



4 MARCH 2019

# EMPLOYMENT ALERT

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### IS ARBITRARINESS A SUFFICIENT GROUND TO ESTABLISH UNFAIR DISCRIMINATION IN WAGE DIFFERENTIATION DISPUTES IN TERMS OF S6(1) OF THE EEA?

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**In *Naidoo and Others v Parliament of the Republic of South Africa* [2018] ZALCCT 38, 69 employees who form part of the Parliamentary Protection Services (PPS) took Parliament to the Labour Court (LC) for allegedly discriminating against them unfairly on an arbitrary ground as contemplated by s6(1) of the Employment Equity Act, No 55 of 1998 as amended (EEA).**

This provision prohibits unfair discrimination on grounds such as race, sex, gender, pregnancy, marital status etc (listed grounds) or on *any other arbitrary ground*. s6(4) prohibits different treatment on any of the grounds in subsection (1) of employees of the same employer doing same work, substantially the same work, or work of equal value.

Parliament took a decision to enhance its capacity of PPS by creating two new positions, namely Control Chamber Support Officer (CCS) and Chamber Support Officer (CSO), which created a total of 66 vacancies, 37 of which were filled by CSO's recruited from SAPS as the existing PPS did not have the requisite capabilities. CSO's were paid higher than the PPS. It is on this basis that the Applicants approached the LC alleging that their manager was engaged in nepotism by head hunting his colleagues from SAPS and paying them higher salaries because they are from SAPS. This decision to pay higher salaries to CSO's on this basis is capricious, unjustifiable and arbitrary.

In its statement of response, Parliament denied that the work performed by PPS and CSO's was of equal value and raised a point *in limine*, that the Applicant's reliance on nepotism and employment by SAPS does not constitute an arbitrary

ground within the meaning of s6(1) of the EEA. Both parties agreed in their pre-trial minute that the LC should address this legal point prior to dealing with the merits of the case. If the LC finds in favour of Parliament on this legal point, it would be the end of the matter.

Therefore, the court had to interpret '*arbitrary ground*' within the meaning of s6(1) and whether the applicant's case as pleaded constituted an arbitrary ground. In dealing with this issue, the LC recognised that our courts have applied a wide and a narrow interpretation of "arbitrary ground".

The Applicants argued that a wide interpretation should be adopted and *arbitrary* should be interpreted to mean irrational and capricious in respect of s6(4) wage differentiation disputes and that '*any other ground*' must be extended to include any actions which are irrational and unjustifiable. On the other hand, Parliament argued that a narrow interpretation must be adopted and '*any other ground*' interpreted to mean grounds that are based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or affect them in a comparable manner. An arbitrary ground must be akin to a listed ground.

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CONTINUED

*The Applicants failed to show that the grounds relied upon is an arbitrary ground analogous to a listed ground and the case was dismissed on this basis alone.*

The LC in referring to relevant case law adopted the narrow interpretation and held that the effect of the introduction of “on any arbitrary ground” in s6(1) is simply that the ground must be affecting human dignity in order to constitute unfair discrimination. It has to be shown that *dignitas* or right of equality as a person, or that the personal attributes and characteristics, have been impaired or prejudiced. The arbitrary ground must be analogous to the grounds listed in s6(1). Arbitrariness in the context of unlisted ground, the court found, is not a synonym for irrationality or unlawfulness. Something irrational would not necessarily constitute discrimination. Discrimination is prohibited on grounds that undermine human dignity and not grounds that are merely irrational. Irrationality of a differentiation *per se* will not win a discrimination case based on arbitrary ground. The arbitrary ground complained of must cause injury to human dignity.

In applying the narrow interpretation, the court found that the Applicants did nothing more than to describe the difference in pay as arbitrary, capricious, unfair, unreasonable and unjustified. Nothing in this description has something to do with their attributes or characteristics and do not impair on their human dignity in a comparable manner to a listed ground. Accordingly, the Applicants failed to show that the grounds relied upon is an arbitrary ground analogous to a listed ground and the case was dismissed on this basis alone.

This is an important judgement to consider when pleading discrimination on an arbitrary ground in wage differentiation disputes. It is important to ensure that the arbitrary ground relied upon is one that is analogous to those listed in s6(1), *i.e* one that impairs or has potential to impair on your dignity as a human being. An arbitrary ground based on irrationality or unfairness will not pass master of unfair discrimination in wage differentiation disputes.

*Gavin Stansfield and Zola Mcaciso*

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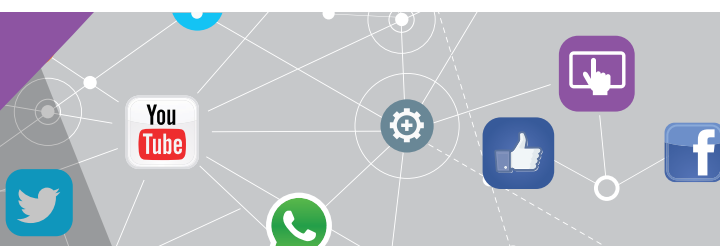
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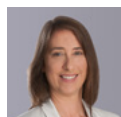


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