



**THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA**

Not reportable

Case no: PA 09/2024

In the matter between:

**AMCU obo MEMBERS**

**Appellant**

and

**ABERDARE CABLES (PTY) LTD**

**First Respondent**

**THE COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**Second Respondent**

**NALEDI BISIWE N.O.**

**Third Respondent**

**Coram: Van Niekerk JA, Nkutha-Nkontwana JA, and Mooki AJA**

**Heard: 26 February 2025**

**Delivered: 14 April 2025**

**Summary: The appellant claims that a wage differential consequent on a collective agreement concluded between the employer and a trade union that was previously the majority union constitutes unfair discrimination on an arbitrary ground. The collective agreement established, as an alternative to retrenchment,**

a wage differential between employees engaged before and after 1 January 2014, prescribing a lower wage rate for the latter. Section 11 (2) of Employment Equity Act applied – conduct complained of not irrational, nor does it amount to unfair discrimination.

---

## JUDGMENT

---

**VAN NIEKERK, JA**

### Introduction

[1] This appeal concerns an equal pay claim filed by the appellant in terms of section 6 (4) of the Employment Equity Act<sup>1</sup> (EEA). The appellant contends that the first respondent (Aberdare) unfairly discriminated against 35 of its members employed by Aberdare (members) because it pays them less than other employees (comparators) who perform the same or similar work. The third respondent (arbitrator) found that the appellant had failed to establish that the difference in terms and conditions of employment between the members and their comparators constituted unfair discrimination. The Labour Court (per Prinsloo J) dismissed an appeal against the arbitrator's award. With the leave of the Labour Court, the appellant appeals against that judgment.

### Factual background

[2] The material facts are not in dispute. Aberdare's business operations fall within the scope of the Metal and Engineering Industries Bargaining Council (MEIBC). The MEIBC regulates the terms and conditions of employment in the industry by means of collective agreements, concluded at industry level, which fix minimum wage levels.

---

<sup>1</sup> Act 55 of 1998, as amended.

Historically, Aberdare paid its employees at rates in excess of the prescribed minimum level.

[3] On 8 March 2013, Aberdare issued a notice in terms of s 189 (3) of the Labour Relations Act<sup>2</sup> (LRA), Initiating a retrenchment process. During the ensuing consultation, Aberdare and the then majority union, the National Union of Metalworkers of South Africa (NUMSA), explored three possible options to address Aberdare's declining financial circumstances. The first was a wage freeze until such time as actual wages aligned with the minimum prescribed by the MEIBC agreement; the second, the commencement of a process of retrenchment; the third, agreement that new employees be paid at the MEIBC minimum rate and to allow natural attrition to ensure that in time, all employees would be engaged on the same rates of pay. The third option addressed Aberdare's concern that hourly rated wages were considerably above industry rates, resulting in a lack of competitiveness in the marketplace. Aberdare accepted (as did NUMSA) that the rates applicable in terms of the MEIBC main agreement were indicative of the market-related rate.

[4] Aberdare and NUMSA agreed to the third option. Aberdare's proposal recorded that it would '*set the norm for all hourly rated employees entering the employ of the Company in future*' and that the measure would '*equally create the opportunity of securing the future viability of the Company and the job security of its employees*'. The minutes of a meeting held between Aberdare management and NUMSA on 5 December 2023 record NUMSA's agreement to the proposal.

[5] Pursuant to the agreement, Aberdare implemented a differential wage rate so that employees engaged after 1 January 2014 (the affected employees among them) are remunerated at the lower MEIBC rate. The consequence has been a continuing differential in the levels of wages at every level, between employees who perform the same, similar, or substantially the same work.

---

<sup>2</sup> Act 66 of 1995, as amended.

The arbitration proceedings and award

[6] In 2015, after the agreement with NUMSA had been concluded, the appellant began recruiting at Aberdare's operation. In 2019, the appellant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) contending that the Aberdare was in contravention of s 6 of the EEA because there was a difference in terms and conditions of employment between the members and their comparators, the latter being employees of the same employer performing the same or substantially the same work, or work of equal value. The terms of the referral are such that they reflect only an averment regarding the existence of the wage differential; no ground on which the differential is based was alleged. The dispute could not be resolved by conciliation and was referred to arbitration.

[7] On 31 July 2020, the appellant filed a statement of claim in terms of Rule 19 of the CCMA Rules. In the statement, the appellant's case is recorded in the following terms:

'9.6 The arbitrary ground upon which the differentiation is based is solely that the Respondent has elected to apply a higher rate of remuneration than the minimum wage provided for in the CA [MEIBC collective agreement] but has, inter alia, irrationally and arbitrarily elected to do so only with respect to the Comparator Employees'

Further:

'9.8 The Arbitrary Ground is the cause/reason for the difference in remuneration between the Employees and the Comparator Employees...

