



# SANTA CLAUS

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# 11

## *Santa Claus, the Perennial Ageist: A Human Rights Perspective on Widespread and Systematic Age- Based Discriminatory Practices and Policies by Santa and his Elves*

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### *1. Introduction*

The vivacious melody of "Jingle Bells" in the background and the joyous laughter of children in the family room gathered around the tree-shaped alter of gifts. In due course, each child will be enveloped with piles of gifts from Santa Claus, from remote control cars to the latest trend in Barbie dolls, the circumference of a local toy shop crammed onto the living room floor. When the time finally comes, each child rips ferociously through the Christmas gift-wrapping, carefully chosen by Santa's Elves, to divulge yet another visible and tangible representation of the highly unlikely supposition that each of them was well-behaved boys and girls in the bygone year. All the while the adults watch in shock and awe while silently pondering a range of perplexing questions: Why did I have to grow up? Why does Santa only bring gifts for the children, was I not "good" this year? What did I do wrong? And finally, why am I being marginalised and excluded from this colourful over-indulgence? After all, as Anne Frank wrote, "No one has ever become poor by giving"—so there's no reason why Santa should not include adults in this festive giving. Therefore, having contemplated

these enigmatic conundrums throughout many Christmases', the simple truth behind this widespread and insidious practice is a matter of human indignity, not necessarily the inadequacy of adult behaviour. In other words, instead of blaming ourselves and regretting the slow process of deterioration with age, we should recognise the true culprit, Santa Claus, the perennial ageist. In this article, a human rights perspective on the exclusionary and controlling generosity of gift-giving by Santa and his Elves exposes the indignity of adult marginalisation, exclusion and prejudice as a result of institutionalised age-based discriminatory policies and practices.

## 2. *The applicable legal standards regarding equality and non-discrimination based on age*

Equality is one of the 'architectonic principles' of human rights and aligns with the concept of normative universalism (Bielefeldt *et al*, 2016), in terms of which all members of the human family are endowed with inherent dignity, which entitles them to equal treatment and enjoyment of rights (*ibid*). The principle of equality thus filters through all human rights and freedoms and can be said to be applicable in all spheres of government, all circles of society, and in the everyday life of all persons. Freedom from discrimination requires equal respect and equal concern for everyone's rights and freedoms. However, non-discrimination is not upheld merely with 'identical treatment'. There may be instances where differential treatment is necessary to attenuate or suppress conditions that perpetuate discrimination (Bielefeldt, 2013). Therefore, non-discrimination "primarily requires systematic endeavours to eliminate all forms of discrimination" (Bielefeldt *et al*, 2016).

As a foundational provision of a sovereign, democratic South Africa, the attainment of human dignity and the achievement of equality are listed amongst the first values in the Constitution (section 1 of the Constitution of the Republic of South Africa, 1996). In furtherance of equality, section 9 guarantees the full and equal enjoyment of all rights and freedoms, and prohibits horizontal unfair discrimination, directly

or indirectly, against anyone on one or more of the listed grounds, which includes, *inter alia*, age. In addition, subsection 5 presumes that discrimination on the ground of age is unfair unless it is established that the discrimination is fair.

Section 9(4) of the Constitution provides that national legislation must be enacted to prevent or prohibit unfair discrimination. In giving effect to this constitutional obligation to the right to equality, the Employment Equity Act 55 of 1998 ('EEA'), the Labour Relations Act 66 of 1997 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), was enacted. The first two statutes deal specifically with discrimination in the context of employment, while the third deals with discrimination in the broader society. PEPUDA was enacted to fulfil three broad objectives, namely: the prohibition of unfair discrimination, to provide access to justice and effective remedies for the victims of unfair discrimination, and the promotion of substantive equality.

Based on these provisions, all individuals in South Africa are protected against age-based discrimination. There are various routes to challenge unfair discrimination based on age, including (Agediscrimination.info/South Africa - <http://www.agediscrimination.info/international-age-discrimination/south-africa>):

- Filing a complaint with the South African Human Rights Commission ('SAHRC');
- Referring a dispute to the Equality Court;
- Challenging unfair discrimination through the various employment law dispute resolution bodies, if relevant.

