



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C 865 / 2016

In the matter between:

K NAIDOO AND 68 OTHERS

Applicants

and

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

Respondent

Heard: 15 November 2018

Delivered: 12 December 2018

Summary: The meaning of 'any other arbitrary ground' as per section 6(1) of the Employment Equity Act, wage differentiation dispute, wide v narrow interpretation of the phrase 'any other arbitrary ground'.

JUDGMENT

PRINSLOO, J

Background facts

- [1] The Applicants are members of the Parliamentary Protection Services (PPS) and they are all employed by the Respondent as protection officers. During 2015 and following incidents in the National Assembly, a resolution was passed to enhance the capacity of the PPS. Two new positions came into existence, namely Control: Chamber Support Officer (CCS) and Chamber Support Officer (CSO) and a total of 66 of these positions were created. The

process was expedited and done in two phases. Phase 1 entailed the creation of the new positions for which external candidates of the South African Police Services (SAPS) were invited to apply, as the existing PPS did not have the necessary capabilities. A total of 37 appointments were made from the ranks of members of the SAPS and they were appointed on salaries higher than those earned by the Applicants. The remainder of the positions were earmarked to be filled from the ranks of the PPS, once certain processes, including training and mentoring, were completed. Arising from this, the Applicants have brought a wage discrimination claim in terms of the provisions of section 6(4) of the Employment Equity Act¹ (EEA).

- [2] The Applicants' case is premised on the provisions of section 6(4) of the EEA that provides that a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in section 6(1), is unfair discrimination.
- [3] The Applicants' case is that the newly appointed CSO's are earning higher salaries than them, notwithstanding the fact that the CSO's have lesser service and experience and perform only part of the functions of the job descript of a protection officer. There is no justifiable or fair reason for the wage disparities and the said disparities constitute discrimination on an arbitrary ground. The decision to pay the CSO's higher salaries is capricious, unjustifiable and arbitrary.
- [4] The alleged arbitrary and capricious decision is based on an act of nepotism by the manager, Mr van der Spuy, who head hunted his erstwhile colleagues from the SAPS and the only reason why the CSO's are remunerated at a higher rate, is because they were employed by the SAPS and the Applicants were not. The Applicants further contend that they are discriminated against based on their longer years of service.
- [5] The Respondent filed a statement of response wherein it was firstly denied that the work performed by the Applicants and the CSO's was the same or substantially the same or work of equal value and even if it was found to be of equal value, there was justification for the wage disparity.

¹ Act 55 of 1998, as amended.

- [6] The Respondent's case is that the wage disparity is not based on an arbitrary ground of discrimination and the Applicants' reliance on nepotism and employment by SAPS does not constitute an arbitrary ground of discrimination.
- [7] The parties subsequently filed a pre-trial minute wherein they agreed that a legal point should be argued upfront.

The legal point

- [8] The legal point to be considered is whether the Applicants' description of the alleged wage disparity as capricious, baseless, unfair, unreasonable and unjustifiable establishes an arbitrary ground for discrimination for the purposes of section 6(4), read with section 6(1) of the EEA.
- [9] The legal point requires this Court to determine two main issues. Firstly, the meaning of 'an arbitrary ground' as provided for in section 6(1) of the EEA and secondly, whether the Applicants' pleaded case is based on such a ground. If it is not, the Respondent's preliminary point stands to be upheld and the Applicants' claim be dismissed. If the preliminary point is dismissed, the matter should proceed to trial. The parties are *ad idem* on this.

The meaning of an arbitrary ground

- [10] The phrase 'or on any other arbitrary ground' was added to section 6(1) and section 6(4) was added to the EEA by way of the 2013 amendments to the EEA, which came into operation on 1 August 2014.
- [11] Section 6(1) of the EEA provides that:
- '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.'
- [12] Section 6(4) of the EEA provides that:

'A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.'

The wide vs narrow interpretation

[13] The meaning of an 'arbitrary ground' gave rise to a wide and narrow interpretation of the phrase, leading to conflicting judgments.

[14] On the wide interpretation, arbitrariness is itself a ground of discrimination.

[15] On the narrow interpretation, in order to qualify as an arbitrary ground, the ground relied upon must be analogous to a listed ground of discrimination, in the sense that it has the potential to impair upon human dignity in a comparable manner, or have a similar serious consequence.

[16] Mr de Kock for the Applicants argued that this Court should adopt the wide interpretation that 'arbitrary' means 'irrational' and 'capricious' in respect of section 6(4) wage differentiation disputes and that 'any other arbitrary ground' must be extended to include any actions which are irrational or which may in itself be determined by no principle. If the act of differentiation cannot be justified, it is discriminatory.

[17] On the other hand, Mr Myburgh for the Respondent, submitted that this Court should follow the narrow interpretation. Mr Myburgh submitted heads of argument that were of great assistance to this Court.

