

DISCRIMINATION

WHAT IS DISCRIMINATION?

Discrimination occurs when an employer treats a person differently based on physical attributes or other factors such as religion or political belief. The act of differentiation may at times be fair, but it is more commonly found that differentiated treatment is unfair.

Discrimination may be fair or unfair. Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

WHAT IS UNFAIR DISCRIMINATION?

Unfair discrimination occurs when an employer shows favour, prejudice or bias for or against a person on a prohibited ground, including a person's 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 or birth, or on any other arbitrary ground.

Where the differentiation is not obviously on one or more of these prohibited grounds, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics of the person which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner

There are two main forms of discrimination related to 'unfair discrimination', namely—

- direct discrimination; and
- indirect discrimination.

Direct discrimination is easily identifiable and involves obvious differential treatment between employees and job applicants on the basis of any grounds. For example an employer follows a policy of remunerating women employees on a lower scale without justification, whereas the male employees are remunerated at a much higher scale for doing the same work.

Indirect discrimination, on the other hand, is not as easily recognisable. It is a more subtle form of discrimination. It involves the application of policies and practices that are apparently neutral and do not explicitly distinguish between employees and job applicants but, in reality, have a disproportionate and negative effect on certain individuals or groups. For example, where the job advertisement without justification, requires that applicants must live in a particular area knowing that the residents of that area are predominantly from a particular race group.

The Employment Equity Act (EEA) also emphasises that—

- **harassment** of an employee is a form of unfair discrimination and is prohibited on any one or a combination of the above-mentioned grounds of unfair discrimination;
- **medical testing** at the request of an employer will not be allowed unless legislation permits or requires the testing, or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job;
- **HIV-testing** can only be carried out at the request of an employer if such testing is determined justifiable by the Labour Court
- **psychometric testing** or other assessments at the request of an employer cannot be done unless such tests are scientifically valid, can be applied fairly and are not biased against any employee or group.

Essentially one has to give consideration to the impact of actions, policies and procedures when evaluating discriminatory practices, rather than intention.

WHEN MAY DISCRIMINATION BE FAIR?

It is not unfair discrimination to –

- take affirmative action measures consistent with the purpose of the Employment Equity Act; or
- distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

AFFIRMATIVE ACTION

Affirmative action aims to achieve equality at work without lowering standards and without unduly limiting the prospects of existing employees.

This is done through the implementation of measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are fairly represented in the workforce. Designated groups refer to black persons, women and people with disabilities who are citizens of the Republic of South Africa by birth or descent, or became citizens of the RSA by naturalisation before 27 April 1994 or after 26 April 1994 and who would have been able to acquire citizenship by naturalisation before that date had it not been for apartheid policies.

THE INHERENT REQUIREMENT OF A JOB

Discrimination based on the inherent requirement of the particular job does not constitute unfair discrimination. An inherent requirement of a job depends on the nature of the job and required qualifications. If such requirements can be shown, discrimination will be fair. For example, discrimination which occurs as a result of a person with poor eyesight failing

to be appointed as a pilot, is not unfair if the quality of eyesight is proven to be an inherent requirement of the job.

FAIR COMPULSORY DISCRIMINATION BY LAW

The law does not allow the employer to employ children under the age of 15 years, or pregnant women four weeks before confinement and within six weeks of giving birth.

DISCRIMINATION BASED ON PRODUCTIVITY

It may be fair for the employer to discriminate on the basis of productivity when giving a salary increase, for example increases based on merit. This, of course, would be dependent on the fairness of the criteria utilised for assessing performance and productivity.

WHAT STEPS SHOULD YOU TAKE WHEN UNFAIR DISCRIMINATION TAKES PLACE

Any employee who feels that he/she has been unfairly discriminated against or that an employer has contravened the laws may lodge a grievance in writing with their employer. The matter may thereafter be referred to the CCMA within six months if the issue cannot be resolved at the workplace. If the CCMA is not able to resolve the dispute through conciliation, the matter can either be referred to arbitration if the employee earns less than the amount set by the Minister of Employment and Labour in Chapter Two of the Basic Condition of Employment Act (BCEA). If the employee earns above the amount referred to in the BCEA, the matter may be adjudicated by the Labour Court. However, in these circumstances, if both parties agree in writing, the matter be arbitrated by the CCMA.

In sexual harassment matters, the employee has a choice between arbitration at the CCMA and adjudication at the Labour Court regardless of how much he or she earns.

RELEVANT LEGISLATION

- The Constitution of the Republic of South Africa 1996, as amended
- Employment Equity Act 55 of 1998, as amended
- Basic Conditions of Employment Act 75 of 1997, as amended
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, as amended