According to a report by the SAHRC for the 2015/2016 financial year, 3% of the complaints of unfair discrimination lodged were based on age. In the public service sector, 4% of the employment-related disputes referred to the Commission for Conciliation Mediation and Arbitration concerning allegations of unfair discrimination based on age (*ibid*).

International human rights instruments categorically insist upon equality and non-discrimination and are therefore expounded in a range of international human rights instruments (e.g. *Universal Declaration of Human Rights* (adopted in 1948), the *International Covenant on Civil and Political Rights* (ICCPR, 1966) with its two Optional Protocols and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966)).

### 3. *Age as a listed ground of discrimination*

'Age', implying a certain duration of existence, is a changing characteristic of humanity (Rishworth *et al*, 2003). Age has the effect that its burdens and benefits are shared across the entire population: everyone is at a point in their life subject to certain age restrictions, such as driving, marrying, voting, or drinking alcohol (Albertyn, 2002). However, while such restrictions are normatively justified as serving a legitimate purpose, viz. the protection of the minors themselves, such an argument is difficult to fathom in the context of aged-based exclusionary gifting. This will be considered in more detail later.

Aged-based discrimination or ageism (Butler 1969 and Butler 2011) is the stereotyping, prejudice, and discrimination against individuals or groups based on their age (World Health Organization - <https://www.who.int/ageing/ageism/en/>). It may take many forms, including prejudicial attitudes, discriminatory practices, or institutional policies that perpetuate stereotypical beliefs. Ageism is a widespread and insidious practise that is considered one of the most pervasive prejudices across human society, and which has harmful effects that may even result in the denial of basic human rights of people from certain age groups. Manifestations of ageism are frequently cited in workplace situations, where "younger adults may have difficulty finding jobs and receive lower pay due to their perceived lack of experience, while older adults may have problems achieving promotions, finding new work, and changing careers" (Duncan *et al*, 2000).

Differentiation and discrimination seem to be an inherent flaw in human nature. The origins, forms and contemporary manifestations of discrimination and related intolerance are complex and multifaceted. It can take various forms, ranging in severity and harm, including distinction, exclusion, restriction, hostility or differential treatment based on age identity. Eventually, whether as its purpose or as its effect, discrimination will result in the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

#### 4. *The enquiry into a violation of the right to equality in the present case*

Based on the decision of the Constitutional Court in *Harksen v Lane* NO 1998 (1) SA 300 (CC), the following stages of enquiry into the alleged violation of equality should be considered *in casu*:

- (a) Does the policies and practices of exclusionary gift-giving differentiate between people or categories of people? In the present case, this question must be answered affirmatively. Santa's policies and practices of exclusionary gift-giving differentiates between adults and children. In other words, the differentiation is based on one of the specified grounds, *viz.* age, and is therefore *prima facie* unfair unless the contrary is proved (Currie and De Waal, 2013).
- (b) Does the differentiation bear a rational connection to a legitimate purpose? This stage should be broken up into several subsections, (1) it is necessary to consider the purpose of the practice of exclusionary gift-giving, (2) whether that purpose is a legitimate one and, (3) if so, whether the differentiation does have a rational connection to that purpose.
  - (i) Tradition has it that Santa brings gifts to the homes of well-behaved children on the night of Christmas Eve or during the early morning hours of Christmas Day. Therefore, the main purpose of Santa's gift-giving has proverbial strings



attached, intended to ameliorate children's' behaviour through controlling generosity and emotional blackmail.

- (ii) If you ask any fair-minded parent, such a purpose seems undeniably reasonable and even necessary to control bored, overindulged children during the long Christmas school holidays.