[18] Turning to the case law: in *Pioneer Foods (Pty) Ltd v Workers* ² (April 2016), which was decided after the amendment of the EEA and dealing with section 6(1), the Court adopted the narrow interpretation and held that:³

'Mention has already been made above of the test articulated in *Harksen*⁴ ... as regards the test to be applied in determining whether a proffered unlisted ground actually constitutes an 'other arbitrary ground'. In short, if the

² (2016) 37 ILJ 2872 (LC).

³ *Supra* n 2 at para 55, 56 and 59.

⁴ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) ("*Harksen*").

differentiation is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner.

Where a collective agreement stipulates different pay levels for employees with different periods of service with the employer concerned, this is not arbitrary differentiation, nor is 'length of service' (or being a 'new employee') an unlisted ground meeting the test just referred to."

"Moreover, length of service with the employer concerned as a factor affecting pay levels is not an 'other arbitrary ground', as contemplated in s 6(1) or in the test laid down by the Constitutional Court. Treating people differently in the workplace in accordance with their length of service with the employer does not impair their fundamental human dignity or affect them adversely in a comparably serious manner. The unlisted ground proffered by the union in its heads of argument did not qualify. That too should have been the end of its case.'

[19] Having disposed of the matter, the Court proceeded:⁵

'And even if the inclusion of an 'arbitrary' ground is meant to widen the scope of discrimination in the context of equal pay for work of equal value, the distinction in this case – length of service – is not arbitrary. This wider reading of the new subsection is discussed in these terms by Du Toit:⁶

"[T]he reintroduction of the prohibition of discrimination on 'arbitrary' grounds cannot be understood as merely reiterating the existence of unlisted grounds, which would render it redundant. To avoid redundancy, 'arbitrary' must add something to the meaning of 'unfair discrimination'. Giving it the meaning ascribed to it by Landman J in *Kadiaka*⁷ – that is, 'capricious' or for no good reason – would broaden the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational without confining it to the latter."

⁵ *Id* n 2 at paras 60-61.

⁶ Du Toit *et al*, *Labour Relations Law* (6th ed, 2015) at 683.

⁷ (1999) 20 *ILJ* 373 (LC) at para 43.

But even on this broader interpretation, the differentiation between new entrants and longer serving employees is rational, sanctioned by collective agreement, and envisaged by the code of good practice.’

- [20] It is evident that these comments were not necessary for the determination of the matter, they were made *obiter*⁸ and the case was disposed of by adopting the narrow interpretation.
- [21] In March 2017, the case of *Ndudula and Others v Metrorail – Prasa (Western Cape)*⁹ also dealt with the amended section 6(1) of the EEA and settled the position in a number of respects. Firstly, dealing with reliance on the Court’s *obiter* comment in *Pioneer Foods*, it was made clear that “[t]his view is not part of the reasoning for the finding in *Pioneer Foods*”.¹⁰ I accept that the comment made in *Pioneer Foods* is no more than an *obiter* remark and it carries no more weight than a judicial observation made in passing.
- [22] Secondly, the Court expressly rejected the views of *Du Toit*¹¹ and placed the findings made in *Kadiaka v Amalgamated Beverage Industries*¹² in context.
- [23] Thirdly, the Court adopted the narrow interpretation and held that:¹³

‘When the amended section 6(1) is interpreted contextually with the amended section 11(2), ‘arbitrary ground’ in the phrase ‘or any other arbitrary ground’ refers to an unlisted ground also called unspecified grounds or grounds analogous to the listed grounds.’

- [24] The Court interpreted section 6 of the EEA and concluded that Parliament did not purport to introduce a third category of grounds upon which an employee

⁸ *De Kock and Others v Van Rooyen* 2005 (1) SA 1 (SCA) at para 17: “An ‘obiter’ pronouncement is a judicial observation made in passing: one not necessary for the decision of the case. It is a stated thought that does not advance the reasoning by which the outcome is reached.”

⁹ (2017) 38 ILJ 2565 (LC) (“*Metrorail*”)

¹⁰ *Metrorail* at para 34.

¹¹ *Metrorail* at para 93.

¹² *Metrorail* at paras 94-98. *Kadiaka* dealt with item 2(1)(a) of schedule 7 to the LRA (now repealed), which defined an unfair labour practice as unfair discrimination “on any arbitrary ground including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility”.

¹³ *Metrorail* at para 103.

could challenge the conduct of an employer. The effect of the amendment simply is that, discrimination on any arbitrary ground affecting human dignity constitutes unfair discrimination. In the event of the listed grounds, discrimination is presumed and any other arbitrary ground that affects human dignity requires that the complainant must define the ground and has the burden of proof¹⁴.

