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EMPLOYMENT

Is length of service reason to pay different salaries to employees performing the same functions?

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Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) & others

ISSUE

Whether length of service is a justifiable reason for paying employees performing the same functions differently.

COURT'S DECISION

In *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) & others* (Case no: C 687/15, 19 April 2016), the Labour Court considered the interpretation of section 6(4) of the Employment Equity Act 55 of 1998, as well as the newly enacted section 10(8).

This matter arose as an appeal against an arbitration award in which the Commissioner upheld a claim of unfair discrimination brought by the First Respondent, Workers Against Regression ("WAR"). At the CCMA, the Commissioner held that the fact that Pioneer Foods (the Applicant) paid, for an initial period of two years, their newly appointed employees 80% of the rate paid to their longer serving employees who performed the same work, amounted to unfair discrimination.

In evaluating WAR's claim the Court noted that in order to establish 'pay discrimination' it is necessary for a complainant to show that:

1. The work performed by the complainant is equal or of equal value to that of a more highly remunerated comparator; and
2. Such difference in pay is based on a prohibited ground of discrimination.

On appeal the first hurdle was establishing the ground on which the alleged discrimination was based. WAR had not based its claim on any of the listed grounds and therefore the Court accepted that the claim was based on an unlisted or arbitrary ground (as a result the onus was on WAR to prove such claim). However, at the CCMA, WAR conceded to the Commissioner that they did not know on which unlisted arbitrary ground they relied. It was only in their heads of argument in Court that WAR alleged, for the first time, that the grounds upon which they based their discrimination claim was the fact that newly appointed employees were being paid less merely because they had started working later than their long-serving colleagues.

The Court held that "nothing in the EEA precludes an employer from adopting and applying a rule in terms of which newly appointed employees start at a rate lower than existing, long-serving employees." The Court held further that the Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value ("Code") expressly recognises seniority or length of service as a consideration that could justify differentiation in remuneration, as do the regulations to the EEA.

As a result, the Court held that in order for 'mere differentiation' to amount to discrimination the reason for the differentiation must be irrational. In the instance where one relies on an 'arbitrary ground' one must be able to show, objectively, that the arbitrary ground is 'based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner'. If one were to adopt a wider interpretation of the term 'arbitrary ground' arising out of the amendment to the EEA then one must show that the differentiation was capricious or for no good reason (i.e, irrational). Even if discrimination, however, is found to be present it must nonetheless be found that such discrimination is also 'unfair'.

On the facts the Court found that there was in fact a rational connection between the difference in remuneration and the length of service, i.e. to reward long service and loyalty of existing employees. Therefore the differentiation was not arbitrary and, as a result was not discriminatory. However, the Court went further and noted that even if the differentiation were found to be arbitrary, and discriminatory, it was in any event not unfair.

IMPORTANCE OF THIS CASE

This case advances the view that differentiation in remuneration of people performing the same work on the basis of length of service does not if itself amount to arbitrary or unfair discrimination. The Code of Good Practice specifically refers to the practice of distinguishing between employees' length of service when determining appropriate remuneration.

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