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Equal pay for equal work – When is the discrimination unfair?

There has been a tick up in the number of these claims since the introduction of arbitrariness as a ground for discrimination, under section 6(1) and 6(4) of the Employment Equity Act, 1998 (the EEA), in the last number of years.

### **What employers should know**

Firstly, the legal test is narrow, and an arbitrary ground is nothing more than a ground analogous to a listed ground under the EEA. Section 6(1) does not prohibit differentiation, arbitrariness or arbitrary discrimination, but rather prohibits unfair discrimination on an arbitrary ground. The test for unfair discrimination boils down to an impairment of human dignity or having an adverse effect in a similar serious consequence.

Secondly, the distinction between listed and unlisted grounds affects only the burden of proof in court.

Thirdly, for an employee to succeed they must simply show that discrimination existed.

Fourthly, irrationality must be shown. The irrationality of discrimination will result in an award of unfair discrimination.

It is an employee's unhappiness with being paid unequally that gives rise to the claim, but for an employee to successfully claim unfair discrimination the employee must rely upon grounds that implicate a clear level of injury to human dignity, comparable to a listed ground.

So, we seem to have come full circle despite the amendments in that arbitrary conduct is not in itself a ground of discrimination, only conduct based on a ground of discrimination that is arbitrary is actionable in court and to be actionable the ground must be analogous to a listed ground.

Unfair discrimination law is inherently complex, and we see this every day in court. An employer's response to a claim is important and must be precisely formulated to be successful.

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