[25] In September 2017, judgment in *Sethole v Dr Kenneth Kaunda District Municipality*¹⁵ was handed down and although it dealt with the pre-amended section 6(1), the Court made important findings about the amended section. The Court endorsed the narrow interpretation adopted in *Pioneer Foods* (with reference to *Harksen*),¹⁶ and found:¹⁷

‘Accordingly, discrimination contemplated in this context means that it has to be shown that *dignitas* or right of equality of the complainant as a person, or that person’s personal attributes and characteristics, have been impaired or prejudiced. To describe it simply, the arbitrariness must be something akin or related to the kind of listed grounds in section 6(1) of the EEA.’

[26] Dealing with the concept of arbitrariness, the Court held that:¹⁸

‘In simple terms, the phrase ‘arbitrary’ in the context of the unlisted grounds in terms of section 6(1) of the EEA is not a synonym for ‘irrationality’ or even lawfulness. They are different concepts. Something may therefore be irrational or unlawful, but would not be discrimination, without also establishing the ‘further element’ as *per Prinsloo*¹⁹ [i.e. discrimination].’

[27] In June 2018, judgment in *Chitsinde v Sol Plaatje University*²⁰ was handed down and in addressing the meaning of an arbitrary ground, the Court quoted

¹⁴ *Metrorail* at para 108.

¹⁵ *Sethole v Dr Kenneth Kaunda District Municipality* [2018] 1 BLLR 74 (LC) (“*Dr Kenneth Kaunda*”).

¹⁶ *Dr Kenneth Kaunda* at para 84.

¹⁷ *Dr Kenneth Kaunda* at para 85.

¹⁸ *Dr Kenneth Kaunda* at para 72.

¹⁹ *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC) at paras 26-27.

²⁰ *Chitsinde v Sol Plaatje University* [2018] 10 BLLR 1012 (LC) (“*Sol Plaatje University*”).

with approval the commentary by *Du Toit*, as already referred to *supra*²¹, which encapsulates the wide interpretation to broaden the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational.

- [28] The Court found that the applicant had not proven discrimination in the “pejorative” sense and concluded that the applicant’s treatment was “not ‘arbitrary’ in the sense of being irrational”,²² with the result that his complaint failed.
- [29] The essence of the issue to be decided is whether, in interpreting the meaning of ‘arbitrary ground’, this Court is to accept a narrow or a wide interpretation.
- [30] In my view the correct approach is to accept the narrow interpretation and I say so for a number of reasons.
- [31] Firstly, I am inclined to follow, in fact I am bound to follow *Pioneer Foods* and *Metrorail*, where the narrow interpretation was accepted. In *Metrorail* it was effectively held that an arbitrary ground is nothing more and nothing less than a ground analogous to a listed ground, as contemplated in *Harksen*. The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparable, similar manner and not the classification of the ground as listed or unlisted. The distinction between listed and unlisted grounds affects only the burden of proof. Differentiation on both a listed and analogous ground amounts to unfair discrimination only if the differentiation has indeed affected human dignity or has had an adverse effect in a similar serious consequence.²³
- [32] Secondly, I am disinclined to follow *Sol Plaatjie* insofar as it is authority for the adoption of the wide interpretation. In *Sol Plaatjie*, no reference is made to *Pioneer Foods* or *Metrorail*, which adopted the narrow interpretation. The said judgments were binding, unless considered clearly wrong, which they are not and were not considered to be.

²¹ *Sol Plaatje University* at para 31 and para 19 of this judgment.

²² *Sol Plaatje University* at para 37 and 39.

²³ *Metrorail* at para 73.

- [33] Thirdly, the EEA does not prohibit differentiation, it prohibits unfair discrimination.
- [34] More specifically section 6(1) of the EEA does not prohibit differentiation, arbitrariness or arbitrary discrimination; it prohibits unfair discrimination on an 'arbitrary ground'. It prohibits discrimination through the phrase 'or on any other arbitrary ground' and not 'any arbitrary ground'. The wording of the section in this regard is significant.
- [35] 'Arbitrary ground' provided for in section 6(1), read in conjunction with section 11(2),²⁴ makes it clear that the irrationality of differentiation *per se* will not win a discrimination case based on an arbitrary ground. The conduct complained of must amount to unfair discrimination in that it must cause an injury to human dignity. Discrimination has to exist to begin with before rationality is considered. Irrationality does not win a case, the irrationality of discrimination does.
- [36] Differentiation *per se* does not constitute discrimination. Differentiation on a specified ground of discrimination is presumed to constitute unfair discrimination, which presumption is rebuttable. Given that an arbitrary ground is synonymous with an unlisted / unspecified ground, the test for whether discrimination is established, is that set in *Harksen* namely, if there is differentiation based on an unspecified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- [37] Although the Constitutional Court did not provide a comprehensive description of what 'attributes and characteristics' would comprise, it held that:²⁵

'What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been

²⁴ The section provides: "If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that - (a) the conduct complained of is not rational; (b) the conduct complained of amounts to discrimination; and (c) the discrimination is unfair."

