

# 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* (2005/2016) [par 16] 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, if 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).

# Equal Pay For Work Of Equal Value

**Michael Rubenstein**



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