

Employment Law

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SOUTH AFRICA

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A remuneration dispute



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Discrimination v differentiation: A remuneration dispute

In 2003, the City of Johannesburg Metropolitan Municipality (Municipality) took a decision to make use of fixed-term contracts of employment for certain positions. In doing so, the Municipality invited permanent employees to convert their contracts of employment to fixed-term contracts, albeit on equal terms (converting employees). As an incentive, the converting employees were offered a salary increase of between 5% and 10%, as well as payment of an annual performance bonus.

In 2004, the decision to make use of the fixed-term contracts was challenged by two unions, the Independent Municipal Trade Union and the South African Municipal Workers' Union. This dispute eventually became settled in 2006 when a South African Local Government Association representative reached a settlement on behalf of all member municipalities, albeit without the requisite mandate to do so.

The settlement agreement reached between the parties was challenged and the parties ultimately reached a resolution where it was agreed that a collective settlement agreement would be concluded. In terms of this, it was agreed that the converting employees would revert to permanent employment contracts effective 1 October 2012, on the same terms as those recorded in their fixed-term contracts of employment, inclusive of the payment of a service bonus.

Additionally, it was further agreed that where the converting employees exceeded the salary band for their respective positions, they would be subjected to the "sunset clause" in the collective settlement agreement, which meant that they would not receive a salary increase until their remuneration fell within the salary band for that position when compared to a permanent employee.

The dispute before the court

At the hearing of this matter, the court was required to determine whether (i) the application of the "sunset clause"; and (ii) the alleged non-payment of service bonuses, both amounted to unfair discrimination as envisaged in section 6 of the Employment Equity Act 55 of 1998 (the EEA), on account of the converting employees not receiving service bonuses and wage increases from 2012 to 2022.

Applicants' case

In short, the high-water mark of the converting employees' case was that the Municipality's conduct in paying out service bonuses and annual salary increases to all permanent employees, save for the converting employees, amounted to discrimination on an analogous ground contemplated in section 6 of the EEA.

Respondents' case

In response to the case presented by the converting employees, the Municipality argued that (i) the converting employees retained their total remuneration packages, inclusive of their service bonuses, when reverting to

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Chambers Global 2024 Results

Employment Law

Chambers Global 2014–2024 ranked our
Employment Law practice in:

Band 2: Employment.

Aadil Patel ranked by
Chambers Global 2024 in

Band 1: Employment.

Fiona Leppan ranked by
Chambers Global 2018–2024 in

Band 2: Employment.

Imraan Mahomed ranked by
Chambers Global 2021–2024 in

Band 2: Employment.

Hugo Pienaar ranked by
Chambers Global 2014–2024 in

Band 2: Employment.



permanent contracts of employment; (ii) the “*sunset clause*” was necessitated by the fact that during the conversion process in 2003, the converting employees received up to a 10% increase in remuneration, thus exceeding the salary band for their respective positions; and (iii) the decision to not provide the converting employees with salary increases was not indefinite as this was to allow for a process of equalisation where, in time, the converting employees would eventually fall within their respective salary bands on account of increases being afforded to those employees who did not convert to fixed-term contracts but instead remained permanent employees and received a far lower remuneration package.

Analysis of the discrimination

In arriving at its decision, the court referred to the test for discrimination as set out in *Harksen v Lane N.O and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997). Additionally, it was noted that section 6(4) of the EEA does not impose a blanket prohibition on wage differentiation, but rather prohibits differentiation where it is directly or indirectly premised on one or more grounds listed in section 6(1) of the EEA.

To succeed with their claim, the converting employees were required to demonstrate more than mere differentiation. They were required to identify a ground of discrimination, and thereafter illustrate that this ground formed the foundation of the discrimination. In short, they were required to prove all three elements set out in section 11(2) of the EEA.

In applying the test set out in *Harksen*, the court found that (i) there was indeed differentiation between the converting employees and those who were permanently employed by the Municipality, insofar as the payment of annual increases was concerned; (ii) the differentiation was rational as in essence and by not affording the converting employees annual increases, the Municipality sought to achieve equality and claw back on the effects of the 2003 conversion process in the least intrusive manner; and (iii) the differentiation did not constitute discrimination as it was not premised on any immutable human characteristic or attribute, but was rather based on the need to ensure equality among permanent employees working for the same employer and performing the same or similar functions.

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Employment 2023 Rankings

Employment Law practice is ranked in Tier 1.

CDH Kenya's Employment Law practice is ranked in Tier 3.

Leading Individuals:
Fiona Leppan | Aadil Patel

Recommended Lawyers:
Anli Bezuidenhout | Jose Jorge
Rizichi Kashero-Ondego | Imraan Mahomed
Phetheni Nkuna | Hugo Pienaar
Thabang Rapuleng | Njeri Wagacha

Insofar as the payment of the annual service bonus is concerned, the court found that the payment of this was a matter of fact, and following an explanation by the Municipality regarding the structure of remuneration packages of the converting employees, it became evident that (i) the converting employees were remunerated their annual bonuses; and (ii) the only differentiation which existed was that while the converting employees received a portion of their annual bonus on a monthly basis, other permanent employees received theirs as a lump-sum payment. Ultimately, the converting employees' case was dismissed.

Takeaway

Differentiation is not discrimination. To come home on an allegation of discrimination, a party is required to (i) identify the differentiation; (ii) establish whether the differentiation bears a rational connection to a legitimate purpose; and (iii) determine whether the differentiation constitutes discrimination and, if so, whether it is fair in the circumstances. Where discrimination is premised on a listed ground, it is presumed to be unfair.

Thabang Rapuleng and Malesela Letwaba



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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