



EQUAL PAY



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"The team is knowledgeable, understands the industry we operate in and is always willing to go the extra mile for us."

CHAMBERS GLOBAL 2022

EQUAL PAY IN SOUTH AFRICA

How does equal pay legislation work in South Africa?



SAME

identical or interchangeable



EQUAL VALUE

accorded the same value



SUBSTANTIALLY THE SAME

sufficiently similar

The Employment Equity Amendment Act, No 47 of 2013 (EEAA) was promulgated into law on 1 August 2014 along with a new set of regulations introduced by Government Gazette Notice 37873 (Regulations). The EEAA amends the Employment Equity Act, No 55 of 1998 (EEA) to strengthen the EEA's objective of achieving equity in the workplace through the pursuit of two key objectives, namely:



The promotion of equal opportunity and fair treatment in the workplace



The implementation of affirmative action to redress the disadvantages in employment experienced by designated groups



"The CDH employment team went out of their way during Covid to keep us informed of employee relevant changes to the lockdown regulations and the impact on our business."

THE LEGAL 500 EMEA 2022



The EEEA with the Regulations align South Africa's employment equity legislation with the applicable conventions of the International Labour Organisation (ILO), within the context of the EEA's objectives. Although our courts have acknowledged the principle of equal pay for work of equal value on several previous occasions, the number of successful claims that have been instituted are minimal.

The Regulations set out guidelines for determining whether work is of equal value. It is anticipated that the statutory inclusion of the equal pay principle will bring about an influx in the number of claims brought on this basis against employers.

Equal Pay for Equal Work – How is Work Compared?

The principle of equal pay applies to work that is the same, substantially the same or of equal value (referred to as work of equal value), when compared to an appropriate actual comparator of the same employer.

In essence, where comparable work is of equal value, employees rendering such comparable work should not be paid unequal pay where the differentiation between them is based on a prohibited ground of discrimination or on grounds that are found to be arbitrary.

Section 6(1) of the EEA

An employer is not permitted to unfairly discriminate against any employee on any of the following listed grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth, or on any other arbitrary ground.

In terms of s6(2)(a) of the EEA, an employer may however fairly discriminate if the discrimination is based on:

- Inherent requirement of the job
- Affirmative action

WHAT DOES THE PHRASE “OR ON ANY OTHER ARBITRARY GROUND” MEAN?

The phrase was introduced by the 2013 amendments to the EEA and became operative in August 2014. Section 6(1) of the EEA states that:

“No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.”

Recently the Labour Court has preferred the narrow interpretation of the phrase. This means that for the conduct to qualify as an arbitrary ground, the ground must be analogous to a to a listed ground of discrimination in that it must have the potential to impair human dignity or have a similar serious consequence. In other words, an arbitrary ground is one that is not listed in s6(1) that has the potential to impair human dignity.

The court confirmed that length of service does not qualify as an arbitrary ground.

EQUAL PAY UNDER THE EEA

Section 6(4) of the EEA, as from 1 August 2014, reads as follows:

“A difference in 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 directly or indirectly based on any one or more of the grounds listed in subsection (1) or on any other arbitrary ground is unfair discrimination.”

Section 6(4) now emphasises the requirement of equal pay and prohibits differentiation in terms and conditions of employment, including employment policies and practices, among employees who work for the same employer and who fall within the category of work that is the same, substantially the same or work of equal value, if that differentiation is based on a prohibited ground. A differentiation as envisaged in s6(4) constitutes unfair discrimination if it is directly or indirectly based on one or more of the listed grounds set out in s6(1) or any other arbitrary ground.

THE COMPARATOR

An employee who seeks to prove that she is being unfairly discriminated against in respect of remuneration must compare her position to that of another employee within the same employer. She needs to therefore prove that they perform the same or substantially the same work or that such work is of equal value as envisaged in the amended EEA.

More recently the Labour Court clarified that the claimants will need to specifically prove the following when bringing such a claim:

- Personal circumstances
- Posts (levels)
- Remuneration
- Comparators
- Basis of comparison
- Basis on which differentials are alleged to discriminate (unfairly)



THE PROCESS TO ASSESS UNFAIR DISCRIMINATION

In the context of pay differentials in the workplace, employers are tasked with the duty to eliminate any unfair discrimination. Employers must adopt measures to eradicate differences in terms and conditions of employment, including *inter alia* remuneration of employees who perform work of equal value if those differences are directly or indirectly based on a listed ground or any arbitrary ground. In the process of the employer ensuring that employees are not paid differently, the employer is to ensure, for instance, that pay differentials are not due to any of the factors listed in s6(1).

The Regulations provide for a systematic approach in assessing whether an employee has a legitimate equal pay claim and whether the employer has a justifiable defence for pay differentials.

Regulation 6 provides a list of objective criteria to assess whether work is of equal value.

JUSTIFICATION FOR DIFFERENCES IN REMUNERATION

Regulation 7 contains grounds to justify differences in remuneration. Provided that the difference in terms and conditions of employment is "*fair and rational*", the employer can differentiate between employees by taking into account one or more of the following factors:

- Seniority and length of service
- Qualifications, ability, competence or potential
- Performance, quantity and/or quality of work (provided that employees are subject to the same performance evaluation system which is consistently applied)
- Demotion due to operational requirements
- Temporary employment for purposes of gaining experience and/or training (internships, learnerships)
- Shortage of relevant skill or the market value in a particular job classification
- Any other relevant factor that is not discriminatory

If an employer relies on one or more of the above factors to justify a differentiation in terms and conditions of employment, the employer must ensure that the differentiation is not biased against any employee or group of employees. The employer must also ensure that the differentiation is applied in a proportionate manner.

BURDEN OF PROOF

In terms of section 11, there are two possibilities:

- If the alleged discrimination is based on one of the grounds listed in s6(1) of the Act, the burden falls on the employer to prove, on a balance of probabilities, that such alleged discrimination did not take place. Alternatively, if it is found that the discrimination did take place, the employer will need to show that the differentiation was rational and not unfair or otherwise unjustifiable.
- If the alleged discrimination is based on an "*arbitrary ground*", the burden of proving the claim would fall on the employee. The complainant would be required to prove, on a balance of probabilities, that the employer's conduct amounted to discrimination and the discrimination was unfair. The complainant would have to plead and show that the alleged discrimination had the potential to impair the complainant's human dignity. It is insufficient to show that the conduct was merely arbitrary.

THE FUTURE OF EQUAL PAY CLAIMS IN SOUTH AFRICA

The legislature provides a statutory mechanism for equalising the disparity between employees who perform work of equal value.

The legislation places a duty on employers to conduct a review of their existing recruitment and employment policies relating not only to remuneration, but also to benefits, rewards, performance evaluations and employment equity.

Finally, the legislation creates certainty in the manner in which equal pay claims are to be considered and it is advisable that a proactive approach is taken in order to mitigate the risk of any such successful claims.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from 2012–2020.

The Legal 500 EMEA 2021–2024 recommended **Anli Bezuidenhout** for employment.

Chambers Global 2018–2024 ranked **Fiona Leppan** in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from 2012–2018.

Chambers Global 2021–2024 ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended **Phetheni Nkuna** for employment.

The Legal 500 EMEA 2022–2024 recommended **Desmond Odhiambo** for dispute resolution.

The Legal 500 EMEA 2023 recommended **Thabang Rapuleng** for employment.

Chambers Global 2024 ranked **Njeri Wagacha** in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A.



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.

PLEASE NOTE

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