...

9.11 The Arbitrary Ground and/or resultant discrimination:

9.11.1 impairs and/or adversely affects the human dignity of the Members;

9.11.2 is based on attributes which have the potential to impair the fundamental dignity of persons and/or the Members as human beings;

9.11.3 is based on attributes which have the potential to affect human beings and/or Members in a comparably serious manner; and/or

9.11.4 the discrimination is for no reason and/or is purposeless.'

[8] In July 2021, the parties concluded a pre-arbitration minute. The minute records:

' ...

7.3.1 The Applicants allege that (and it is noted by the Respondent that) the arbitrary ground upon which the differentiation in remuneration is based solely that the Respondent has elected to apply a higher rate of remuneration than the minimum wage provided for in the CA (emphasis added) but has, *inter alia*, irrationally and arbitrarily elected to do so only with respect to the Comparator Employees.

7.3.2 In amplification of the above, the Applicants allege that the Respondent has arbitrarily elected to apply the higher Aberdare rate to the employees employed before 1 July 2014 (that being the Comparator Employees), and the lower MEIBC Rate to employees employed after such date.

7.3.3 The Respondent alleges that the Arbitrary Ground identified by the Applicants does not qualify as an arbitrary ground within the meaning to be ascribed to that concept for purposes of Section 6 of the EEA.

7.4 Whether the differentiation is effected on the basis of an arbitrary ground as contemplated in Section 6 of the EEA.' (Own emphasis)

[9] The pre-arbitration minute further recorded that the CCMA is required to decide:

'8.1 whether the Respondent has, in contravention of section 6 of the EEA, perpetuated unfair discrimination on arbitrary ground against the Employees; and/or

8.2 any ancillary/ consequential issues thereto.'

[10] In her award, the arbitrator summarised the evidence and the applicable legal principles. She accepted that it was trite that a mere differentiation in pay between employees who undertake similar work or work of equal value does not mean that an

act of discrimination was being perpetrated. The arbitrator accepted that the appellant relied on the members' status as 'being new employees' as the arbitrary ground for the differentiation between them and their comparators. The arbitrator accepted that that was one leg of the test. Aberdare had introduced the new wage rates (with the consequence of a differentiated wage rate between existing employees and those to be engaged in future) with the agreement of the then majority union, as a means of addressing operational requirements that would otherwise have resulted in the loss of employment. Aberdare's decision was thus not unfair and did not discriminate against future employees as it was implemented for a rational and objective business motive, to save its operations. The arbitrator concluded that the decision by Aberdare '*did not discriminate on the fundamental dignity of the new employees as it was rational and justified*'. In consequence, the arbitrator found that the appellant had failed to discharge the onus to prove that the differential in wages between the members and their comparators at Aberdare amounted to unfair discrimination. The appellant's claim was thus dismissed.

#### The Labour Court's judgment

[11] In an appeal to the Labour Court against the arbitrator's award, the appellant contended that the arbitrator had erred in making particular factual findings and drawing conclusions of law. The appellant sought an order to the effect that Aberdare had discriminated against the members in contravention of section 6 of the EEA on an arbitrary ground.

[12] The Labour Court delivered its judgment on 20 December 2023. In a judgment that comprehensively canvassed the evidence led at the arbitration hearing and the applicable legal principles, the Court dismissed the appeal. Although the Court's judgment is lengthy, the decision turns on a narrow point, i.e. that the appellant had failed to establish that the reason for the undisputed wage differentiation is some characteristic that impacts human dignity. In coming to this conclusion, the Court applied the approach adopted by this Court in *Naidoo and Others v Parliament of the*

*Republic of South Africa*<sup>3</sup> (Naidoo), and held that a claimant relying on section 6 (4) of the EEA must demonstrate more than mere differentiation. Reliance on ‘*any other arbitrary ground*’ requires a claimant specifically to identify and plead a ground of discrimination that is analogous to a listed or specified ground of discrimination, in the sense that it had the potential to impair upon human dignity in a comparable manner or have a similar serious consequence.

#### Grounds for appeal

[13] The grounds of appeal are extensive and ignore the narrow basis on which the Labour Court’s judgment is based. In essence, the appellant contends that the appeal concerns the application by the Labour Court of the legal test set out in *Harksen v Lane NO*<sup>4</sup> in relation to the issue of alleged unfair discrimination on an arbitrary ground. A secondary issue is the extent of the obligation on a referring party to formally ‘plead’ an arbitrary ground.