Although the purpose of Santa's exclusionary gift-giving to children is a legitimate one, the differentiation does not seem to have a rational connection to that purpose. While it may be conceded that controlling generosity through gift-giving serves an important role in improving behaviour, there seems to be no rational basis why such a practice should exclude adults. In fact, some research has concluded that such an unspoken social contract to reward well-behaved adults, may reduce the crime rate by up to 85% and adult obesity by 72% (Layman's Institute for Adult Research, 2019). In addition, as children near the age of adulthood, they subconsciously realise the impending exclusion associated with adulthood, resulting in various psychological and emotional disorders. As a result, the same research concluded that gift-giving to reward well-behaved adolescents will seriously decrease tendencies of under-age drinking, premarital sex and pregnancies, and even improve parent-teen relationships.

- (c) Considering that the discrimination is based on a specified ground, unfairness is presumed. The presumption of unfairness as a result of discrimination based on a specified ground is not conclusive proof that the discrimination is in fact, unfair. Consequently, the discrimination must have an unfair impact, including the extent to which the rights of adults have been impaired and whether there has been an impairment of their fundamental dignity. Equality itself is derived from the inherent dignity or worth of the human person, implying that every person is inherently entitled to recognition and respect as holders of certain inalienable rights and freedoms (United Nations General

Assembly, 1966). It is clear that the age-based exclusionary gifting implies not only an impairment on the right to equal treatment but amounts to a prejudicial practice in terms of which adults experience certain economic harms and denials of access to certain patrimonial interests.

- (d) During the final stage of enquiry, a determination will have to be made as to whether the unfair discrimination outlined above, can be justified under the limitations clause (section 36 of the Constitution). However, considering that the constitutional value of equality is derived from the inherent dignity of the human person, and thus from the same normative axiomatic principles, unfair discrimination is nearly impossible to justify in terms of the related criteria used to adjudicate the legitimacy of a limitation of the right to equality in terms of section 36. As Currie and De Waal note: "It is, for instance, difficult to see how discrimination that has already been characterised as 'unfair' because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings can ever be acceptable in an open and democratic society based human dignity, freedom and equality" (Currie and De Waal, 2013)

## 5. *Conclusion*

Santa Claus is generally depicted as a portly, jolly, white-bearded man carrying a bag full of gifts for children. While no one would deny any child this joyful privilege of Christmas, there is no legal justification or rationality for the exclusion of adults from this practice. As such, exclusionary gifting to the recipient based solely on their youthful age, is an institutionalised policy of age-based discrimination. Santa's primary purpose, to bring gifts to the homes of well-behaved children, is clearly biased and subsequently prejudicial to adults. Adults are fully capable of committing to a gift-based incentive for "good" social and moral decorum. As such, Santa Claus must include all adults throughout the world on his list, categorising them according to their behaviour, and accordingly deliver presents, including toys and candy,



to all of the well-behaved men, women and children, and coal to all the misbehaving individuals, on the night of Christmas Eve.

An individual or identifiable group who alleges having been discriminated against based on age is entitled to institute proceedings in the Equality Court. It is thus recommended that a class action claim be brought in terms of section 38(c) of the Constitution, which provides that 'anyone acting as a member of, or in the interests of, a group or class of persons' has the right to approach a competent court to allege that a right in the Bill of Rights has been infringed or threatened. Based on the alleged violation of age-based discrimination outlined above, section 21(2) of PEPUDA provides for various remedies that may be combined to ensure effective relief, including declaratory orders, interim orders, declaring a settlement agreement an order of the court, or ordering the payment of damages. As a starting point, the court may be approached for an order to direct Santa and his Elves to make an unconditional apology to all adults that have suffered discrimination based on their age and for restraining the continuation of this unfair discriminatory practice. More compelling relief could also be considered, such as a prohibitory interdict restraining Santa and his helpers from distributing any gifts during the coming Christmas period.

In conclusion, recognizing the inherent dignity and equal and inalienable rights of all members of the human family requires an all-inclusive and non-discriminatory policy of Christmas gifting for all ages, which serves an important role in improving behaviour.

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