

EQUAL PAY A FEW YEARS ON



WHAT THE CASES TELL US

AGENDA: THE CASES TWO YEARS ON

Introduction and Re-cap

1. Jurisdiction
2. Comparator
3. Causation
4. Equal Value and Job Evaluation
5. Seniority and Experience
6. Qualifications
7. Geography
8. Collective Bargaining
9. 'Administrative Chaos'
10. Error

SOUTH AFRICA: THE EMPLOYMENT EQUITY ACT

- **SECTION 6**
- No employer may unfairly discriminate, directly or indirectly, against any employee (includes job applicant), in any employment policy or practice, on a wide variety of grounds, such as race, sex, gender, HIV status, language, political opinion, age and religion or any other arbitrary ground.
- Differentiation based on the listed grounds in order if:
 - Inherent requirement of the job
 - Affirmative action in compliance with the Act
- Harassment on any of the listed grounds constitutes unfair discrimination

SOUTH AFRICA – THE EMPLOYMENT EQUITY ACT

- **SECTION 11**

- The burden of proof provision is amended by distinguishing between allegations of discrimination on a listed ground and allegations of discrimination on an arbitrary ground:

- listed ground:

- the employee must make *out prima facie* case
- *the employer* must prove that the discrimination did not take place as alleged; or that it is rational, not unfair or otherwise justifiable

- arbitrary ground: *the complainant* must prove that the conduct complained of is not rational, that the conduct amounts to discrimination and that the discrimination is unfair

SECTION 6(4)

- **6(4)**
 - 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)
 - is unfair discrimination.

SECTION 6(4)

- **IN TERMS AND CONDITIONS OF EMPLOYMENT**
 - Section 6(1) prohibits unfair discrimination in any “*employment policy or practice*”
 - recruitment procedures, advertising and selection criteria;
 - appointments and the appointment process;
 - **job classification and grading;**
 - **remuneration, employment benefits, and terms and conditions;**
 - the working environment and facilities;
 - training and development;
 - **performance evaluation systems;**
 - promotion;
 - transfer;
 - demotion;
 - disciplinary measures other than dismissal;
 - dismissal.
- 6(4): Not only “*remuneration*”

1. JURISDICTION

Theme	Case	Comment	Employer policy implication
Jurisdiction	Health and Other Services Personnel Trade Union of South Africa obo Rayners v Uitenhage Hospital (Department of Health) [2016] 6 BALR 630 (CCMA) applied s10(6) of the EEA	<ul style="list-style-type: none"> CCMA only has jurisdiction where the complainant earns below the prescribed earnings threshold, currently R205,433.30 per annum 	N/A
	Famous Brands Management Company (Pty) Limited v CCMA & Others Case No JR738/16	<ul style="list-style-type: none"> CCMA has jurisdiction over unfair pay discrimination cases irrespective of whether the case involves one applicant or more. 	N/A

2. COMPARATOR

Theme	Case	Comment	Employer policy implication
<p>Must identify a comparator</p> <p>(s6(4) states ... between employees of the same employer)</p>	<p>Mzobe & Others v Fencerite (Pty) Limited (2016) 37 ILJ 1767 (CCMA).</p>	<ul style="list-style-type: none"> • Third applicant (Mshololo) did not identify a comparator and in the circumstances, no finding of unfair discrimination could be made. 	<ul style="list-style-type: none"> • Obligation to identify a comparator is that of the employee. • Employee may use the provisions of the Promotion of Access to Information Act to obtain relevant information. • Section 78 of the BCEA entitles employees to discuss terms and conditions of employment with fellow employees, employer or any other person. Confidentiality clauses in employment contracts accordingly not enforceable.

3. CAUSATION

Theme	Case	Comment	Employer policy implication
<p>Causation – it must be the prohibited ground that causes the difference</p>	<p>Abanqobi Workers Union obo Mali v Trojan Security (Pty) Limited [2016] 9 BALR 935 (CCMA)</p>	<ul style="list-style-type: none"> Quoted Louw v Golden Arrow Bus Services: “The applicant must prove that the difference in salary constitutes discrimination. He must prove that his salary is less because of his race.” Not the case here. The difference was not because of race but because Van der Merwe received his increase a month earlier due to financial difficulties – it was a gesture of goodwill; he was not given the increase early because he is white. 	<ul style="list-style-type: none"> Employers well-advised to ensure that the terms on which employee assistance schemes such as staff loans are provided are communicated to and understood by employees. Individual loan agreements may be confidential, but the principles on which loans are granted must be available.

