit Kenyan employers from taking part in discriminatory practices against employees on grounds such as “race, colour, sex, ... or any other status”. Accordingly, complaints of discrimination founded on an applicant’s criminal past would be deemed to fall under “other status”.¹⁹

¹⁵ Art 1(1)(a) of Convention 111.

¹⁶ Art 2 of Convention 111.

¹⁷ Art 1(1)(a) of Convention 111.

¹⁸ Art 1(2) of Convention 111.

¹⁹ Art 2(2) of the ICESCR; Art 2(1) of the ICCPR and Art 2(1) of the CRC.

3 THE KENYAN LEGAL FRAMEWORK FOR PROTECTION AGAINST UNFAIR DISCRIMINATION

The Kenyan legislation on unfair discrimination is complex and designed to serve a specific purpose: to promote diversity and eliminate discriminatory practices. But while there have been significant legislative developments in protecting employees against discrimination, it continues to manifest in three stages: before hiring, which is at the heart of this article, during the employment relationship²⁰ and upon leaving employment. In *Gichuru v Package Insurance Brokers Ltd*, the following definition of discrimination was adopted:

“In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic ...* as follows:

‘Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, 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.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”²¹

3.1 The Constitution of the Republic of Kenya, 2010²²

The Constitution is replete with provisions that uphold the ideals and spirit of non-discrimination.²³ As a sovereign state, Kenya stands firmly on the constitutional foundations upon which it was built. The enactment of the Constitution in 2010 ushered in provisions that changed prisons from places of punishment to places of correction.²⁴ Noteworthy is that under the Constitution, every employer in Kenya has a constitutional duty to ensure equal opportunity in the workplace²⁵ and to promote the right to fair labour

²⁰ For example, if dismissed from employment, denied training opportunities, denied promotion, subjected to less favourable working conditions or terms of employment and harassed in the workplace.

²¹ *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR) par 22. See also *Kurui v Aquila Development Company Ltd* [2024] KEELRC 658 (KLR) par 38.

²² The Constitution of the Republic of Kenya, 2010 (Constitution).

²³ Art 27(4) of the Constitution states that: “The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

²⁴ Art 2(4) of the Constitution.

²⁵ *VMK v Catholic University of Eastern Africa Nairobi Industrial* [2013] KEELRC 86 (KLR). See also s 5(2) of the Employment Act.

practices.²⁶ Article 10(2) of the Constitution, in particular, outlines the national values and principles of governance, including equality, human rights, and non-discrimination. Employers are therefore obliged to ensure that these values are implemented in the workplace by establishing adequate measures to eradicate any form of inequality and unfair discrimination. This includes preventing situations where certain categories of job applicants are denied opportunities, benefits, and privileges that others enjoy.²⁷

Additionally, the Constitution stipulates that “every person is equal before the law and has the right to equal protection and equal benefit of the law.”²⁸ Accordingly:

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”²⁹

Similarly, “a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated” above.³⁰

The legislators’ decision to use the word “discrimination” as opposed to “differentiation” implies that they were emphasising differential treatment, that is, on the face of it, unfair. For this reason, discrimination based on any of the grounds enumerated in Article 27(4) is considered unfair unless proven otherwise. One characteristic associated with all the grounds listed in Article 27(4) is the potential to undermine the inherent worth and dignity of an individual or to cause them harm or distress if manipulated.³¹ It is worth noting that the Constitution explicitly prohibits wide-ranging forms of unfair discrimination. It uses the phrase “including” to mean that these 17 grounds are not exhaustive. It therefore allows for the enactment of complementary legislation, such as the Employment Act³² and the Labour Relations Act (LRA),³³ to promote and guarantee equality and safeguard against unfair discrimination, particularly within the workplace.³⁴

Notably, the Constitution prohibits both direct and indirect discrimination. However, the Constitution does not define the term “direct discrimination”.

²⁶ Art 41(1) of the Constitution.

²⁷ Art 1 of Convention Concerning Discrimination in Respect of Employment and Occupation 1958 (No 111). Article 1(1) of this Convention defines discrimination as “[a]ny 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” or “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation ...”. See also Grogan *Workplace Law* (2014) 107.

²⁸ Art 27(1) of the Constitution.

²⁹ Art 27(4) of the Constitution.

³⁰ Art 27(5) of the Constitution.

³¹ *Odhiambo v Attorney General; Nyanhoga* [2024] KEHC 354 (KLR).

³² Employment Act. See also *Samuel Gitau Gichuru v Package Insurance Brokers* [2021] KESC 12 (KLR).

³³ 14 of 2007.

³⁴ Notably, Art 41 of the Constitution entrenches several provisions relevant to labour relations.

“Direct discrimination” involves overt differential treatment against people on the basis of any ground listed in Article 27(1) of the Constitution.³⁵ An example of direct discrimination may occur when an employer refuses to employ someone on the basis of their age, believing they are too old to learn new skills. The Kenyan National Cohesion and Integration Act³⁶ attempts to define “direct” and “indirect” discrimination in the following terms: section 3(2) stipulates that a person discriminates if

- “he applies to that other person a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but—
- (a) which put or would put persons of the same race or ethnic or national origins as that other person at a particular disadvantage when compared with other persons;
 - (b) which puts that other person at that disadvantage; and
 - (c) which he cannot show to be a proportionate means of achieving a legitimate aim.”

