

EQUAL PAY FOR WORK OF EQUAL VALUE

INTRODUCTION

South Africa has a legacy of discrimination in relation to remuneration and benefits paid to employees, based on race, gender and other discriminatory grounds. The Employment Equity Act (the EEA) and Employment Equity Regulations provide protection to employees 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 section 6(1) of the EEA is unfair discrimination.
- The listed grounds are: 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.
- The Labour Appeal Court in *Naidoo and 68 Others v Parliament of SA and others* (C865/2016) [par 15] held that "In order to qualify as an arbitrary ground, the ground relied upon must be analogous to a listed ground of discrimination, in the sense that it has the potential to impair upon human dignity in a comparable manner or have a similar serious consequence." There therefore needs to be a link between the arbitrary ground and one of the other listed grounds.

WHAT IS REQUIRED TO SHOW WORK IS OF EQUAL VALUE?

- The job is the same / identical as that of the job that it is being compared with (the 'comparator').
- The job is largely the same and it is possible for the employee to swap jobs with the comparator.
- The outputs of the job are of equal value to the employer.

- The responsibility for people, finances and material are similar.
- The skills, qualifications and experience for the job are similar to the comparator job.
- The physical, mental and emotional effort required to perform the work are similar.
- The conditions under which the work is performed (physical environment, psychological conditions, time and geographic location etc.) are similar.

WHAT FACTORS MIGHT JUSTIFY A DIFFERENCE IN REMUNERATION?

The LAC in *Naidoo* (referred to above) states that the EEA does not prohibit differentiation, it prohibits unfair discrimination [par 33].

EEA Regulation 7 provides the following:

- "(1) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is **fair and rational** and is based on any one or a combination of the following grounds:
- (a) the individuals' own **seniority or length of service**;
 - (b) the individuals' own **qualifications, ability, competence or potential** above the minimum acceptable levels required for the performance of the job;
 - (c) the individuals' own **performance, quantity, or quality of work**, depending on fairness of the application of the performance evaluation system;
 - (d) where an employee is **demoted** because of organisational restructuring or for any other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;

- (e) where an individual is **employed temporarily in a position for purposes of gaining experience or training** and as a result receives different remuneration or enjoys different terms and conditions of employment;
- (f) the existence of a **shortage of relevant skill, or the market value** in a particular job classification; and
- (g) any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA.

- (2) A differentiation in terms and conditions of employment based on one or more ground listed in section 6(1) will be fair and rational if it can be shown that the differentiation won't be biased against an employee or group of employees based on race, gender or disability or any other ground; and it is applied in an equal or fair manner."

Employers should therefore conduct grading and job evaluation exercises to ensure that pay levels are fair and do not discriminate.

DISPUTE RESOLUTION

Any employee who believes that he or she is being discriminated against in respect of these provisions must:

- Ensure that the job which the employee is comparing his or her own with is being performed by a fellow employee of the **same employer**.
- Ensure that the **ground** on which discrimination is claimed is clearly identified e.g. I perform the same work as A, but A is paid more than I am **because A is a male and I am a female** (discrimination based on sex).

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The EEA requires that the employee must:

A: Firstly, as far as this is reasonable in the circumstances, **lodge a complaint** with the employer in order to show that a reasonable attempt has been made to resolve the dispute before referring it to the CCMA.

B: If the complaint is not resolved, a dispute may be referred to the CCMA for conciliation **WITHIN SIX (6) MONTHS** after the discriminatory act / omission. (Condonation may be applied for in cases of a late referral).

C: If the dispute is not resolved at conciliation an employee may, **WITHIN 90 DAYS** of the expiry of the 30-day conciliation period, or if it is earlier, within 90 days of the conciliation hearing, select one of the following options:

Refer the matter to the CCMA for arbitration or to the Labour Court for adjudication **if the employee earns equal to or less than the threshold set by the Minister of Employment and Labour in terms of section 6 of the Basic Conditions of Employment Act (BCEA)** or refer the matter to the Labour Court for adjudication **if the employee earns more than the threshold.**

If there is a written agreement of consent between the employer and employee parties, an employee earning above the threshold may refer the dispute to the CCMA for arbitration.

Commissioners arbitrating such disputes have the power to make any appropriate arbitration award that gives effect to the EEA, including an award ordering payment of compensation, payment of damages or an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees.

HOW CAN AN EMPLOYER ENSURE THE PROVISION OF FAIR REMUNERATION AND BENEFITS?

Employers should -

- Consult with employees and unions to ensure the identification of any barriers to equity in the workplace, including terms and conditions of employment.
- Ensure that all jobs are objectively assessed and fairly remunerated, taking into account, *inter alia*:
 - a) the responsibility demanded of the work, including responsibility for people, finances, and material;
 - b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
 - c) physical, mental, and emotional effort required to perform the work; and
 - d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.

In addition to the criteria specified in above, any other factor indicating the value of the work may be considered in evaluating work, provided the employer shows that the factor is relevant to assessing the value of the work.

The assessment must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or any arbitrary ground that is prohibited in terms of the Act.

NOTE: An employer may **justify the value assigned to an employee's work** by reference to the classification of a relevant job in terms of a **sectoral determination** made by the Minister of

Employment and Labour in terms of section 55 of the BCEA which applies to the employer.

RELEVANT LEGISLATION

- Employment Equity Act 55 of 1998, as amended.
- Employment Equity Regulations.
- Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 in GG 38837 of 1 June 2015.
- Basic Conditions of Employment Act 75 of 1997, as amended.