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Unfair discrimination on “any other arbitrary ground”

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The Employment Equity Act[1] (“**EEA**“) aims to recognise and address the disparities in employment, occupation and income within the national labour market. Section 6(1) of the EEA prohibits unfair discrimination based directly or indirectly on 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.

Section 6(4) specifically recognises that a difference in terms and conditions of employment, directly or indirectly based on any one or more of the grounds listed in section 6(1), between employees of the same employer performing the same or substantially the same work or work of equal value constitutes unfair discrimination.

1. Facts

In the matter of ***L Qoyi and 220 Others v Metrorail – PRASA (Western Cape)***[2] the Labour Court (“**LC**“) was tasked with determining a claim under section 6(4) of the EEA of alleged unfair discrimination relating to the terms and conditions of employment of individual applicants (the “**Applicants**“) employed either as metro guards or train drivers by Metrorail.

The Applicants alleged that they performed the same or substantially the same work or work of equal value to other metro guards or train drivers who receive better remuneration packages. They claimed further that this amounted to unfair discrimination based “on an arbitrary ground” in terms of section 6(1) of the EEA. The Applicants argued that the aim of the EEA and specifically section 6(4) is to eradicate wage discrimination within the workplace and that Metrorail’s actions by not aligning the salary inequities amounted to unfair discrimination.

2. The differentiation complained of is briefly summarised below:

2.1 Differentiation based on medical aid subsidies

Metrorail offered all employees in certain income categories the option to belong to a medical aid scheme (the “**Subsidy**“). Those who chose not to were provided with an “equalisation amount” of R356 per month. Those employees who opted for a medical aid membership were provided with the Subsidy up to a maximum of R1 090. On the face of it, the gross remuneration package of those employees who opted for the medical aid membership placed them in a better financial position than those who chose not to belong to one.

In reality, the Subsidy appeared to have been insufficient to fully cover the medical aid contributions. Consequently, after deducting those contributions, they ended up with a lower gross salary than those who had not opted for the Subsidy and received the equalisation amount instead.

2.2 Promotion cases

The Applicants compiled a list of employees who became entitled to a package increase, inclusive of the Subsidy, whilst they were metro guards. These employees were then promoted to train drivers (“**Promoted Employees**“) and placed on the lowest salary level applicable to

train drivers. This salary level was still much higher than the highest salary level for metro guards. The Applicants contended that the Promoted Employees were advantaged twice by virtue of the package increase and the subsequent promotion.

2.3 Re-Absorbed employees on fixed-term contracts

In 2005, Metrorail sought to standardise the remuneration package of fixed-term contract employees. In order to attract former staff members to take these contractual posts, it was decided that they be paid at the same salary level they received when they left permanent employment. These Re-Absorbed fixed-term contract employees were later converted to permanent employees ("**Re-Absorbed Employees**").

Some of the Applicants were employed with Metrorail longer than the Re-Absorbed Employees. However, these Applicants were paid at a lesser rate than the Re-Absorbed Employees.

On the basis of these contentions, the Applicants argued that Metrorail discriminated against them on "an arbitrary ground" as the payment of different salaries to employees performing the same work or work of equal value has not been justified and must be regarded as "arbitrary".

Metrorail argued that the Applicants could not rely on "an arbitrary ground" as a ground of unfair discrimination unless the arbitrariness is based on a ground of discrimination of a nature similar to the grounds already set out in section 6(1) or an analogous ground. In the absence of an analogous ground, the discrimination complained of is not unfair.

3. Labour Court Evaluation

The LC looked at the test for proving discrimination on an arbitrary ground as set out in section 9(2) of the EEA. It provides that a complainant alleging unfair discrimination 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.

Additionally, the Regulation 3 of the EEA Regulations provides that in order to eliminate unfair discrimination, an employer must take steps to eliminate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value if those differences are directly or indirectly based on a listed ground or any arbitrary ground that is prohibited by section 6(1).

Regulation 7 provides factors which justify differentiation in terms and conditions of employment. It states that 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 of a combination of a number of listed grounds. Notably, amongst the listed grounds are an individual's seniority or length of service[3] and any other relevant factor that is not unfairly discriminatory in terms of section 6(1).[4]

The LC dealt with each category of differentiation in turn:

3.1 Differentiation based on medical aid subsidies

The LC recognised that those employees who had not opted for the medical scheme membership might appear to be in a more favourable gross financial position. However, it was held that this differentiation was rationalised when consideration is had to the financial burden of having to carry the cost of any medical expenses that the employees would have otherwise been covered for had they chosen the option which would give them less gross remuneration. Additionally, the cost of bearing this financial burden will vary depending on the medical insurer and the health of the individual employee and their family.

3.2 Promotion cases

The LC found that the mere fact that the Promoted Employees were placed on the lowest salary level for train drivers receiving the Subsidy could not, in and of itself, be an unfavourable form of differentiation unless the very differentiation between the highest metro guard salaries and the lowest train driver salaries is being challenged. This was not the case made out by the Applicants.

The LC held further that the argument regarding the Subsidy received by the Promoted Employees would be determined on the same principles as discussed in 3.1.

3.3 Re-Absorbed employees on fixed-term contracts

The LC held that the Re-Absorbed Employees were re-engaged because of their previous experience. The Re-Absorbed Employees were not earning salaries comparable to what they would have been earning had they only started employment as train drivers at the start of their first fixed-term contract. The LC held further that the Applicants did not provide the court with examples of employees who had the same length of experience as the Re-Absorbed Employees and who might therefore be entitled to expect to be paid the same.

The LC agreed with Metrorail's argument and held that despite section 6(4) of the EEA providing express redress where employees performing the same or substantially the same work or work of equal value are not receiving the same remuneration, the reason for differentiation must be one that is directly or indirectly based on one or more of the grounds listed in section 6(1). It was held that the Applicants did not rely on any grounds expressly identified as examples of reasons for salary differentials but rather only relied on the general category of "any other arbitrary ground".

It was found that the EEA Regulations, read with section 9(2) of the EEA introduce an additional set of criteria to be used when determining equal pay claims that effectively excludes certain challenges to discrepancies in remuneration unless those also have an unfairly discriminatory impact.

The LC was not persuaded by the Applicants' claims of unfair discrimination and dismissed the claims.

The case shows that although section 6(1) of the EEA prohibits unfair discrimination "on an arbitrary ground", the ground considered to be arbitrary should still be sufficiently similar to the expressly listed grounds. It follows that a claim for unfair discrimination cannot be solely based on an arbitrary ground and must at least be linked to a listed ground.

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[1] Act 55 of 1998.

[2] Case no: C1022/2015.

[3] Regulation 7(1)(a) of the EEA Regulations.

[4] Regulation 7(1)(g) of the EEA Regulations.



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