²⁵ *Harksen* at para 50.

associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features.'

- [38] The test set out in *Harksen v Lane NO and Others*²⁶ will apply and in order for the alleged grounds of arbitrary discrimination to qualify as such, they must, objectively, constitute grounds based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner to a listed ground. In short: the unequal treatment must be based on attributes and characteristics attaching to a person before it will fall within the meaning of 'discrimination'.
- [39] Fourthly, the Explanatory Memorandum²⁷ in respect of adding the phrase 'or any other arbitrary ground' to section 6(1) of the EEA, explained that it was added *inter alia*, to bring section 6(1) of the EEA in line with the formulation of section 187(1)(f) of the Labour Relations Act²⁸ (LRA). In *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*²⁹, the Labour Appeal Court, when interpreting section 187(1)(f)³⁰ of the LRA, which provides for unfair discrimination on any arbitrary ground, accepted that an arbitrary ground is one which has the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. I can see no reason not to accept the same interpretation of the phrase 'any arbitrary ground' as provided for in the EEA.

²⁶ 1998 (1) SA 300 (CC).

²⁷ Explanatory Memorandum to the 2012 Employment Equity Amendment Bill, published in Government Gazette 35799 dated 19 October 2012.

²⁸ Act 66 of 1995 as amended.

²⁹ [2009] 12 BLLR 1181 (LAC).

³⁰ The section defines an automatically unfair dismissal as being where the reason for dismissal is that "the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility".

- [40] Lastly, arbitrary or irrational differentiation *per se* is not elevated to discrimination and should not be interpreted in that sense. 'Arbitrary' in itself is not a ground of discrimination and should section 6(1) of the EEA be interpreted to in effect, include a general right to rational differentiation, it would have a sweeping effect on the employment landscape. The differentiation tail should not wag the discrimination dog³¹.

The Applicants' case

- [41] The first issue to be decided was the meaning of 'an arbitrary ground' and as I have accepted that the narrow interpretation should be followed, the remaining question is whether the Applicants' pleaded case is based on such a ground.
- [42] In summary, the Applicants' pleaded case is that wage disparities constitute wage discrimination on an arbitrary ground and that those wage disparities are capricious, unfair, unreasonable and unjustifiable. The grounds for arbitrary discrimination advanced by the Applicants are nepotism, length of service and employment by SAPS of the comparators as qualifying criteria.
- [43] The question is whether these pleaded grounds qualify as grounds of discrimination based on an arbitrary ground.
- [44] Applying the *Harksen* test, for the Applicants pleaded grounds of arbitrary discrimination to qualify as such, they must show that it constitute grounds based on attributes and characteristics which have the potential to impair their fundamental human dignity or to affect them adversely in a comparably serious manner to a listed ground.
- [45] The Applicants cannot succeed as they cannot show that the grounds of arbitrary discrimination, as per their pleaded case, are analogous to the listed grounds as they have nothing to do with attributes or characteristics which make the Applicants who they are and they do not impair upon human dignity in a comparable manner to a listed ground. The Applicants failed to allege that the reason for differentiation is some characteristic that impacts upon their

³¹ Christoph Garbers and Peter le Roux "*Employment Discrimination into the Future*" (www.saslaw.org.za – conference – 2015 – papers).

human dignity. They did no more than attempting to describe the difference in pay as 'arbitrary', 'capricious', 'unfair', 'unreasonable' and 'unjustifiable'.

[46] The gist of the Applicants' case is that the Respondent favoured members of SAPS by employing them, instead of the Applicants, at salaries higher than those earned by the Applicants, despite their longer service with the Respondent. Although the Applicants' unhappiness with this reality is understandable and notwithstanding the fact that the differentiation in salary may be unfair or irrational, it does not change the fact that the grounds raised by the Applicant's do not involve a level of injury to human dignity, comparable to a listed ground and they do not constitute an arbitrary ground of discrimination.

[47] The Applicants have failed to make the minimum sufficient allegations to sustain a claim for unfair discrimination within the meaning of section 6(1) of the EEA.

[48] In short, arbitrary conduct is not, in itself, a ground of discrimination; only conduct based on a ground of discrimination that is arbitrary is actionable; and to be actionable, the ground must be analogous to a listed ground.

Costs

[49] This Court has a wide discretion to make orders for costs according to the requirements of the law and fairness and in my view this is a matter where the interests of justice and fairness will be best served by making no order as to costs.

[50] In the premises I make the following order:

Order

1. The Respondent's preliminary point is upheld;
2. The Applicants' case is dismissed;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate C de Kock

Instructed by: Bagraims Attorneys

For the Respondent: Advocate A Myburgh SC with Advocate A
Montzinger

Instructed by: State Attorney