Likewise, “indirect discrimination” is not defined in the Constitution. Usually, indirect discrimination is more often difficult to prove. It may be intentional or unintentional. An example would be where the employer applies policies and practices that appears neutral on the face of it and does not expressly differentiate between two or more employees and job applicants but, when examined closely it has a disproportionate negative effect on certain individuals or group of people. For instance, a weight requirement that would exclude all but small minority women.³⁷

3 2 Labour Relations Act

The Kenyan LRA primarily governs the relationship between employers, employees, trade unions, and employer organisations. However, it only indirectly touches on issues of unfair discrimination. Section 5(1) of the LRA states that no person shall discriminate against any person seeking employment. Similarly, the LRA stipulates that no person shall dismiss or in any other way prejudice a person seeking employment.³⁸

3 3 The Employment Act

The Employment Act³⁹ was enacted to give effect to the provisions of section 27 of the Constitution in the context of employment. The Act aims to protect workers and job applicants from discrimination and, to a large extent,

³⁵ Campbell and Smith “Distinguishing Between Direct and Indirect Discrimination” 2023 *Modern Law Review* 34. See also *Samuel Gitau Gichuru v Package Insurance Brokers supra*, Kiilu “Indirect Discrimination: Huduma Namba (Digital Identification) and the Plight of the Nubian Community in Kenya” 2022 7(1) *Strathmore Law Review* 17–47 and *Ngurusi v County Government of Marsabit* [2024] KEELRC 1251 (KLR).

³⁶ 12 of 2008.

³⁷ S 5(3)(a) of Employment Act 2007 (Kenya), art 27(4)–(5) Constitution of Kenya 2010; *Rose Wangui Mambo & 2 others v Limuru Country Club others* [2014] Eklr para 23.

³⁸ S 5(2)(c) of the LRA.

³⁹ Other labour laws include the Labour Institutions Act 12 of 2007, the LRA, the Occupational Safety and Health Act 15 of 2007 and the Works Injury Benefits Act of 2007.

incorporates the spirit of the majority of United Nations human rights treaties and international standards regarding the eradication of discrimination in the workplace.⁴⁰ However, a preliminary investigation suggests that the Employment Act may not adequately protect all job applicants from workplace discrimination.

The Act further directs the Cabinet Secretary, labour officers, and employers to strive to advance equality of opportunity in employment.⁴¹ The Act makes provisions for dispute resolution pertaining to employment, including those concerning discrimination, to be heard exclusively by the Employment and Labour Relations Court (ELRC), which is a specialised court established by the Constitution for this purpose. Some of the precedent-setting decisions in discrimination disputes include *VMK v Catholic University of Eastern Africa*,⁴² *Koki Muia v Samsung Electronics East Africa Limited*,⁴³ and *CAS v CS Limited*.⁴⁴

3 3 1 Section 5(3)(a) Employment Act and its inadequacy in protecting ex-convict job applicants

The Employment Act prohibits unfair discrimination pursuant to section 5(3)(a). By prohibiting discrimination in the workplace, this section gives form and content to Article 27(4) of the Constitution. The section states:

“No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.”

One notable aspect of the above provision is that it protects applicants for employment against unfair discrimination. This clearly includes job applicants who may have been involved in conflicts with the law, such as former convicts. The ELRC has not had the opportunity to hear and determine a case against an employer that insists on a clean criminal record before hiring. But the court in *PMK v Inspector General of Police*⁴⁵ observed that it would be unconstitutional to keep a lifelong record of the offences of children. The court affirmed:

⁴⁰ See the Preamble to the Employment Act and for example, the Equal Remuneration Convention 1951 (C100) and the Discrimination (Employment and Occupation) Convention 1958 (C111). Article 1 of the Convention concerning discrimination in respect of employment and occupation (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.

⁴¹ S 5(1)(a) and (b); s 5(2) and (7) of the Employment Act.

⁴² [2013] KEELRC 86 (KLR).

⁴³ [2015] KEELRC 699 (KLR).

⁴⁴ [2016] KEELRC 977 (KLR).

⁴⁵ [2019] KEHC 486 eKLR. See also *Peter Ngari Kagume v Attorney General* [2009] KEHC 4179 (KLR).

“[a] decision by which juvenile offenders are treated as an incorrigible mass cannot be supported. It flies in the face of the law and the reality. It fails to appreciate the fragility and immaturity of juvenile offenders and fails to take into account the best interests of a child.⁴⁶ In a nutshell, [such decision] is patently unconstitutional”.⁴⁷

Even though the court recognised the issue of juvenile offences blighting a life, it fell short of clarifying what could be done constitutionally.

While section 5(3)(a) of the Employment Act seeks to protect applicants for employment, its scope remains inadequate. The provision is clear that the:

“employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the [listed] grounds specified in [section 5(3)(a)]”.⁴⁸

However, it is unclear what would happen in cases where a job applicant asserts a claim of discrimination based on a ground that is not explicitly listed under section 5(3)(a) of the Act, but is comparable to any one or more grounds listed therein. One example is discrimination based on the mandatory requirement that job applicants submit a CGC before being considered for employment. In other words, what happens if a job applicant claims discrimination based on a ground that is not listed (for example, a criminal record), but such a ground is arbitrary and could potentially harm their fundamental human dignity or put them at a disadvantage compared to other job applicants or even make them less competitive in the job market?