#### Evaluation

[14] The right to equal pay for the same or similar work or work of equal value is established by section 6 of the EEA. Section 6 (4) of the EEA was introduced by way of an amendment effected to the EEA in 2014,<sup>5</sup> partly in response to criticism by the International Labour Organization of the lack of any express statutory prohibition of wage discrimination, and particularly the absence of any express right to equal pay for work of equal value. Prior to 2014, equal pay claims had been brought under the more general prohibition of unfair discrimination established by section 6 (1) of the EEA. That section prohibits unfair discrimination, in any employment policy or practice, on specified grounds that include race, gender, sex, age, disability and religion, as well as the catch-all ‘*or on any other arbitrary ground*’.

---

<sup>3</sup> (2020) 41 ILJ 1931 (LAC).

<sup>4</sup> 1998 (1) SA 300 (CC) (*Harksen v Lane NO*).

<sup>5</sup> Act 47 of 2013, which came into effect on 1 August 2014.

[15] Section 6 (4) reads as follows:

‘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.’

[16] It is clear from this formulation that the EEA does not prohibit differentiations in terms and conditions of employment *per se*. A claimant in an equal pay claim must establish both that the work he or she performs is the same work (or substantially the same work), or work of equal value to that performed by a named comparator; and secondly, that the difference in pay is based, directly or indirectly, on one or more of the grounds referred to in section 6 (1). Section 6 (1) reads:

‘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.’

[17] The interpretation of section 6 (1), and in particular, the scope of the prohibition on discrimination on an ‘arbitrary’ ground, has been controversial. Two schools of thought emerged from academic analysis of the section, both of which find reflection in the jurisprudence. The broader view of section 6(1) suggests that the defining characteristic of the prohibited grounds, including the listed grounds, is their arbitrary nature. Simply put, arbitrariness, without more, could constitute a ground of discrimination. This approach was criticised in an instructive article by Garbers and Le Roux,<sup>6</sup> where the authors express the view that to ascribe a broad meaning to ‘arbitrary grounds’, at least in the sense that broadens the scope of the prohibition of unfair discrimination from grounds that undermine human dignity to grounds that are merely irrational,<sup>7</sup> is mistaken. The authors note that section 11 (2) of the EEA requires that

<sup>6</sup> C Garbers, P le Roux ‘Employment Discrimination Law into the Future’ 2018 *Stell LR* 237.

<sup>7</sup> Du Toit ‘Protection Against Unfair Discrimination: Cleaning Up the Act’ (2014) 35 *ILJ* 2623.

where unfair discrimination is alleged on an arbitrary ground, the complainant must prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair. In other words, the irrationality of any differential that is the subject of an unfair discrimination complaint is not in itself sufficient – the complainant must, in addition, establish discrimination (which necessarily requires an identifiable ground to be established) and also unfairness. The authors conclude that there is thus no basis for the argument that differentiation constitutes discrimination – discrimination is about the infringement of dignity. They conclude:

‘Discrimination is about infringement of dignity (or a comparably serious harm), about an identifiable and unacceptable ground and about the link (directly or indirectly) between that ground and the differentiation. Should a ground not be listed, it should meet the well-established test for unlisted grounds: it must have the potential to impair the fundamental human dignity of a person (or have a comparably serious effect) and has to show a relationship with the listed grounds.’

[18] In *Naidoo*, this Court (per Sutherland JA) concluded that the narrow interpretation of an ‘arbitrary ground’ is correct, and that a claimant seeking to establish discrimination on that basis must necessarily identify an arbitrary ground of discrimination, as opposed to making a general allegation of mere arbitrariness or capriciousness. The Court said the following about section 6 (1):

‘The injunction in s 6(1) is to outlaw, not “arbitrariness”, but rather to outlaw unfair discrimination that is rooted in “another” arbitrary ground (the syntax of “any other...” cannot be understood as otherwise than looking back at what has been stipulated in the text that precedes it). Capriciousness, by definition, is bereft of a rationale, but unfair discrimination on a “ground” must have a rationale, albeit one that is proscribed. The glue that holds the listed grounds together is the *grundnorm* of Human Dignity...’.

[19] In *Minister of Justice and Correctional Services v Ramaila and Others*<sup>8</sup> (*Ramaila*), this Court confirmed that the phrase '*any other arbitrary ground*' is not meant to establish a self-standing ground, but rather one that refers back to the specified grounds, so that a ground of a similar kind would fall within the scope of section 6.

