EQUAL PAY FOR EQUAL WORK – CAN YOU DIFFERENTIATE WITHOUT UNFAIRLY DISCRIMINATING?

“Prohibition of unfair discrimination: 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 origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground” (from the Employment Equity Act)

Our employment laws and labour courts come down heavily on any unfair discrimination in the workplace, but it’s not always easy to decide whether “differentiation” between employees is or is not “unfair discrimination”.

Take for instance a recent Labour Court case where a black female employee complained to the CCMA (Commission for Conciliation, Mediation and Arbitration) about the higher salary paid to her white male colleague.

They were both employed as “surveillance auditors” in a casino with the same job descriptions, doing the same work on a daily basis, graded at the same level, and reporting to the same surveillance shift manager. Nevertheless her remuneration package was nearly half of her colleague’s – unfair discrimination, she said, on the grounds of race and gender.

The CCMA agreed with her and ordered her employer to (1) place her in the same salary bracket as her colleague and (2) pay her a once-off amount of the annual difference in their packages.

Requirements and defences

The Labour Court however set aside the CCMA’s award and ordered a re-hearing before a different commissioner. Its decision, although based on “reviewable irregularities” in the CCMA (in itself a topic of interest to labour lawyers more than to their clients) neatly summarises the legal principles as they applied in this case. Principles important to both employers and employees –

* Where unfair discrimination is alleged, the onus is on the employer to prove that the discrimination did not take place or that any discrimination that did take place was rational and not unfair, or is otherwise justifiable.
* There is a general requirement on employers to “ensure that employees are not paid different remuneration for work of equal value based on race, gender or disability”.

“Work of equal value” means work that –

* Is the same as the work of another employee of the same employer, if their work is identical or interchangeable;

* Is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;

* Is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value ...”.

(In this case of course there was no dispute that the first category – same work - applied, so the other categories were not analysed by the Court, but in many workplaces they will be highly relevant.)

Where there is differentiation, an employer can raise various defences to justify it - seniority, length of service, qualifications and the like. In this case the employer relied on the male employee’s superior (30 years’ worth) relevant experience in security, much better qualifications and “market forces” which it said forced it to match his existing package in order to recruit him.

The commissioner’s failure to adequately address these defences was central to the Court’s decision here, but the practical issue is that as an employer, whatever defence/s you raise, you will have to prove “rationality, fairness or other justifiability”.

As always, our labour laws being as complex as they are (the above is of necessity just a brief summary of a particular case), and the penalties for getting them wrong potentially so costly, take specific legal advice in any doubt!