4 CIRCUMSTANCES UNDER WHICH A CRIMINAL RECORD COULD BE DEEMED RELEVANT TO EMPLOYMENT

Although the concept of non-discrimination seeks to provide equal and fair employment opportunities for those with criminal histories, it does not preclude some differentiation between those who have and those who do not have a criminal record.⁴⁹ In order to assess whether it would be proper to exclude persons with a past criminal history from certain employment sectors, it is necessary to identify the “inherent requirements” of the job at hand. It is also important to thoroughly determine whether or not an individual’s criminal record will impede their ability to satisfactorily fulfil those requirements. In Kenyan employment law, the doctrine of an “inherent requirement of a job” is still underdeveloped. As a result, employers lack adequate judicial guidelines on how to determine what constitutes an “inherent requirement of a job” and evaluate whether or not a candidate meets those requirements for the purposes of filling a position. Accordingly,

⁴⁶ Apel and Sweeten “The Impact of Incarceration on Employment During the Transition to Adulthood” 2010 *Social Problems* 448–479.

⁴⁷ *PMK v Inspector General of Police supra* par 45.

⁴⁸ S 5(7) of the Employment Act.

⁴⁹ English “Conflicting Approaches to Addressing Ex-Offender Unemployment: The Work Opportunity Tax Credit and Ban the Box” 2018 *Ind LJ* 513.

Kenya can draw significant lessons from international law, South African jurisprudence and case law in this area of employment and labour law.

4 1 Determining what constitutes an “inherent requirement” of a job in South Africa

Owing to the unique nature of each job and an individual’s criminal record, there is no definitive guideline for determining the inherent requirements of a particular job. Some categories of jobs demand an exceptionally high degree of integrity from employees. Therefore, even the slightest conviction might result in a candidate being unable to satisfy the inherent requirements of the position. In *TFD Network Africa (Pty) Ltd v Faris*,⁵⁰ the Labour Appeal Court, quoting from the decision in *Department of Correctional Services v Police and Prisons Civil Rights Union*⁵¹ ascribed the following meaning to the term “inherent requirement of the job”:

“An inherent requirement of a job has been interpreted to mean ‘a permanent attribute or quality forming ... an ... essential element ... and an indispensable attribute which must relate in an inescapable way to the performing of a job.’”⁵²

The court went on to state that the test for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality inquiry.⁵³ Considering the exceptional nature of the defence, the requirement must be strictly construed. The court stated that a mere legitimate commercial rationale would not be enough. In *Connor v LexisNexis (Pty) Ltd*⁵⁴ the court held that the requirement must be rationally connected to the performance of the job. This means that the requirement should be adopted in a genuine and good faith belief that it is necessary and required for the fulfilment of a valid work-related purpose and must be reasonably essential for achieving or accomplishing that purpose. Further, in *Damons v City of Cape Town*,⁵⁵ the Constitutional Court stated:

“The [inherent] requirement must be genuine. Once a requirement is determined to be inherent, then as a matter of law, it is not unfair discrimination for an employer to insist on employees meeting the requirement”.

Besides the notable case law development of the notion of “inherent requirement of the job”, South Africa has established a regulatory framework that prohibits employers from requiring job applicants to submit their criminal history before being considered for employment. For instance, the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (Code of Good Practice on the Integration of Employment Equity)⁵⁶ states that: “an employer should only conduct

⁵⁰ (2019) 40 ILJ 326 (LAC) par 36.

⁵¹ (2013) 34 ILJ 1375 (SCA).

⁵² *Department of Correctional Services v POPCRU supra* par 23.

⁵³ *TFD Network Africa (Pty) Ltd v Faris supra* par 37 and 38.

⁵⁴ [2024] ZALCPE 11.

⁵⁵ (2022) 43 ILJ 1549 par 67.

⁵⁶ GN 1358 in GG 27866 of 2005-08-04.

integrity checks, such as ... investigating whether the applicant has a criminal record, if this is relevant to the requirements of the job.”⁵⁷ The Code further states that: “an employer may not collect personal data regarding an employee’s ... criminal convictions, except in exceptional circumstances where such information may be directly relevant to an employment decision.”⁵⁸

In light of the provisions of the Code, excluding an applicant from employment based on a criminal history would constitute unfair discrimination in circumstances where that criminal history is irrelevant to the job requirements. Such an exclusion would be arbitrary because the decision would be made without rational justification. However, the Labour Appeal Court confirmed in *Naidoo v Parliament of the Republic of the Republic of South Africa*⁵⁹ that unfair discrimination based on an arbitrary ground requires more than logical arbitrariness. Referring to the seminal decision of *Harksen v Lane NO (Harksen)*,⁶⁰ the Labour Appeal Court held that a claim for unfair discrimination on an arbitrary ground under the Employment Equity Act can only be sustained if the discrimination is based on attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a manner that is comparably as serious as discrimination on a listed ground, such as race, gender and culture.⁶¹

5 HARKSEN V LANE NO

Harksen is an important decision of the Constitutional Court of South Africa in which the court laid down the foundational test for determining cases of discrimination. Noteworthy, the Kenyan ELRC has on several occasions relied upon the principles laid down in *Harksen*.⁶² The court adopted a two-stage inquiry when challenging the fairness or unfairness of a practice, such as the one in question, that is, employers demanding that job applicants submit a CGC. The first inquiry is to determine whether the policy or practice in question differentiates between people.⁶³ If the practice does differentiate, the next inquiry is to determine whether the differentiation amounts to discrimination on one or more of the listed grounds or an unlisted or arbitrary

⁵⁷ Par 7.3.32 of the Code of Good Practice on the Integration of Employment Equity.

