

UNFAIR DISCRIMINATION IN THE WORKPLACE

WHAT IS DISCRIMINATION?

For the purposes of the Employment Equity Act, discrimination may be distinguished from unfair discrimination.

Discrimination occurs when an employer treats a person differently based on physical attributes or other factors such as religion or political belief. The act of treating employees differently may be justified in some circumstances (e.g. years of service may result in higher pay), but once such differentiation is based on a ground of unfair discrimination (e.g. race or disability), it may be unfair – depending on the circumstances as will be discussed below.

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

WHAT IS UNFAIR DISCRIMINATION?

Unfair discrimination occurs when an employment practice or policy unfairly discriminates against an employee, either directly or indirectly, 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.

Where the differentiation is not obviously on one or more of the prohibited (listed) grounds, then whether or not there is unfair discrimination will depend on whether, gauged objectively, the ground is based on attributes and characteristics of the person, which has the potential to impair that person's right to human dignity or to affect that person in a comparably serious manner.

Unfair discrimination may be direct or indirect discrimination.

Direct discrimination is easily identifiable and involves obvious differential treatment between employees and job applicants on the basis of any ground. For example, an employer follows a policy of remunerating women employees on a lower scale, without justification, than male employees for doing the same or similar work.

Indirect discrimination, on the other hand, is not as easily recognisable. It is a subtle form of discrimination. For example, it may involve the application of policies and practices that are apparently neutral and do not explicitly distinguish between employees and job applicants, but in reality, have a disproportionate and negative effect on certain individuals or groups.

For example, where a job advertisement without justification requires that applicants must live in a particular area, knowing that the residents of that area are predominantly from a particular race group. The onus would be on the employer to prove, on a balance of probabilities that discrimination did not take place, or that the act or omission was rational.

The Employment Equity Act (EEA) also emphasises that:

- **Harassment** of an employee is a form of unfair discrimination and is prohibited on any one or a combination of the above-mentioned grounds of unfair discrimination;
- **Medical testing** at the request of an employer will not be allowed unless legislation permits or requires testing or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job;
- **HIV-testing** can only be carried out at the request of an employer if such testing is determined justifiable by the Labour Court;
- **Psychometric testing** or other assessments at the request of an employer cannot be done unless such tests are scientifically valid, can be applied fairly, are not biased against any employee or group, and have been certified by the Health Professions Council of South Africa.

When evaluating discriminatory practices one has to give consideration to the impact of actions, policies and procedures on the person(s) claiming to have been unfairly discriminated against, rather than the intention behind the act or omission.

WHEN MAY DISCRIMINATION BE FAIR?

It is not unfair discrimination to:

- take affirmative action measures consistent with the purpose of the Employment Equity Act; or
- distinguish, exclude, or prefer any person based on an inherent requirement of a job.

AFFIRMATIVE ACTION

Affirmative action aims to achieve equality at work through mechanisms set out in the Employment Equity Act. This is done through the implementation of measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are fairly represented in the workforce.

Designated groups are black persons, women and people with disabilities who are citizens of the Republic of South Africa by birth or descent or became citizens of the RSA by naturalisation before 27 April 1994 or after 26 April 1994 and who would have been able to acquire citizenship by naturalisation before that date had it not been for the apartheid policies of the past.

INHERENT REQUIREMENT OF A JOB

Where an employer cites 'inherent requirement of a particular job' to differentiate between employees or job applicants and such differentiation appears to exclude a person or persons on one or more of the listed or arbitrary grounds, the onus would be on the employer to show that such differentiation is fair.

For example, a job advertised for an airline pilot may make eyesight one of the requirements of the job.

DIFFERENTIATION BASED ON PRODUCTIVITY

It may be fair for an employer to differentiate on the basis of productivity when giving a salary increase, for example, increases linked to performance review criteria. A collective agreement entered into between an employer and a registered trade union may also provide direction on performance or productivity-linked salary increases.

Criteria used for assessing performance and productivity will need to be fair.

WHAT STEPS SHOULD AN EMPLOYEE TAKE WHEN UNFAIR DISCRIMINATION TAKES PLACE

Any employee who feels that he/she has been unfairly discriminated against may lodge a grievance in writing with their employer. If the matter cannot be resolved at the workplace, or if it is structurally not possible for the employee to try to deal with it internally (e.g. in a small business where the employer is also the source of the discriminatory act or omission), the matter may be referred to the CCMA for conciliation within six months from the occurrence of the discriminatory act or omission.

If the CCMA is not able to resolve the dispute through conciliation, the employee has 90 days to follow one of the following applicable options:

Claims of unfair discrimination other than sexual harassment

- if the employee earns equivalent to or less than the threshold amount set by the Minister of Labour and Employment in terms of section 6(3) of the Basic Condition of Employment Act (BCEA) – R241 110.59 as of 1 March 2023 – the employee may elect to refer the matter to the CCMA for arbitration or to refer the matter to the Labour Court for adjudication. Alternatively, the employee has the right to approach the Labour Court.
- if the employee earns above BCEA threshold, the employee matter may be referred to the Labour Court for adjudication. However, the parties may agree in writing to have the matter arbitrated by the CCMA.

Claims of discrimination based on sexual harassment.

- in sexual harassment matters an employee has a choice between arbitration by the CCMA or adjudication by the Labour Court regardless of how much that person earns.

RELEVANT LEGISLATION

- The Constitution of the Republic of South Africa 1996, as amended.
- Employment Equity Act 55 of 1998, as amended.
- Basic Conditions of Employment Act 75 of 1997, as amended.
- Code of Good Practice on HIV and AIDS in the workplace.
- Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace