

EMPLOYMENT

Higher qualifications not an automatic reason validating differential pay between employees

13 September 2017 5 min read

ISSUE

Whether the employer had unfairly discriminated against farm supervisors by grading and paying them less than farm foremen who performed the same work but who had different academic qualifications.

SUMMARY

In the matter of *National Education Health and Allied Workers Union obo Sinxo and Others versus Agricultural Research Council 2017 CCMA (26 January 2017)*, the Commission for Conciliation, Mediation and Arbitration ("Commission") had to decide whether farm supervisors, who were being paid less than farm foremen, were being unfairly discriminated against in terms of the provisions of the Employment Equity Act 55 of 1998 ("EEA").

Five farm supervisors were employed by the Agricultural Research Council for a considerable period. A dispute arose after it emerged that the farm-supervisors were being paid significantly less than the Agricultural Research Council's farm foremen.

Due to an organisational design process farm foremen were subsequently, and after the farm-supervisors had already been employed for a number of years, given a global grade (GG) of nine, which required a tertiary qualification, and farm-supervisors a GG of seven, which required a grade 12 qualification. The Applicants were kept at a GG of five because they did not possess a grade twelve qualification.

The farm-supervisors contended that they performed the same work as farm foremen. They had therefore been discriminated against. In response the employer contended that farm-supervisors could not have been discriminated against because the duties and responsibilities of the two positions were different and the two positions required different qualifications.

COMMISSION'S DECISION

In determining whether the farm-supervisors had been discriminated against the Commission had regard to the provisions of the EEA as well as its regulations.

Section 6(4) of EEA provides that:

"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 subsection (1), is unfair discrimination."

Section 6(1) of the EEA, in turn, provides that:

"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

In addition, the regulations to the EEA governing equal work for equal pay, issued on 1 August 2014, describe the criteria and methodology for assessing work of equal value as contemplated by section 6(4) of the EEA. It provides that a case must be made as to whether work is of equal

value, whether there is a difference in terms and conditions of employment, including remuneration, and, if so, whether the difference amounts in unfair discrimination. The regulations must be read in conjunction with section 11 of the EEA.

Section 11 of EEA deals with burden of proof and provides that:

(1) if unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –

- did not take place as alleged or;
- Is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –

- the conduct complained of is not rational;
- the conduct complained of amounts to discrimination; and
- the discrimination is unfair.

Taking the above into account the Commission held that in substance the work performed by the two positions was the same, or substantially the same. This finding was based, particularly, on the positions as they stood at the time of the hearing of the matter. The question then was whether the difference in remuneration was based on fair and rational criteria. The Commission found, in this regard, that although regulation 7 expressly recognizes that qualifications can be a valid basis for differentiation in remuneration it does not automatically make differentiation on such a ground rational and fair.

Rather, what is required is a proportionate analysis in which no one single factor should be given undue weight. Given that the farm-supervisors had actually been performing the work for a number of years, the introduction of the requirement of a qualification may be justified for new entrants into employment but not the farm-supervisors. The Commission found that there was no question that by grading and remunerating the farm-supervisors at a lower level purely because of their academic qualifications impugned their dignity.

Accordingly the Agricultural Research Council was ordered to appoint the five farm-supervisors on the midpoint of GG 7 with effect from the date of the award.

IMPORTANCE OF THIS CASE

This decision highlights the importance of a thorough and careful analysis of payment practices within an enterprise. There must be a valid and rational reason for the differentiation in remuneration where employees are paid different salaries and perform the same or similar work. It may be insufficient to simply rely on one of the justifications provided for in the Regulations where it would be inappropriate in the particular circumstances.



Andre van Heerden

Director

[View Profile](#)



Jacques van Wyk

Director

[View Profile](#)