[20] Mr Fitcher, who appeared for the appellant, did not dispute that the mere existence of the wage differential between the members and their comparators was insufficient to establish unfair discrimination and accepted that the principles established by *Naidoo* should be applied. The appeal thus turns on the existence or otherwise of a cognisable case pleaded on the narrow construction of section 6 (1). This requires a determination of the arbitrary ground on which the appellant relies and, secondly, a determination of whether that ground is an affront to human dignity in the sense contemplated by section 6 (1).

[21] The relevant framework for the assessment of an equal pay claim based on what is alleged to be '*on any other arbitrary ground*' is established by section 6 (4), read with section 11 and regulation 7<sup>9</sup>. Section 6 (4), as noted above, establishes the right to equal pay for work of equal value by prohibiting a difference in pay for the same work or substantially the same work or work of equal value that is directly or indirectly based on one or more grounds listed in subsection (1), including discrimination '*on any other arbitrary ground*'. Section 11 (2) provides that 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;
- (c) the discrimination is unfair.'

[22] Regulation 7 provides guidance on the factors that justify differentiation in terms and conditions of employment. A difference in pay that is fair and rational and is based on any one or a combination of grounds that include seniority, length of service,

---

<sup>8</sup> (2021) 42 ILJ 339 (LAC).

<sup>9</sup> Employment Equity Regulations, 2014, GNR 595, GG 37873, 1 August 2014.

qualifications, ability, possession of a scarce skill and the like, is not unfair discrimination. Regulation 7 (2) provides that a differentiation in terms and conditions of employment based on one or more of these factors will be fair and rational if it is established that its application is not biased against an employee or group of employees based on race, gender, or disability or any other ground listed in section 6 (1), and applied in a proportionate manner.

[23] In the present instance, the referral to the CCMA records no more than the following:

‘The Company has got 2 rates for its employees which is MEIBC rates and ABERDARE CABLES rate and that has caused a huge gap between employees doing the same job in the same Grade and this Was created by employer deliberately (sic)’.

[24] The pre-arbitration minute records that the arbitrary ground upon which the differentiation in remuneration is based is solely that Aberdare irrationally and arbitrarily elected to apply the higher MEIBC wage rate only with respect to the comparator employees. What is significant about this formulation is that it defines the arbitrary ground of discrimination on which the appellant relies as Aberdare’s decision to apply a higher rate of remuneration in respect of the comparator employees, a decision that is contended to be irrational and arbitrary. What is also significant about the formulation of the issue in dispute in paragraph 7.3.1 of the pre-arbitration minute is that this is stipulated to be the sole arbitrary ground on which the appellants rely.

[25] The arbitration proceeded based on the issues in dispute as they had been framed in the pre-arbitration minute. The resultant award is not a model of clarity, but the reasoning that underpins the award appears to be that the appellant had established that ‘*being new employees*’ was the arbitrary ground of unfair discrimination that was alleged, but that Aberdare’s operational requirements at the time had resulted in the strategy to reduce the wage bill, agreed with NUMSA, to save jobs and protect the conditions of employment of existing members.

[26] The section 11 enquiry requires the Court to establish first, whether the appellants established that the differential complained of is irrational; secondly, whether it amounts to discrimination; and finally, whether any discrimination found to be established is unfair. In my view, the appellant failed to establish that the differential on which they rely is irrational. Rationality is concerned with the relationship between means and ends; specifically, the relationship between the means selected to achieve a particular purpose on the one hand and the purpose itself.<sup>10</sup> What is required is that the means employed are rationally related to the purpose sought to be achieved. The appellant's witness, Mr Mbali, not one of the affected employees and at some stage a NUMSA shop steward, stated under cross-examination that he was aware of the reason for the differentiated wage rate and that he agreed that there were sound operational reasons for the decision. He acknowledged that Aberdare had taken reasonable steps in the circumstances to address the financial difficulties in which it found itself. It was never put to Mr. Potgieter, Aberdare's group financial manager, that the agreement to introduce a differentiated wage was arbitrary or irrational – on the contrary, the cross-examination of Potgieter was largely focused on Aberdare's economic performance after the introduction of the varied wage rate. In the absence of proof that the conduct complained of is irrational, the appellant falls at the first hurdle, the requirement established by section 11 (2)(a). The Labour Court was thus correct to conclude that the appeal against the arbitrator's award should fail.