⁵⁸ Par 17.3.6 of the Code of Good Practice on the Integration of Employment Equity.

⁵⁹ (2020) 41 ILJ 1931 (LAC).

⁶⁰ (1998) 1 SA 300 (CC).

⁶¹ *Harksen v Lane NO supra* par 16.

⁶² Some of the judgments include *Nubian Rights Forum v Attorney General; Child Welfare Society* [2020] KEHC 8772 (KLR); *BM v Attorney General* [2022] KEHC 13920 (KLR); *Free Kenya Initiative v Independent Electoral & Boundaries Commission; Kenya National Commission on Human Rights* [2022] KEHC 10217 (KLR) and *EG v Attorney General; DKM; Katiba Institute* (2019) (KLR) par 5.

⁶³ Important is to distinguish between differentiation in the pejorative on the one hand which means a differentiation made based on a ground that is hurtful, bad, arbitrary, unfair, or objectionable and in the non-pejorative sense which means differentiation made on a ground that is fair, justifiable, reasonable, or non-objectionable.

ground.⁶⁴ In *Enver v Barloworld Equipment South Africa, A Division of Barloworld South Africa (Pty) Ltd*⁶⁵ and *Tshazibane v Montego Pet Nutrition*⁶⁶ the Labour Court held:

“where reliance is placed on an arbitrary ground a complainant in an unfair discrimination claim is required to establish that [they have] been the object of unequal treatment based on attributes and characteristics [they] either possess or with which [they are] associated and which have the potential to sully or diminish [their] intrinsic humanity and that of others in [their] situation. It is the impact on the complainant which is decisive”.

The decision in *Harksen* was further emphasised in *Mbana v Shepstone & Wylie*⁶⁷ and *Tshwane University of Technology v Maraba*,⁶⁸ where the court held that if discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair. However, if the ground is unlisted, then whether or not it amounts to discrimination would depend, objectively,⁶⁹ on whether the ground is based on attributes and characteristics that, when manipulated, have the potential to impair the inherent fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.⁷⁰ And unlike discrimination based on listed grounds, there is no presumption of unfairness.⁷¹ The court has highlighted that the intention to discriminate is irrelevant.⁷² The impact of discriminatory practices is decisive.⁷³ the Constitutional Court further elaborated that the next step after establishing discrimination is to determine whether it is fair or unfair.⁷⁴ Where the discrimination is found to be unfair, a determination must be made to determine whether it can be justified.⁷⁵ In

⁶⁴ *Harksen v Lane NO supra* par 54. See also Kruger “Equality and Unfair Discrimination: Refining the *Harksen* Test” 2011 128(3) SALJ 479.

⁶⁵ (2024) 45 ILJ 1554 (LAC) par 31.

⁶⁶ (2022) 43 ILJ 2610 (LC).

⁶⁷ (2015) 36 ILJ 1805 (CC) par 26.

⁶⁸ *Tshwane University of Technology v Maraba* [2021] LC 56.

⁶⁹ *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC) 278.

⁷⁰ In *Enver v Barloworld Equipment South Africa supra* par 31 and *Tshazibane v Montego Pet Nutrition supra* par 5 the Labour Court held that “where reliance is placed on an arbitrary ground a complainant in an unfair discrimination claim is required to establish that [they have] been the object of unequal treatment based on attributes and characteristics [they] either possess or with which [they are] associated and which have the potential to sully or diminish [their] intrinsic humanity and that of others in [their] situation. It is the impact on the complainant which is decisive”. See also *IMATU obo Diaz v City of Cape Town* [2024] ZALCCT 38 (30 August 2024). An analogous ground has been defined as one which is “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparably serious manner”. See also Van Der Walt *Labour Law in Context* (2012) 67.

⁷¹ Van Der Walt *Labour Law in Context* 67.

⁷² Van Der Walt *Labour Law in Context* 73. See also *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 3 BLLR 311 (LC) par 19.

⁷³ *Association of Teachers v MEC* (1995) 16 ILJ 1048 (IC) 1089–1090.

⁷⁴ De Visser *Local Government Law Bulletin* (1999) 1–5. In the *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) par 43, the court held that “to determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.” See also that the unfairness inquiry is concerned with the impact of the impugned measures on the complainants.

⁷⁵ *Harksen v Lane NO and Others* [1997] ZACC 12 par 43.

other words, whether the differentiation bears a rational connection to a legitimate governmental purpose. Importantly, the court noted that even if a rational connection exists, it could still constitute discrimination.

6 WHY EMPLOYERS' POLICY AND PRACTICE OF DEMANDING EX-CONVICT JOB APPLICANTS TO SUBMIT CGCs AMOUNTS TO UNFAIR DISCRIMINATION

Considering the principles laid down in *Harksen*, this article notes that the practice of employers demanding ex-convict job applicants submit CGCs amounts to unfair discrimination. As per the test in *Harksen*, the practice treats two job applicants differently. Those job applicants with clean CGCs and those without, such as ex-convicts. The consequence is that the employer's practice singles out only job applicants who have been previously convicted and subjects them to differential treatment on grounds linked to their certificate of conduct, while disregarding the fact that they have undergone rehabilitation through successfully completing a prison term and reintegration into the labour market.

