DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT

ALERT

31 MARCH 2014

IN THIS ISSUE

DRAFT REGULATIONS PROVIDE CLARITY ON 'EQUAL PAY FOR WORK OF EQUAL VALUE'

Section 6(4) of the Employment Equity Amendment Act, No 47 of 2013 (EEA) brands an employer's failure to adhere to the 'equal pay for work of equal value' principle an act of unfair discrimination.

In the pursuit of legal certainty, there is a need for parameters which clearly regulate any differentiation by an employer regarding terms and conditions of employment of employees who perform the same or similar work or work of equal value and which deems any unjustified or unreasonable differentiation in this regard as a recognised form of unfair discrimination.

The Minister of Labour recently distributed draft regulations (regulations) to the EEA within which this need seems to have been addressed.

The regulations contain provisions which intend to promote and comprehensively regulate the 'equal pay for work of equal value' standard introduced by s6(4).

Although the standard gives employees an individual right, the *onus* will be on the aggrieved employee to prove that their salary is less than the comparator on the basis of either a listed or unlisted ground. This requires the employee to address the following potential problems, namely:

continued

- Identifying a comparator or comparators. In *Ntai & Others v South African Breweries Ltd [2001] 2 BLLR 186 (LC)*, the applicants identified two white employees as comparators and although the Labour Court (LC) accepted the two white employees as suitable comparators, it held that the applicants had failed to prove grounds upon which their allegation of arbitrary discrimination was based.

- An employee must prove a causal link between the unequal pay and the alleged conduct. In Ntai, the LC found that the applicants failed to prove the link between remuneration levels and the race of the employees. The LC stated that the existence of an anti-discrimination provision does not confer a right to affirmative action.

- If an employee claims indirect discrimination, such employee will have to provide proof of such an allegation. This may take the form of statistics or alternative relevant facts. Indirect discrimination could arise in this context when it is proved that a practice affects black employees disproportionately as a group.

- If an employee claims unfair discrimination on an unlisted ground (arbitrary discrimination), the employee must show that the discrimination was of such a nature that it impacted on their human dignity. In *Numsa and Others v Gabriel (Pty) Ltd (2002) 23 ILJ 2088 (LC)*, the applicants failed to allege that the reason for the differentiation was some characteristic that impacted upon their human dignity. The LC held that the applicants did no more than attempt to describe the difference in pay as being "disproportional, irrational, arbitrary and capricious", and "arbitrary, capricious and irrational actions/practices of the respondent".

It should also be noted that, although the regulations provide employers with certain defences to claims of unfair discrimination on this basis, employers will not be able to raise a lack of intention to discriminate as a defence.

As long as employers are able to objectively justify differences in remuneration where employees perform the same or similar work or are of comparable value to an organisation on the basis of fair criteria (such as responsibility, expertise or skills), employers should not find it too problematic escaping liability in respect of claims made pursuant to s6(4).

Fiona Leppan and Ben Cripps

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com

Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Gillian Lumb
Cape Town Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com

Gavin Stansfield
Director
T +27 (0)21 481 6314
E gavin.stansfield@dlacdh.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Andrea Taylor
Senior Associate
T +27 (0)11 562 1687
E andrea.taylor@dlacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

Anli Bezuidenhout
Associate
T +27 (0) 21 481 6351
E anli.bezuidenhout@dlacdh.com

Shungu Mariti
Associate
T +27 (0)11 562 1475
E shungu.mariti@dlacdh.com

Inez Moosa
Associate
T +27 (0)11 562 1420
E inez.moosa@dlacdh.com

Zinhle Ngwenya
Associate
T +27 (0)11 562 1119
E zinhle.ngwenya@dlacdh.com

Lauren Salt
Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa Dx 5 Cape Town

T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com