

Differentiation of employment conditions

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Introduction:

In contemporary South Africa, the predominant question on all newly qualified persons lips is how one obtains experience if all employers require experience as part of employment requirements, and if one obtains employment, could there be differentiated between employees relating to remuneration if those employees provide the same value to the company.

The focus of this article will be on employment opportunities falling above the threshold as determined by the Minister from time to time, wherefore the provisions of the Basic Conditions of Employment Act, Act 75 of 1997 ('BCEA'), is not applicable.

The discussion in this article will furthermore revolve predominantly around the second part of the question, as consideration of the first question will require an economic, sociological, and business experiment falling outside the parameters of this article.

Applicable legislation:

Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the 'Constitution');

As South Africans' we are blessed with possibly the most comprehensive, inclusive, and progressive constitution in the contemporary international political and legislative spheres.^[1]

It is therefore apt to commence each analysis of the rights attributed to any South African citizen and/or foreigner employed within the boundaries of South Africa with consideration of the provisions of the applicable section/s of the Constitution.

Section 9 – Equality:

The drafters of the Constitution, in an attempt to prevent the future discrimination and/or oppression of any of the diverse peoples within South Africa, included this section in the Constitution.^[2]

Section 9 provides that 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'^[3]

Section 9 furthermore provides that all citizens and foreigners within the boundaries of South Africa is protected from unfair discrimination, whether direct or indirect.^[4]

Section 9(3) also provides the listed grounds constituting unfair discrimination.

Section 36 – Limitation:

The drafters of the Constitution foresaw that, in order to ensure that the rule of law continues to prevail in contemporary South Africa, certain of the basic Human Rights contained in Chapter 2 of the Constitution, will have to be limited in certain circumstances.

In this instances Section 36 of the Constitution provides that the rights contained in Chapter 2 of the Constitution may only be limited if such '... limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...'^[5]

Of importance to the subject of this article is the fact that the rights provided for in Chapter 2, as referred to above, may only be limited if such limitation does not impugn the human dignity of an employee.

Employment Equity Act, Act 55 of 1998 (hereinafter referred to as the 'EEA'):

The provisions of Chapter 2 of the EEA regulate any employment relationship within the boundaries of South Africa.^[6]

Section 6 – Prohibition of unfair discrimination:

The Courts consider the provisions contained in Section 9(3) of the Constitution and Section 6(1) of the EEA analogous, wherefore the Courts have opted to apply these provisions in conjunction when considering instances of unfair discrimination.^[7] An important principle emanating from the provisions of Section 6 is the principle of 'equal value for equal pay' which provides that employees are entitled to receive the same

remuneration if they provide the same value to a company.

A strict interpretation of this section, as well as the case law dealing with the abovementioned principle seems to provide that all employees providing equal value to the employer must receive equal pay.

Section 6, read with Section 187 of the Labour Relations Act, Act 66 of 1995, and Section 9 of the Constitution of the Republic of South Africa, 1996, further provides the listed grounds, as well as, the unlisted and/or 'arbitrary grounds' constituting unfair discrimination within the South Africa employment sphere.

Labour Relations Act, Act 66 of 1995 (hereinafter referred to as the 'LRA'):

Section 187 provides the grounds constituting unfair discrimination, which grounds include listed grounds, as well as, unlisted and/or 'arbitrary' grounds.

Applicable case law:

S Ndudula & 17 Others v Metrorail – PRASSA:^[8]

The honourable Labour Appeal Court confirmed the reasoning of the honourable Landman J in *Kadaika* in which it was held that differentiation between employees on the grounds listed in Section 6 of the EEA, Section 9 of the Constitution and Section 187 of the LRA, or unlisted/'arbitrary' grounds will constitute unfair discrimination. The honourable Landman J further held that a differentiating ground which '... does not serve legitimate purpose (that would serve as justification).'^[9] constitute unfair discrimination.

It is found in the judgement in *Kadaika*, that the impingement of the basic human rights contained in Chapter 2 of the Constitution will constitute unfair discrimination in terms of the EEA and LRA, if not reasonable, justifiable and with due consideration to the human dignity of a specific employee.

The honourable Court in *Kadaika* furthermore explains that the rationality of a differentiation is found in the connection between the differentiation and the legitimate purpose, and not the logic or level-headedness of the average employer or validity of the differentiation in general.^[10] The effect of this judgment is that the differentiation between employees on listed or unlisted/'arbitrary' grounds will constitute unfair discrimination if such grounds cannot be reasonably justifiable.^[11]

South African Municipal Workers' Union obo Armstrong, and others v Nelson Mandela Metropolitan Municipality:^[12]

With regards to remuneration payable to different employees, it was held by the honourable Commissioner J Gruss, that an employee's length of service, the status of the position held, and the responsibilities of that employee are considered reasonable and justifiable grounds for differentiating between employees.

Conclusion:

According to the abovementioned sections, legal principles and case law, the short answer to the second part of the question is that employers are entitled to differentiate between employees and that employees who do not have the same length of service as other employees could legally be paid less, even though those employees provide the same value to the employer.

It is however clear from the abovementioned that only an in-depth analysis of all the circumstances prevalent in a specific scenario will provide a conclusive answer to that specific scenario.

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^[1] 'Is the South Africa Constitution the 'Best in the World'?', Martin van Staden, Rational Standard, 16 July 2018, T<https://rationalstandard.com/is-the-south-african-constitution-the-best-in-the-world/>. 'Why the South African Constitution is BETTER than the United States's', Mark S Kende, 2010, <https://academic.udayton.edu/race/06hrights/GeoRegions/Africa/Safrica03.htm>.

^[2] See also Sections 10, 12, 13, 15, 16, 17, 18, 21, 22, 23, 24, 17, 29, 30, 33 and 36 of the Constitution of the Republic of South Africa, 1996.

^[3] Section 9(1) of the Constitution of the Republic of South Africa, 1996.

^[4] Section 9(3) and (4) of the Constitution of the Republic of South Africa, 1996. See also Section 8 of the Interim Constitution of the Republic of South Africa, 1993.

^[5] Section 36 of the Constitution of the Republic of South Africa, 1996. Refer specifically to Section 36(1)(a) to (e) of the Constitution of the Republic of South Africa, 1996.

^[6] Section 4(1) of the Employment Equity Act, Act 55 of 1998.

[7] *Ndudula and Others v Metrorail PRASA (Western Cape)* (C1012/2015) [2017] ZALCCT 12; [2017] 7 BLLR 706 (LC); (2017) 38 ILJ 2565 (LC) (30 March 2017), para 56.

[8] *Ndudula and Others v Metrorail PRASA (Western Cape)* (C1012/2015) [2017] ZALCCT 12; [2017] 7 BLLR 706 (LC); (2017) 38 ILJ 2565 (LC) (30 March 2017).

[9] *Supra* footnote 2, paragraph 99.

[10] *Supra* footnote 2, paragraph 78.

[11] *Supra* footnote 2, paragraph 79 - The differentiation must furthermore be evaluated in light of the provisions of Section 9(1) of the Constitution

[12] [2016] 11 BALR 1260 (CCMA)