Such conduct from employers' amounts to a differentiation on unlisted grounds (criminal history or record). As the court stated in *Harksen*, if the ground is unlisted, then whether or not it amounts to discrimination would depend, objectively,⁷⁶ on whether the ground is based on attributes and characteristics which have the potential, when manipulated, to impair the inherent fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.⁷⁷ A job applicant who holds a certificate with information that portrays their negative past character would certainly suffer harm to their dignity and face prejudice, and therefore fail to receive equal employment opportunities. This has a more negative impact on the rest of the job applicant's life, particularly for ex-convict job applicants. In fact, in practice, employers typically disqualify job applicants with criminal records without considering their academic or other qualifications.⁷⁸ This article argues that denying ex-convict job seekers employment owing to their criminal record amounts to not only unfair discrimination but also double jeopardy, as many would have already faced imprisonment as punishment for their crimes.

⁷⁶ *City Council of Pretoria v Walker* supra 278. Similarly, the ground for differentiation is unlisted and therefore, the question is whether the differentiation is rationally linked to a legitimate government purpose. This article argues that there is no such link because the government does not impose a requirement that employers should insist on CGCs prior to employment.

⁷⁷ *IMATU v City of Cape Town* supra. An analogous ground has been defined as one which is "based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparably serious manner". See also Van Der Walt *Labour Law in Context* 67.

⁷⁸ LeBel "Perceptions of and Responses to Stigma" 2008 2 *Sociology Compass* 409–432; Pager *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (2007) 23–44.

So, while an employer may have the discretion not to offer employment to an individual with a criminal record, it is important to exercise this discretion objectively on a case-by-case basis, considering the inherent requirements of the job. This would serve to prevent any form of discrimination in the workplace. As such, a delicate balancing act is required to address the problem of discrimination linked to criminal records because, having served and completed their jail term and made good on their social obligations, ex-offenders no longer become a burden on society.⁷⁹ Like everyone else in society, they become eligible to seek employment.

7 THE NEED TO PROTECT JOB APPLICANTS AGAINST DISCRIMINATION

There is a significant need for Kenya to develop a legislative framework to support individuals who leave penal institutions after completing their sentences. While the original intent of a CGC remains to ensure that citizens abide by law and order, the same has the potential to achieve the exact opposite, given that many people are issued with certificates reflecting their past offences, whether petty or for which they served prison sentences, and continue to face inequality and unfair discrimination when seeking employment.⁸⁰ Similarly, hindering employment through civil limitations, such as the requirement of a CGC, hinders the reintegration process of ex-convicts into the workforce and contributes to the unemployment rate in Kenya, which currently stands at 5.6 per cent.⁸¹ A review of the primary criminal statutes in Kenya, namely the Penal Code,⁸² the Criminal Procedure Code,⁸³ and the National Police Service Act,⁸⁴ reveals that there is no provision in Kenya to expunge criminal records after serving a jail term. Therefore, in the interest of justice, the legislature must develop a legal framework and guidelines outlining the process for expunging ex-convicts' criminal records from the DCI file. This will prevent the continued discrimination and violation of ex-convicts' rights to dignity. Kenya could follow the examples set by other jurisdictions, such as the UK and the US

⁷⁹ LeBel "Invisible Stripes? Formerly Incarcerated Persons' Perceptions of Stigma" 2012 33(2) *Deviant Behavior* 89–107. See also Haimson "Redemption Performance in Exoneration and Parole: Two Pathways Home" 2022 45(1) *Qualitative Sociology* 241–269.

⁸⁰ LeBel "If One Doesn't Get You Another One Will: Formerly Incarcerated Persons' Perceptions of Discrimination" 2012 92(1) *The Prison Journal* 63–87. See also Augustine "Working Around the Law: Navigating Legal Barriers to Employment During Reentry" 2012 44(3) *Law & Social Inquiry* 726–751.

⁸¹ O'Neill "Unemployment Rate in Kenya 2023" (22 April 2024) <https://www.statista.com/statistics/808608/unemployment-rate-in-kenya/> (accessed 2024-04-14) 16. See also Lotter *The Integration of Ex-Offenders in South Africa Based on the Contemporary Chinese Model: An Interdisciplinary Study* (doctoral dissertation, University of the Free State) 2012 39. See also Muthee *Challenges Facing Re-Entry and Reintegration of Women Ex-Offenders into the Community in Nyeri County, Kenya* (doctoral dissertation, Moi University) 2020 3–17. See also Bloom *Employment-Focused Programs for Ex-prisoners: What Have We Learned, What Are We Learning, and Where Should We Go from Here* Paper Presented at the National Poverty Center, Gerald R. Ford School of Public Policy, University of Michigan, Ann Arbor.

⁸² The Penal Code Cap 63.

⁸³ Criminal Procedure Code Cap 75.