[27] In any event, the second hurdle faced by the appellant, as established by section 11 (2)(b), requires proof by the appellant that the wage differentiation amounts to discrimination. This requires that the appellant establish a ground of discrimination. Where, as in the present instance, the appellant has asserted an arbitrary ground, *Naidoo* and *Ramaila* make clear that it is incumbent on the appellant to establish, objectively, a ground that is based on attributes and characteristics which have the

---

<sup>10</sup> *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at para 32.

potential to impair the fundamental human dignity of persons as human beings or affect them adversely in a comparably serious manner.<sup>11</sup>

[28] As I have indicated, clause 9.6 of the statement of case makes clear that the sole arbitrary ground asserted by the appellant in support of its claim is Aberdare's election to apply a higher rate of remuneration in respect of the comparator employees. This assertion is repeated in the pre-arbitration minute, with the gloss that Aberdare arbitrarily elected to apply the higher wage rate to the comparator employees employed before 1 January 2014, and the lower rate to employees employed after that date. There is no attempt to assert, either in the statement of case or the pre-arbitration minute, how precisely the asserted arbitrary ground is irrational or how objectively it is analogous to any of the specified grounds or any ground akin to them. There was no evidence before the arbitrator, save for unsubstantiated and amorphous assertions of financial embarrassment, to establish that the wage differential introduced by Aberdare in 2014, with NUMSA's agreement, had the potential to impair the fundamental dignity of those persons employed after that date, in a comparably serious manner. In the Labour Court (and in the present proceedings), the appellant introduced a fresh nuance in an attempt, no doubt, to escape the constraints of the pre-arbitration minute. The appellant contended that the arbitrary ground on which it relied was the employees' date of employment, being 1 January 2014. I have some difficulty appreciating how it can be said that a particular date of employment can constitute an arbitrary ground for the purposes of a claim of unfair discrimination. The judgment in *Ramaila*, which in essence was a claim of discrimination on an arbitrary ground (being the date of engagement in the public service) the Court made clear that 'newness' in employment (the term employed by Mr Ramaila) is far removed from any of the specified grounds or any ground akin or analogous to them.

[29] Nothing advanced by the appellants, either at arbitration (or impermissibly thereafter), identified a ground of discrimination for the purposes of section 6 (1) of the EEA. To the extent that the appellant sought, in these proceedings, to introduce the

---

<sup>11</sup> This wording is, of course, drawn from *Harksen v Lane NO* at para 54.

attributes of unemployment, low earning power and a reduced ability to bargain, to meet the test of an unspecified ground, this is not a basis for the claim contemplated in the statement of case, nor the issues in dispute reflected in the pre-arbitration minute.

[30] Finally, even if the wage differential of which the appellant complains about constitutes discrimination, it is not apparent from the facts that the discrimination would be unfair. Regulation 7 contemplates a number of circumstances in which a difference in terms and conditions of employment is not unfair discrimination, on the basis that the difference is fair and rational and based on one or a combination of grounds. These include seniority or length of service, the existence of a shortage of skill or the market value in a particular job classification, and the like. One of the grounds is *'where an employee is demoted as a result of organisational restructuring or for any other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level'*.<sup>12</sup> This practice, colloquially known as 'red circling', results in a difference in wages between employees doing the same work – the higher-earning employee's wage is frozen or maintained at a higher rate than the rate for the job until the salaries of lower-paid employees 'catch up'. The present case represents the reverse side of the coin but is conceptually similar – the practice of retaining an employee or group of employees on existing terms and conditions of employment while different, usually less favourable terms and conditions apply to all future cases, (colloquially referred to as 'grandfathering') is not uncommon in human resources management. Both mechanisms are, by definition, temporary, and that being so, a point may be reached where the differential applied in each instance will no longer be rational. But this was not the case made by the appellant.

[31] In summary, having regard to the triad of requirements established by section 11 (2) of the EEA, the Labour Court was correct to uphold the arbitrator's award. The appeal thus stands to be dismissed.

---

<sup>12</sup> Regulation 7 (1)(d).

[32] Insofar as costs are concerned, the requirements of the law and fairness are best satisfied by each party bearing its own costs. There is no reason to depart from the general rule applicable in the Labour Courts that costs do not ordinarily follow the result and that some exceptional circumstance must be established before the court makes an order for costs.

[33] I make the following order:

Order

1. The appeal is dismissed
2. There is no order as to costs.

A van Niekerk  
Judge Of the Labour Appeal Court

Nkutha-Nkontwana JA and Mooki AJA concur.

APPEARANCES

FOR APPLICANT: M Futcher, Futcher & Poppesquo Inc

FOR RESPONDENT: F le Roux

Instructed by Chris Baker and Associates