

# Employment Law

ALERT | 10 June 2024



## In this issue

### SOUTH AFRICA

Unequal pay for equal work:  
When is it discrimination?



For more insight into our  
expertise and services

**EMPLOYMENT LAW  
ALERT**

## Unequal pay for equal work: When is it discrimination?

Can paying your employees the same wage or salary amount to unfair discrimination? What does one have to prove in order to satisfy the court that such an allegation indeed constitutes unfair discrimination in terms of the Employment Equity Act 55 of 1998 (EEA)? The Labour Court in *AMCU obo Members v Aberdare Cables (Pty) Ltd* (P135/2021) [2024] ZALCPE 3 (15 February 2024) was called on to answer these questions in the scenario where an employer was alleged to have discriminated unfairly against its employees.

### Background

In the matter, the Association of Mineworkers and Construction Union (AMCU), acting on behalf of its members, approached the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the EEA alleging unfair discrimination. The discrimination was alleged to be on an arbitrary ground and the dispute stemmed from a differentiation in remuneration.

Aberdare Cables (Pty) Ltd (Aberdare) had four level grading structures which stipulated minimum wages and hourly rates per applicable level. This meant that all employees employed on a specific level receive the same minimum wage, regardless of job their description. The nature, complexity, difficulty and, as such, the value of work performed increased with each level. Therefore, the wage associated with each level increased as the level increased.

Aberdare initiated a retrenchment process in terms of section 189 and 189A of the Labour Relations Act 66 of 1995 (LRA), which resulted in the reduction of its workforce. The employer and trade union agreed, during these consultations, that all new employees would be engaged on the Metal and Engineering Industries Bargaining Council (MEIBC) rate of pay and they would rely on natural attrition to ensure that, over a period of time, all employees would be engaged on the same rates of pay. An agreement to this effect was implemented from January 2014. As a result of this agreement, all those employed on or after 1 January 2014 earned the minimum wage rate. The old employees retained their higher Aberdare rate of salaries.

At the CCMA, AMCU stated that Aberdare had two rates for its employees, the MEIBC rate and the Aberdare rate, and that this has created a huge gap between the employees doing the same job in the same grade. Their case was premised on the provisions of section 6(4) of the EEA which provides that:

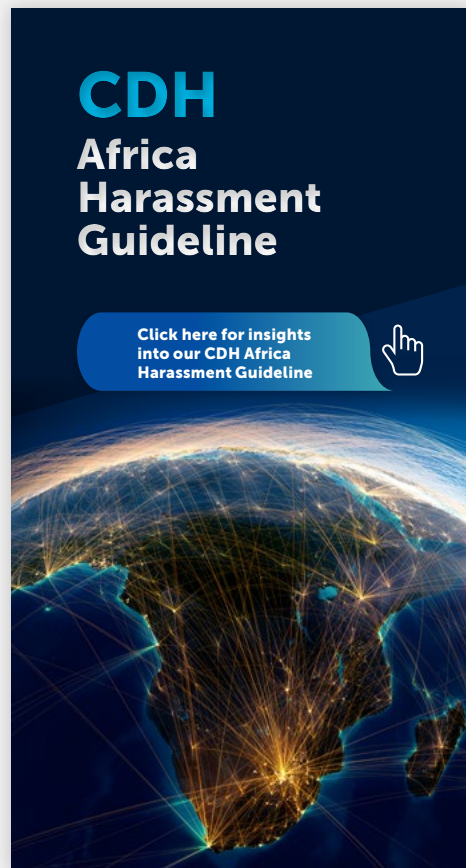
*"A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in section 6(1), is unfair discrimination."*

AMCU pleaded that the arbitrary ground upon which the differentiation in remuneration was based was solely that Aberdare has elected to apply a higher rate of remuneration than the minimum wage provided for in the collective agreement, but that this election was irrational and arbitrary.

**EMPLOYMENT LAW  
ALERT**

## Unequal pay for equal work: When is it discrimination?

CONTINUED



### In the Labour Court

The matter made its way to the Labour Court. Prinsloo J in her judgment stated that the EEA does not prohibit differentiation, it prohibits unfair discrimination on an arbitrary ground, in that it must cause an injury to human dignity. Section 6(4) of the EEA does not impose a blanket prohibition on wage differentiation. It prohibits such differentiation where it is directly or indirectly based on any one or more of the grounds listed in section 6(1).

An applicant must allege a specific ground of discrimination and must prove that the pleaded ground of discrimination is the basis for differentiation, and that it is unfair. There is a distinction to be drawn between differentiation and discrimination; differentiation does not per se constitute discrimination on an arbitrary ground, which must be clearly identified and pleaded.