⁸⁴ 11 of 2011.

state of Indiana, which expunge misconduct records from an offender's record.⁸⁵ Worth noting is that the spirit of this Constitution is that a person who has finished their prison term, upon satisfaction by officers who supervise the term, must come out with a CGC indicating that the person has been adequately rehabilitated and that they are fit and clean to join society and be productive like everybody else (meaning no conviction).⁸⁶

However, it would be naïve to assume that convictions should always be ignored, forgotten and left in the past. Employers frequently have valid justifications for imposing these restrictions.⁸⁷ First, employers could have adequate justifications for being concerned about their legal liability. Furthermore, some criminal records are so directly relevant to a specific job or position that it would be unwise for prospective employers to disregard them.⁸⁸ The Society for Human Resource Management's research revealed several reasons why employers hesitate to hire individuals with criminal records.⁸⁹ Some explanations for their nervousness include: the fear of being held personally responsible and accountable for any harm caused to fellow employees or customers, the risk of financial loss due to theft, and the consciousness that a criminal record usually suggests a lack of skills or trustworthiness in the person in question.⁹⁰ Despite the absence of studies suggesting a direct correlation between a person's criminal past and poor work performance, such concerns nonetheless persist.⁹¹ While it is usually true that individuals with a criminal history are more likely to reoffend in the future, such generalisations ignore important aspects such as the influence of unemployment in fostering recidivism and lessening or diminishing risk with time.⁹² Research indicates that individuals with past criminal records have an equal likelihood of engaging in future criminal activity compared to those without any previous records.⁹³ In fact, in Kenya, freed criminals have

⁸⁵ Nally, Lockwood and Knutson "Post-Release Recidivism and Employment Among Different Types of Released Offenders: A 5-Year Follow-Up Study in the United States" 2014 9(1) *International Journal of Criminal Justice Sciences* 9. See also Raphael "Improving Employment Prospects for Former Prison Inmates: Challenges and Policy" 2010 *NBER Working Paper No 15874*.

⁸⁶ Ghai "Convictions, Discrimination and Jobs" 2021 *e Paper* 1–12.

⁸⁷ Be that as it may, considering that the majority of criminal acts do not happen in the workplace, risk factors are reduced even more. Given the impact of unemployment on the likelihood of recidivism, such discrimination creates serious implications not only for individuals with criminal records but also for the community at large.

⁸⁸ Deborah, Archer and Williams "Making America the Land of Second Chances: Restoring Socioeconomic Rights for Ex-Offenders" 2006 30 *NYU Rev L & Soc Change* 527–536.

⁸⁹ Soc'y For Human Res Mgt "Background Checking: Conducting Criminal Background Checks" (2010) <http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx> (accessed 2024-05-23) 7.

⁹⁰ Holzer 2007 *Inst for the Study of Labor (IZA) Discussion Paper No 3118*.

⁹¹ Hickox and Mark "Roehling, Negative Credentials: Fair and Effective Consideration of Criminal Records" 2013 50 *AM Bus LJ* 201 208.

⁹² Jocelyn "Rethinking 'Rational Discrimination' Against Ex-Offenders" 2006 13 *GEO J on Poverty L & Pol'y* 283 284.

⁹³ United Nations Office on Drugs and Crime (UNODC) *Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders* (2012) 1–138. Besin-Mengla "Reintegration Difficulties of Ex-Convicts: Reasons for Recidivism of Ex-Convicts in Cameroon" 2020 3(4) *African Journal of Social Sciences and Humanities Research* 10–24. See also Berghuis "Re-Entry Programs for Adult Male Offender Recidivism and

a 75 per cent chance of reoffending and a 50 per cent chance of re-entering prison within two years of their release.⁹⁴ This alarming figure is further affirmed by the Kenya National Bureau of Statistics report, which reveals that of the 77 000 convicted prisoners in Kenya's jails, 22 000 or so had previous convictions, with the major cause of recidivism attributed to inability to get a job and general rejection by society.⁹⁵

8 DISPUTE RESOLUTION AND REMEDIES AVAILABLE TO EX-CONVICTS FOR UNFAIR DISCRIMINATION

As has been established above, the policy and practice of requiring ex-convict job applicants to submit CGCs amounts to unfair discrimination. If such discrimination occurs in the workplace, ex-convicts have specific remedies at their disposal. The Employment Act expressly states that an employer who unfairly discriminates against an employee or job applicant⁹⁶ commits an offence.⁹⁷ With no independent dispute body such as the Commission for Conciliation, Mediation and Arbitration (CCMA) of South Africa in existence, the ex-convict job applicant is required to lodge a complaint with the Cabinet Secretary for Labour or a labour officer stationed at the Ministry of Labour.⁹⁸ The LRA makes mention of the CMC,⁹⁹ which, according to the intention of the legislature, appears to be an institution equivalent to the CCMA. However, despite its express mention in the LRA, this institution has never been created or established, and it has been nearly two decades since it was incorporated into the LRA. Notably, it is becoming increasingly common for statutory dispute resolution services to operate independently of the state, even though the state largely finances these services through its departments of labour.¹⁰⁰ This means all employment-related disputes are referred to and dealt with by an independent statutory institution of the first instance.

Be that as it may, once the aggrieved ex-convict refers a dispute to the cabinet secretary (for collective labour disputes) or labour officer (for individual disputes), they are mandated to investigate and address

Reintegration: A Systematic Review and Meta-Analysis" 2018 *International Journal of Offender Therapy and Comparative Criminology* 4655–4676 and *Colon Ecological Needs and Challenges That Impact Ex-Offenders' Reintegration and Recidivism* (doctoral Dissertation, University of Arizona) 2022; Simonson "Rethinking 'Rational Discrimination' Against Ex-Offenders" 2006 13(2) *Geo J on Poverty L & Pol'y* 283 284.

⁹⁴ Omosa and Lusire "The Role of Prison Experience on Recidivism in Kakamega County, Kenya" 2017 7(5) *Journal of Public Policy and Administration Research* 27.

