

15 APRIL 2019

# EMPLOYMENT ALERT

## IN THIS ISSUE >

### Differentiation doesn't always equal discrimination: Defences against unfair discrimination claims

Section 6(1) of the Employment Equity Act, No 55 of 1998 (EEA) states that no person may unfairly discriminate against an employee, either directly or indirectly, on one or more grounds, including but not limited to, race, gender, sex, age, culture etc.

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CLIFFE DEKKER HOFMEYR

## Differentiation doesn't always equal discrimination: Defences against unfair discrimination claims

The applicant sought to have an arbitration award set aside after the arbitrator had found in favour of the complainant.

Section 6(1) of the Employment Equity Act, No 55 of 1998 (EEA) states that no person may unfairly discriminate against an employee, either directly or indirectly, on one or more grounds, including but not limited to, race, gender, sex, age, culture etc. Section 6(4) of the EEA goes on to highlight that if there is a difference between the terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is based on one of the grounds listed in subsection 1, such shall amount to unfair discrimination.

In the case of *Sun International Limiter v SACCAWU obo Rebecca Ramerafe*, the Labour Court was tasked with determining a review application in respect of an unfair discrimination claim brought on grounds listed in s6(1) and 6(4) of the EEA. The applicant sought to have an arbitration award set aside after the arbitrator had found in favour of the complainant and ruled that where the employer had remunerated Mr Botha, a white male, considerably more favourably than Ms Rebecca Ramerafe, a black female, for

work of the same nature and or value, such had amounted to unfair discrimination on the grounds of race and gender.

The Labour Court found that the arbitrator had erred in applying the applicable law, and but for this error would have reached an alternate conclusion. The court's first point raised was that of onus. The court highlighted that in such a case where unfair discrimination is alleged against the employer, in accordance with s11 of the EEA, the onus falls upon the employer to prove that such discrimination either did not take place or that the discrimination is not unfair and is rational or otherwise justifiable.

Secondly, the court found that the arbitrator failed to distinguish between the three categories of 'work of equal value' provided for in Regulation 4 of the EEA. The court identified the three categories as, work performed by an employee that is the same work as that of another employee; work that is substantially the same as that of another employee and work that is of the same value as the work of another employee. In this matter, it was agreed that the employees were performing the same work.



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## Differentiation doesn't always equal discrimination: Defences against unfair discrimination claims...continued

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The employer was successful in discharging its onus in showing that on a balance of probabilities the discrimination was rational and justifiable and therefore not unfair.

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The third consideration highlighted by the court was that of the factors which may be considered to justify differentiation in terms and conditions of employment as provided for in Regulation 7 of the EEA, examples of which include seniority, length of service and qualifications. In this case, the employer relied on the so called 'market related forces' defence to the claim of discrimination. In doing so the employer argued that it had to offer Mr Botha a remuneration package which resulted in his nett pay being equal to what he was already earning at his previous place of employment in order to secure the recruitment. The employer further argued that Mr Botha's years of experience and superior qualifications in comparison to that of the complainant further justified the differentiation. The court found that the arbitrator failed to

consider the evidence of the employer and in doing so failed to undertake the analysis required by regulation 7 (2) of the EEA by not considering whether the employer had made out a case of rationality, fairness or other justifiability in respect of the admitted differential in income.

Given the above, the employer was successful in discharging its onus in showing that on a balance of probabilities the discrimination was rational and justifiable and therefore not unfair. This case reinforces the fact that where there are rational and justifiable reasons to differentiate the remuneration of employees doing the same work, that such differentiation will not amount to unfair discrimination.

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*Hugo Pienaar and Jessica Osmond*



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