
Unfair discrimination claim upheld despite differences in job titles

Unfair discrimination – equal pay – indirect discrimination – labour broker – transfer

The Labour Court, in *Southern African Clothing and Textile Workers' Union v Alpha Pharm (Pty) Ltd*, considered whether black employees who perform similar work to their white counterparts, but earn significantly less, were unfairly discriminated against on the basis of race. The case focused on whether differences in job titles and historical employment arrangements justify pay disparities. CTH acted for the trade union and its members.

The union and its members (“applicants”) referred an ‘equal pay for equal work’ dispute to the CCMA in terms of section 6(4) of the Employment Equity Act. They alleged that they were being unfairly discriminated against on the basis of race, as they earned substantially less than their white counterparts for performing the same or substantially similar work, or work of equal value.

The applicants had initially been employed by a labour broker before being transferred to Alpha Pharm in terms of section 197 of the Labour Relations Act. Their comparators had been directly employed by Alpha Pharm prior to the transfer. The comparators were also employed under the job title “multi-skilled” employees, whereas the applicants were employed under various job titles, such as “goods receiving clerks”, “dispatch clerks”, and “packers”.

The commissioner found that although there was differentiation in pay, this was justified and reasonable due to the historical differences in employment and the different job titles which denoted different forms of work. The commissioner accordingly dismissed the claim and found that it did not amount to unfair discrimination.

On review, the Labour Court found that the commissioner placed undue emphasis on job titles rather than the actual nature and substance of the work performed. Evidence before the commissioner showed that the applicants were as capable and skilled in performing work across multiple departments and thus were effectively “multi-skilled” as well, despite their formal job titles. The employer’s witnesses were unable to demonstrate meaningful differences in skill, training, or responsibilities between the applicants and their comparators.

The Court further found that factors such as length of service did not justify the substantial pay disparity. In some instances, employees with similar, or only marginally longer service, earned significantly more, while others with shorter service earned the same as the applicants. Further, the Court held that the applicants should not be prejudiced because they were previously employed by a temporary employment service, although they were placed at Alpha Pharm throughout.

In considering whether the conduct amounted to unfair discrimination, the Court applied sections 6(1) and 6(4) of the Employment Equity Act. As the claim was based on race, a listed ground under section 6(1), the employer bore the onus in terms of section 11(1) to prove that the discrimination did not take place as alleged, or that the conduct was rational, not unfair, or otherwise justifiable.

The Court held that the reliance on job titles and the theoretical ability of “multi-skilled” employees to work across departments did not justify the wage disparity, particularly where such rotation seldom occurred in practice. Importantly, the Court found that the source of the disparity lay in the historical employment structure. Employees who had been employed through the labour broker, all of whom

were black, were paid significantly less than those who had always been employed directly by Alpha Pharm, all of whom were white. This constituted indirect discrimination.

The Court concluded that the commissioner unreasonably found that employer demonstrated that the discrimination was justified. The commissioner had misdirected herself by failing to properly consider the evidence and the nature of the enquiry. The arbitration award was accordingly reviewed and set aside in respect of the fourth to ninth individual applicants. The Court substituted the award with an order declaring that the applicants had been unfairly discriminated against and directing the employer to equalise their remuneration with that of the comparators.

Employers must ensure that pay differentials are based on objective and justifiable factors, not formal job titles which do not align with actual work or historical arrangements. Where employees perform work of equal value, significant disparities may constitute unfair discrimination, particularly where they disproportionately affect employees based on a listed ground such as race.

For Employees to succeed with similar 'equal pay for equal work' claims under sections 6(1) and 6(4) of the Employment Equity Act, they would have to prove that they perform the same/similar work or work of equal value with their higher-paid comparators but are earning substantially less than their counterparts. The Employees would also need to establish that there are no meaningful differences in skill, training, or responsibilities between them and their comparators. Finally, they will have to show that the basis for the pay disparity is on a listed ground of discrimination.

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