

Discrimination in the Work Place

Discrimination is a vast and complicated subject, and not able to be addressed fully in this service release. This release is aimed at making employers aware of the complexity and the pit falls within the employment context.

At the heart of unfair discrimination, lies differentiation. Differentiation, in the employment context, simply means that an employer treats employees or applicants for employment differently or the employer uses policies or practices that exclude certain groups of employees. Differentiation only becomes discrimination once that differentiation takes place for unacceptable reasons.

In other words, differentiation becomes discrimination if a link can be established between the differentiation, (on the one hand) and one of the listed or unlisted grounds of discrimination (on the other hand).

The Employment Equity Act does not prohibit discrimination as such, but only prohibits unfair discrimination. It follows that as long as discrimination is fair, it is acceptable.

The Employment Equity Act renders unfair any act or omission involving the 'unfair discrimination, either directly or indirectly' against any employee on various grounds. This could embrace any employment practice¹ which has the effect of unfairly discriminating in any way, for what ever motive.

The Employment Equity Act further prohibits employers' from discriminating against applicants for employment, when considering the suitability of their qualifications, solely on the basis of their 'lack of relevant experience'.²

An intention to discriminate need not be present. The impact of the discriminatory practice is the decisive factor.³

However, the Employment Equity Act, provides for three defences an employer may use to counter a claim of unfair discrimination – the inherent requirements of a job, affirmative action consistent with the purpose of the Act or, possibly, a general fairness defence.

Grogan states, direct discrimination occurs when an employer acts to the prejudice of employee on the basis of some invidious criterion for example when a woman is overlooked for promotion merely because she is a woman. Direct discrimination is invariably intentional. Whilst indirect discrimination occurs when an employer adopts some seemingly neutral criterion for differentiating between employees, but which has the effect of prejudicing a

¹ According to its definition in section 1 of the EEA, an employment practice includes recruitment procedures, advertising and selection criteria, the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, the working environment and facilities, training and demotion, disciplinary measures and dismissal.

² S 10 Employment Equity Act

³ *Ontario Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536 at 551; *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (IC) at 1089-90

particular group or category.⁴ For example a height or weight requirement that would exclude all but a tiny minority of women.

The employer's motive is irrelevant when establishing whether indirect discrimination has taken place, and the employee need not prove that he has been prejudiced or suffered loss.⁵

In South Africa, direct discrimination is said to occur when people are not treated as individuals. It occurs when characteristics, which are generalised assumptions about groups of people, are assigned to each individual who is a member of that group, irrespective of whether that particular individual displays the characteristics in question.

The prohibition of unfair direct discrimination makes it clear that the focus should be on the individual, and it precludes the treatment of individuals as simply components of a racial, religious, sexual or national class.⁶

The legislature has listed the kind of criteria that are to be regarded as *prima facie* arbitrary:⁷

- Race;
- Gender;
- Sex;
- Ethnic or social origin;
- Colour;
- Sexual orientation;
- Age;
- Disability;
- Religion;
- HIV status;
- Conscience;
- Belief;
- Political opinion;
- Culture;
- Language;
- Marital status;
- Family responsibility;
- Or any other arbitrary ground.

It should also be mentioned that in *Harksen*⁸ the court listed various factors that must be considered in determining the unfairness or otherwise that must be considered. These are (i) the position of the complainants in society; (ii) the nature of the provision of power and the purpose sought to be achieved by it;

⁴ Workplace Law, Seventh Edition.

⁵ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC) at 289E-G and 293A.

⁶ *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) ; *Swart v Mr Video (Pty) Ltd* (1998) 19 ILJ 1315 (CCMA)

⁷ S 6 Employment Equity Act

⁸ *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC)

and (iii) the extent to which the discrimination has affected the rights of the complainants and whether it has led to an impairment of their fundamental dignity.

Differential treatment becomes arbitrary when it cannot be justified when measured against the requirements of the job concerned or the operational requirements of the employer.

The Labour Court has held that discrimination is unfair if it is purposeless, or for a purpose of insufficient importance to outweigh the rights of job-seeker or employee, or if it is 'morally offensive'.⁹

The Labour Court was quick to find that where only eight black employees out of a total of fifty were paid on a monthly basis, restriction of membership of a staff benefit fund to monthly paid employees constituted indirect discrimination.¹⁰

The Constitutional Court held that where discrimination is based on one of the specified grounds, it is presumed to be unfair; if the discrimination is based on some other ground, the complainant must establish unfairness.¹¹ This means where a claim of discrimination on one or more of the listed grounds is made, **the Courts will accept that the act complained of to be unfair, until the employer proves otherwise.** The onus is therefore upon the respondent (the employer) to prove that the discrimination complained of is fair.

⁹ *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) at 384A-D

¹⁰ *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1998) 19 ILJ 285 (LC)

¹¹ *Harksen v Lane NO & others* 1998 (1) SA 300 (CC)