⁹⁵ Praxides "I Choose Jail: Why Lamu Prison Is Teeming with Repeat Offenders" (23 May 2023) *The Star* <https://www.the-star.co.ke/news/big-read/2023-05-25-i-choose-jail-why-lamu-prison-is-teeming-with-repeat-offenders/> (accessed 2024-03-02). See also Onyango Omboto, Wairire and Chepkong'a "The Profile of Recidivists in Kenya: The Case of Prisoners at Nairobi County Prison Institutions" 2020 33(3) *South African Journal of Criminal Justice* 45.

⁹⁶ S 5(8)(a) of the Employment Act.

⁹⁷ S 5(6) of the Employment Act.

⁹⁸ S 5(1) of the Employment Act.

⁹⁹ S 66(1)(C) of the LRA.

¹⁰⁰ Steadman in *Handbook on Alternative Labour Dispute Resolution* (2010) 52.

allegations of discrimination. Thereafter, the Cabinet Secretary may appoint a conciliator or a conciliation committee to attempt to resolve the dispute.¹⁰¹ Importantly, the conciliators appointed to help parties resolve their disputes have statutorily prescribed duties and powers under the LRA.¹⁰² These include the powers to:

- mediate the dispute, or
- conduct a fact-finding exercise, or
- making recommendations or proposals to the parties for settling the dispute.¹⁰³ Perhaps this may take the form of an advisory arbitration award.

The Employment Act expressly states that no advocate shall represent a party in proceedings before a labour officer. The parties may only be assisted or represented by an official of a trade union or an official of an employer's organisation, notwithstanding the fact that the official is an advocate.¹⁰⁴

If the unfair discrimination dispute is successfully resolved at conciliation, the conciliator is required to record in writing the terms of the settlement agreement.¹⁰⁵ The agreement must be signed by both parties as well as the conciliator. Thereafter, a signed copy of the agreement must be filed with the Cabinet Secretary.¹⁰⁶

However, if conciliation is unsuccessful or a 30-day period has elapsed since the appointment of the conciliator, or any longer period agreed to by the parties, the conciliator must issue a certificate stating that the issue in dispute remains unresolved.¹⁰⁷ The certificate of non-resolution is a prima facie proof that an attempt has been made to resolve the dispute through conciliation, but the dispute remains unresolved.¹⁰⁸ In practice, the acquisition of the certificate of non-resolution triggers the subsequent process of labour dispute resolution at the ELRC in accordance with the rules of this court.¹⁰⁹

The ELRC of Kenya has the power to make various orders as remedies for unfair discrimination arising from the workplace, especially where an individual successfully demonstrates a violation of their statutory rights. Primarily, if discrimination led to an unfair dismissal, especially in

¹⁰¹ S 66(2) of the LRA.

¹⁰² S 67(1) of 2007 LRA.

¹⁰³ S 67(2)(a) and (b) of the LRA.

¹⁰⁴ S 48 of the 2007 Employment Act.

¹⁰⁵ S 68(1)(a) and (b) of the LRA.

¹⁰⁶ S 68(2) of the LRA.

¹⁰⁷ S 69(a) and (b) of the LRA.

¹⁰⁸ S 14(3) of the Employment and Labour Relations Court Act 18 of 2014. The certificate issued by a conciliator, accompanied by the record or evidence of the minutes of the conciliation meetings giving reasons for the decisions as arrived at by the conciliator.

¹⁰⁹ S 73(1) of the LRA. Interesting to note is that prior to the establishment of the industrial court, labour disputes that remained unresolved after conciliation attempt would be referred to the District Magistrate Courts, which heard all manner of cases in addition to labour disputes.

employment cases, the ELRC can order reinstatement to the former position. The term “reinstatement”¹¹⁰ is not defined in the LRA or the Employment Act. However, a legal analogy may be drawn from *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*, a decision of the South African Constitutional Court, which explained reinstatement as restoring “the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions.”¹¹¹ The purpose of reinstatement is to place an employee in the position they would have been but for the unfair discrimination that resulted in dismissal. This means that the employer is ordered to allow the employee to retrospectively return to work as if the dismissal had never occurred in the first place.

Besides reinstatement, the court may order re-engagement in a similar role. Like the position under the South African LRA, in terms of the Employment Act, a labour officer or conciliator or the ELRC,¹¹² in deciding whether to reinstate or re-engage the employee, is obliged to take into account a host of factors, including any or all of the following:

- “(a) the wishes of the employee [ex-convict];
- (b) the circumstances in which the termination took place ...; and
- (c) the practicability of recommending reinstatement or re-engagement;
- (d) ...
- (e) ...
- (f) the reasonable expectation of the employee [ex-convict];
- (g) the opportunities available to the employee [ex-convict] for securing comparable or suitable employment with another employer;
- (h) ...
- (i) ...
- (j) any expenses reasonably incurred by the employee [ex-convict] as a consequence of the termination;
- (k) any conduct of the employee [ex-convict] which to any extent caused or contributed to the termination;
- (l) any failure by the employee [ex-convict] to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including *ex gratia* payment, in respect of [the] termination of employment paid by the employer and received by the employee.”¹¹³

Finally, under the 2007 Employment Act, if, in the opinion of a labour officer, a summary dismissal or termination of an employee’s contract is found to be

¹¹⁰ S 49(3) of the Employment Act.

¹¹¹ In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (1) SA 390 (CC) 36. See also Grogan *Employment Law* (2015) 11. It has also been understood as meaning to revive the original employment contract or to restore the status quo ante the dismissal. See for instance *Mediterranean Textile Mills v SA Textile Workers Union* (1998) 6 BLLR 549 (A) and *Nel v Oudtshoorn Municipality* (2013) 34 ILJ 1737 (SCA). See also Grogan *Dismissal* 4ed (2022) 615 616. Grogan describes reinstatement as the remedy that is preferred under the 1995 LRA and its predecessor, the 1956 LRA. He argues that an employer is required to provide compelling reasons why reinstatement should not be ordered in instances where a substantively unfair dismissal occurred.

¹¹² S 50 of the Employment Act requires that in determining a complaint or suit under the Employment Act, involving wrongful dismissal or unfair termination of the employment of an employee, the Employment and Labour Relations Court shall be guided by the provisions of s 49.

¹¹³ S 49(4) of the Employment Act.

unfair, the labour officer may make an order requiring the employer to compensate the employee or prospective employee.¹¹⁴

9 CONCLUSION

In Kenya, individuals who have previously served time in prison may find it difficult to secure employment. Upon their release from prison, individuals often endure humiliation and experience mistreatment at the hands of society. To lower recidivism rates, it is imperative for society, particularly Kenyan employers, to adopt an integrated strategy and actively support the reformation of ex-offenders by accepting and integrating them back into the world of work.¹¹⁵ This is partly owing to the fact that the majority of prisoners participate in rehabilitation programs. These rehabilitation initiatives aim to instil and equip them with fundamental skills, enabling them to achieve economic independence and positively contribute to society upon their release from incarceration.¹¹⁶ This provides them with practical experience and improved abilities that are advantageous for prospective employment.¹¹⁷ With this respect, the correctional facility is viewed not just as a confined setup intended to confine criminals, but also as an institution that facilitates their rehabilitation and equips them with the skills necessary to secure employment.

Given the foregoing, legislators and courts should make every effort to outlaw employment discrimination by intensifying protections against discrimination on a wide range of grounds. As such, this article recommends an amendment to section 5 of the Employment Act by replacing paragraph (a) in subsection (3) with the following more comprehensive provision to protect job applicants against unfair discrimination:

“No employer [may] [unfairly] discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee ‘(a) on [one or more grounds] [including] race, sex, [gender], pregnancy, marital status, health status, ethnic or social origin, colour, [sexual orientation], age, disability, religion, conscience, belief, culture, dress, language or birth [or any other arbitrary ground].”

The above provision, if adopted, would be a step forward towards closing the gap and enhancing the scope of protection against discrimination in the workplace, particularly indirect forms of discrimination such as those based on a criminal record. Consequently, any employer’s policy or practice which

¹¹⁴ In terms of s 49(1) of the 2007 Employment Act any amount of remedial payment made by the employer is subject to statutory deductions.

¹¹⁵ Moak, Walker, Earwood and Towery “Using Reentry Simulations to Promote Changes in Attitude Toward Offenders: Experiential Learning to Promote Successful Reentry” 2020 45(1) *American Journal of Criminal Justice* 126–144. See also Moyo “Using Restorative Justice Approaches with Ex-Prisoners and Their Families: An Action Research Project in Zimbabwe” 2017 *Building Peace Via Action Research: African Case Studies* 207–222.

¹¹⁶ Abotchie *Treatment of Criminals and Crime Prevention in Ghana* (2008) 24–45. See also Hagan *The Impact of the Rehabilitation Programmes of the Nsawam Prisons on Its Inmates* (doctoral dissertation, University of Ghana) 2013.

¹¹⁷ Collins, Coffey and Cowe “Stress, Support and Well-Being as Perceived by Probation Trainees” 2009 56(3) *Probation Journal* 238–256.

unfairly discriminates against a job applicant on any of the listed grounds or “any other arbitrary ground”, such as the one under scrutiny, will not be permitted. Consequently, the demand by Kenyan employers that job applicants produce a CGC, irrespective of the nature of the job, before employment, would be deemed unfair discrimination against job applicants who are ex-convicts. The Kenyan legislature can draw valuable lessons from South African labour law, where restrictions on prospective employers’ refusal to employ due to past convictions vary significantly. The practice assumes that a criminal conviction unrelated to the job’s inherent requirements cannot be a reason to reject an applicant. Kenya ought to follow suit to ensure the promotion of equality and non-discriminatory practices during the recruitment process.

Importantly, this article recommends that pursuant to section 5(1)(a) and (b) and section 5(2) and (7) of the Employment Act, the Cabinet Secretary and labour officers must strictly exercise their respective duties to enforce the promotion of equality of opportunity in employment to eradicate the questioned discriminatory practice in the Kenyan workplace.

On the whole, whereas employers may wish to establish whether a prospective employee has any previous criminal convictions, the existence of a conviction, if discovered, should not automatically mean that the person is unsuitable for employment. Sometimes, a conviction may not have any connection to a specific applicant’s suitability for the position. Therefore, if an employer rejects a job candidate simply because they have a previous conviction, it could be considered unfair discrimination. In certain categories of employment, employers may legitimately consider a criminal record as a factor in their hiring decisions and, if deemed appropriate, decline to hire an applicant based on their criminal record. However, the refusal by the employer to consider a job applicant on the sole basis of criminal history constitutes unfair discrimination based on an “arbitrary ground”, particularly where criminal history is not relevant to the inherent requirements of the job.