

# Pay discrimination on arbitrary grounds? Prove it.

 By Jacques van Wyk

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To succeed with a claim of unfair discrimination based on an arbitrary ground, an employee would need to adduce evidence or establish link between the arbitrary ground and the differentiation complained of. There may be other plausible reasons justifying pay differential such as a difference in workload which justifies the difference in pay between employees.



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## Court's decision

In the case of *Minister of Correctional Services & others v Duma* (2017), the Labour Appeal Court (“LAC”) had to consider this issue. The respondent (“Employee”) was appointed to the post of senior correctional officer on a salary level 8. After the appointment, the employee became aware that employees at various places in four other provinces who performed the same work with the same job description were on salary level 9, and earned a higher remuneration than she did. The employee believed that she was discriminated against on the ground of her geographical location. The employee contended that she was doing the same amount of work as four colleagues in other provinces and that it was discriminatory of the employer to compensate her less than the others. The employer agreed that employees in the same position as the employee would perform the same kind of work no matter where they are located; however, the volume work would differ from region to region.

The LAC noted that section 6(1) of the Employment Equity Act 55 of 1998 (“EEA”) provides that “No person may unfairly discriminate, directly or indirectly, against an employee in an employment policy or practice” on one or a number of the grounds set out in the section, which include “on any other arbitrary ground”. Furthermore, in terms of section 6(4), differences in remuneration between employees who perform the same or substantially the same work based on one of the grounds in section 6(1) amounts to unfair discrimination.

The LAC noted further that the employee bore the burden to prove that the conduct complained of clearly amounted to a differentiation on geographical grounds and that it was unfair and impaired her dignity.

The employee was required, at a minimum to show that the nature and volume of the work was similar to that of employees in the same position in other provinces who occupied a higher grade level and thus the ground of differentiation was in fact geographic location.

The LAC held that the employee did not provide concrete evidence of this other than the inferences drawn by the employee. Accordingly, the employee had not proven that the differentiation was as a result of geographic location and there were other plausible reasons, such as differences in workload, which could explain the differentiation.

## **Importance of this case**

When claiming that the reason for a difference in pay or remuneration is based on an “arbitrary” ground, the employee bears the burden of proving not only that the difference is due to the ground on which they rely but also that it amounts to unfair discrimination.

## **ABOUT JACQUES VAN WYK**

Jacques van Wyk is a director in Labour and Employment Law at Werksmans Attorneys. He was named as a recommended lawyer in Labour & Employment by the Legal500 (2010-2012), and co-authored 'Labour Law in Action - A Handbook on the new Labour Relations Act - 1997' with Frances Anderson. Jacques specialises in commercial employment transactions arising during mergers and acquisitions, corporate restructures, executive employee terminations of employment, drafting employment contracts and letters of appointment; disciplinary codes and procedures; and grievance procedures.

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