3. CAUSATION (CONTINUED)

Theme	Case	Comment	Employer policy
<p>If differentiation is alleged on an “arbitrary ground” the ground must be specified.</p>	<p>Independent Municipal & Allied Trade Union obo Nengovela & Another v Tshwane Metropolitan Municipality [2016] 4 BALR 336 (CCMA)</p>	<ul style="list-style-type: none"> It is not sufficient to simply allege that the differentiation is “arbitrary” / “irrational”. 	<p>N/A</p>
	<p>National Education, Health and Allied Workers’ Union obo Totyi v Airport Company of South Africa (SOE) [2016] 9 BALR 1017 (CCMA)</p>		
	<p>Govender v Umgungundlovu District Municipality (2016) 37 (ILJ) 724 (CCMA)</p>		
	<p>Ndudula and Others v Metrorail PRASA (Western Cape) [2017] ZALCCT 12 (30 March 2017)</p>		

4. EQUAL VALUE AND JOB EVALUATION

Theme	Case	Comment	Employer policy implication
Assessing work of equal value	Mzobe & Others v Fencerite (Pty) Limited (2016) 37 ILJ 1767 (CCMA)	<ul style="list-style-type: none"> • Court undertook detailed analysis of the actual duties performed by the complainants and the comparators. • Jobs found not to be of equal value and the claim was dismissed. 	<ul style="list-style-type: none"> • No evidence of a job evaluation system in place at this employer. • In the absence of this, direct testimony had to be led as to the exact duties associated with the applicant's and comparator's jobs respectively. • Such an evaluation may be more complicated when one deals with professional / managerial positions. • The importance of using a robust job evaluation system is clear.

4. EQUAL VALUE AND JOB EVALUATION (CONTINUED)

Theme	Case	Comment	Employer policy implication
Job evaluation	Govender v Umgungundlovu District Municipality (2016) 37 ILJ 724 (CCMA)	<ul style="list-style-type: none"> No evidence that the grading was not rational. Even if the posts were incorrectly graded, it does not mean that they were irrational. To be rational means to be “endowed with reason, sensible, sane, not foolish or absurd”. In this case, the grading was rational. Even if grading not rational, commissioner held that remunerating the applicant at a lower level than the manager: revenue did not amount to unfair discrimination. Differentiation was not based on characteristics that impaired the applicant’s human dignity. Applicant based the case on discrimination, not incorrect grading. Ground must be stated and ground must be the cause of the differentiation. Not proved. 	<ul style="list-style-type: none"> Importance of utilising an established and robust job evaluation system once again demonstrated. The various components of a JE system (qualification and skills, experience, management breadth, accountability) were once again brought to the fore in establishing a clear difference between the applicant’s position and the comparator’s position.

5. SENIORITY AND EXPERIENCE

Theme	Case	Comment	Employer policy implication
Seniority as basis for justifying differentiation	Ndlela & Others v Philani Mega Spar	<ul style="list-style-type: none"> CCMA does not simply accept the employer's justification, even if this is based on a recognised ground such as seniority. BUT in this case, CCMA did not consider the parameters required by reg7(2), i.e. differentiation based on one of the grounds listed in reg 7 will be fair and rational provided that it does not amount to unfair discrimination based on one of the listed grounds. 	<ul style="list-style-type: none"> Length of service used to justify the granting of further benefits such as life cover and a pension/provident fund. CCMA was of the approach that length of service should not be used to apply benefits to staff, we are of the opinion that this could still pass muster if structured appropriately, particularly considering the case below.
	Pioneer Foods (Pty) Limited v Workers Against Regression and Others (Case No C687/15)	<ul style="list-style-type: none"> CCMA had erred in finding that the employer had unfairly discriminated against the employees on the basis of length of service. Seniority recognised in Regulation 7, section 198D and the Code of Good Practice. 	<ul style="list-style-type: none"> Length of service can be applied to levels of pay. The length of service differentiation in question stemmed from a collective agreement with a union.

5. SENIORITY AND EXPERIENCE (CONTINUED)

Theme	Case	Comment	Employer policy implication
Experience as basis for justifying differentiation	Independent Municipal & Allied Trade Union obo Nengovela & Another v Tshwane Metropolitan Municipality [2016] 4 BALR 336 (CCMA)	<ul style="list-style-type: none"> Experience may be a ground for differentiating in pay. In offering higher remuneration to the comparator, the Municipality took into account that she had worked 15 years in a municipal environment and thus had vast experience in the core function of the post. The municipality acted in a fair and rational manner in determining the job offers. 	<ul style="list-style-type: none"> Relevant prior experience of an employee is recognised as a basis for differentiation and thus paying the employee at a higher rate. It is probably advisable for employers to state in a policy that it would be permitted to recognise prior experience and differentiate in pay on this basis. BUT employers are not obliged to recognise pay (Pioneer Foods)
	National Education, Health and Allied Workers' Union obo Totyi v Airport Company of South Africa (SOE) [2016] 9 BALR 1017 (CCMA)	<ul style="list-style-type: none"> Totyi did not identify the alleged arbitrary ground. Simply stated that the differentiation was unfair. Claim would fail on this basis alone. In any event, ACSA was permitted to differentiate on the basis of experience, past employment history and skills retention. These are not unfair discriminatory reasons. This is in line with Regulation 7 and the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value. 	<ul style="list-style-type: none"> Employer policies should preferably clearly state what factors the company may rely on when making decisions about levels of pay, and this should preferably include a "catch-all" phrase, i.e. any other factor that is relevant in the circumstances of the particular case.