Having found that AMCU failed to identify an arbitrary ground for discrimination, there could be no finding that AMCU had proven discrimination. In the absence of finding discrimination existed, there was no need to consider whether the discrimination was unfair.

### Conclusion

In short, the court made it clear that the perceived arbitrary conduct on the part of the employer is not per se a ground of discrimination. An applicant alleging unfair discrimination must be able to identify a specific ground on upon which its allegation is based. Aberdare's conduct in paying different wages for the same or similar work, however unfair it might be perceived to be, is not unfair discrimination within the purview of section 6(1) of the EEA. More than mere differentiation is required in terms of the EEA.

**Anli Bezuidenhout, Lynsey Foot and Kirsten Davids**



## OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

**Aadil Patel**

Practice Head & Director:  
Employment Law  
Joint Sector Head:  
Government & State-Owned Entities  
T +27 (0)11 562 1107  
E aadil.patel@cdhlegal.com

**Anli Bezuidenhout**

Director:  
Employment Law  
T +27 (0)21 481 6351  
E anli.bezuidenhout@cdhlegal.com

**Asma Cachalia**

Director:  
Employment Law  
T +27 (0)11 562 1333  
E asma.cachalia@cdhlegal.com

**Jose Jorge**

Director:  
Employment Law  
T +27 (0)21 481 6319  
E jose.jorge@cdhlegal.com

**Fiona Leppan**

Director:  
Employment Law  
T +27 (0)11 562 1152  
E fiona.leppan@cdhlegal.com

**Imraan Mahomed**

Director:  
Employment Law  
T +27 (0)11 562 1459  
E imraan.mahomed@cdhlegal.com

**Nadeem Mahomed**

Director:  
Employment Law  
T +27 (0)11 562 1936  
E nadeem.mahomed@cdhlegal.com

**Yvonne Mkefa**

Director:  
Employment Law  
T +27 (0)21 481 6315  
E yvonne.mkefa@cdhlegal.com

**Phetheni Nkuna**

Director:  
Employment Law  
T +27 (0)11 562 1478  
E phetheni.nkuna@cdhlegal.com

**Desmond Odhiambo**

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E desmond.odhiambo@cdhlegal.com

**Hugo Pienaar**

Sector Head:  
Infrastructure, Transport & Logistics  
Director: Employment Law  
T +27 (0)11 562 1350  
E hugo.pienaar@cdhlegal.com

**Thabang Rapuleng**

Counsel:  
Employment Law  
T +27 (0)11 562 1759  
E thabang.rapuleng@cdhlegal.com

**Njeri Wagacha**

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E njeri.wagacha@cdhlegal.com

**Mohsina Chenia**

Executive Consultant:  
Employment Law  
T +27 (0)11 562 1299  
E mohsina.chenia@cdhlegal.com

**Jean Ewang**

Counsel:  
Employment Law  
T +27 (0)11 562 1499  
E jean.ewang@cdhlegal.com

**Ebrahim Patelia**

Legal Consultant:  
Employment Law  
T +27 (0)11 562 1000  
E ebrahim.patel@cdhlegal.com



## OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



**Rizichi Kashero-Ondego**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E rizichi.kashero-ondego@cdhlegal.com



**Jordyne Löser**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1479  
E jordyne.loser@cdhlegal.com



**Lee Masuku**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1213  
E lee.masuku@cdhlegal.com



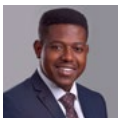
**Leila Moosa**

Senior Associate:  
Employment Law  
T +27 (0)21 481 6318  
E leila.moosa@cdhlegal.com



**Christine Mugenyu**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E christine.mugenyu@cdhlegal.com



**Kgodisho Phashe**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1086  
E kgodisho.phashe@cdhlegal.com



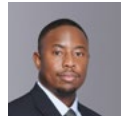
**Taryn York**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1732  
E taryn.york@cdhlegal.com



**Lynsey Foot**

Associate:  
Employment Law  
T +27 (0)11 562 1429  
E lynsey.foot@cdhlegal.com



**Malesela Letwaba**

Associate:  
Employment Law  
T +27 (0)11 562 1710  
E malesela.letwaba@cdhlegal.com



**Biron Madisa**

Associate:  
Employment Law  
T +27 (0)11 562 1031  
E biron.madisa@cdhlegal.com



**Thato Maruapula**

Associate:  
Employment Law  
T +27 (0)11 562 1774  
E thato.maruapula@cdhlegal.com

**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**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**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@cdhlegal.com](mailto:jhb@cdhlegal.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@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

©2024 13562/JUN