

EMPLOYMENT

Salary discrimination not automatically unfair

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Unfair discrimination on the basis of an inequality in pay – between male and female staff, or staff of different ethnic or racial groups or any other arbitrary ground – is unlawful in terms of the Employment Equity Act.

But the opposite position – that there can be fair discrimination – also applies.

Even if there is a difference between pay or terms and conditions (which legally would be recognised as the employer discriminating between an employer and another, comparator employee), this discrimination may not always be unfair and a conclusion of inequality cannot automatically be drawn.

Certainly, if an employee complained of pay discrimination and was female for example, and otherwise of the same status, seniority, experience level and educational qualification as a comparator male employee, the reason for the difference may be solely the fact that she is female.

This would be unfair discrimination, due to pay inequality, where the employees being compared perform the same work. However, the Employment Equity Act recognises all (and more) of the above factors, such as status, seniority, experience level and educational qualification, as fair reasons to justify the difference. Even though there may be a difference, it is not due to the first employee's gender, and is therefore not unfair.

An additional factor that the Labour Court has recently taken into account, in determining whether a difference between a male and female employee is fair or unfair, is the "market forces defence."

This position takes into account that one employee (in this case a male), had more years of service and seniority and a higher Private Security Industry Regulatory Authority (PSIRA) grade (relevant for the employer in this case).

The court recognised that he could command a higher salary due to these factors, and that the employer had paid him more than another female employee in a similar position because he asked for a higher salary based on his market value. The difference was found to be not unfair.

Employers must be aware that this sensitive issue must be assessed on each case, and the mere fact that a difference exists, does not mean it is unfair.



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