6. QUALIFICATIONS

Theme	Case	Comment	Employer policy implication
Qualifications as a basis for justifying differentiation	National Education, Health and Allied Workers Union obo Nquma v Department of Justice and Constitutional Development [2017] 1 BALR 76 (CCMA)	<ul style="list-style-type: none"> • DoJ paid all drivers for having a ‘higher’ level license • Even though Mtshalana was not actually using his Code 11 licence, mere fact that he possessed it and thus could perform additional tasks was sufficient to justify the difference in pay. • Potentially controversial. 	<ul style="list-style-type: none"> • Employers should be cautious in differentiating on the basis of possession of qualifications in addition to what are required for the particular job. • In this instance, the employer made provision in its policies for paying higher-qualified drivers extra even if the qualification was not actually used. • Additional qualifications and how they are recognised should preferably dealt with in relevant policies. • Cautious approach: only additional qualifications that are of direct application be recognised in differentiation in terms and conditions.



7. GEOGRAPHY

Theme	Case	Comment	Employer policy implication
Geography as a basis for justifying differentiation	Duma v Minister of Correctional Services & Others Case No C604/2012	<ul style="list-style-type: none"> • Court held that the ground for the differentiation, i.e. geographic location was entirely arbitrary and that it had the potential to affect people’s dignity in a comparably serious manner as differentiation on the grounds listed in s6(1). It accordingly amounted to discrimination and was unfair. <p>Point of caution: Case determined on the EEA prior to the 2014 amendments (although it was heard after the amendments came into force). The court didn’t consider Regulations which specifically permit differentiation on the basis of geographic location. Respondent also offered very little evidence in support of the differentiation.</p>	<ul style="list-style-type: none"> • Policy of applying geographical differentials is still used by many companies with a national footprint. • We are of the view that, if applicable data such as existing salary surveys, cost of living studies and the like are used in determining geographic differentials, this would be justifiable in terms of applying differing levels of pay. • Also think that higher pay levels applied to very remote areas justifiable based on remoteness, availability of amenities, etc.



8. COLLECTIVE AGREEMENTS

Theme	Case	Comment	Employer policy implication
Collective agreements	Pioneer Foods (Pty) Limited v Workers Against Regression and Others (Case No C687/15)	<ul style="list-style-type: none"> • Collective agreement between Pioneer Foods and FAWU provided for the 80% of pay new hires rule. • This did not amount to unfair discrimination. Length of service is not an arbitrary ground. 	<ul style="list-style-type: none"> • Employer policies should be aligned to applicable collective agreements.
	SAA v Janse van Vuuren & Another (2014) 35 ILJ 2774 (LAC)	<ul style="list-style-type: none"> • Collective agreement itself discriminatory and the court accordingly held that this did not justify the discrimination. • One cannot contract out of the right to equality, not even in a collective agreement. 	<ul style="list-style-type: none"> • Parties are not able to contract out of the provisions of section 6 of the EEA – this applies to individual agreements and collective agreements.

9. 'ADMINISTRATIVE CHAOS'

Theme	Case	Comment	Employer policy implication
<p>"Administrative chaos" as a basis for justifying differentiation</p>	<p>South African Municipal Workers' Union and Another v Nelson Mandela Bay Municipality Case No P483/11</p>	<ul style="list-style-type: none"> • Not an unfair labour practice to pay different wages for equal work or work of equal value, but becomes one if the reason/cause for doing so is unfair discrimination. • Court held that it was not because of her gender that she was paid less. All the directors, except Toyise, had furthermore been placed on grade 15. • Tetyana indicated that if Anthony and Mahashe were female, she would still have complained. • The actual reason for the disparity was administrative chaos. <p>BUT: If the applicant alleged unfair discrimination on the arbitrary ground of "administrative chaos" as opposed to gender, the case might have been decided differently.</p>	<ul style="list-style-type: none"> • The importance of having clear policies with regard to job evaluation, pay grades, remuneration adjustments and recruitment policy is again demonstrated as this may minimise disputes.

10. ERROR

Theme	Case	Comment	Employer policy implication
<p>“Error”</p>	<p>Ndudula and Others v Metrorail PRASA (Western Cape) [2017] ZALCCT 12 (30 March 2017)</p>	<ul style="list-style-type: none"> • Company employed two section managers at a higher salary scale in error. Error subsequently corrected. • The applicants did not contend that the error of paying a comparator at a higher rate is the alleged arbitrary ground, and the claim failed on the basis that the applicants did not identify the ground of alleged unfair discrimination. • The introduction of the phrase “arbitrary ground” did not introduce an additional category of ground, i.e. listed grounds, analogous grounds and arbitrary grounds. Just two categories, i.e. those expressly listed and those that are arbitrary/analogous. 	<ul style="list-style-type: none"> • Common issue when new entrants are brought in at a higher scale than existing employees on that same grade. • Although error on the part of the company, it does shed the light again on ‘replacement value’ versus existing salaries (new entrants are brought in at a higher level.) • Should this not have been an ‘error’ the case would have been very strong.

THANK YOU