

DISCRIMINATION



WHAT IS DISCRIMINATION

Discrimination is to show favour, prejudice or bias for or against a person on any arbitrary grounds, for example on the basis of 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 and birth by an employer.

TYPES OF DISCRIMINATION

There are two kinds of discrimination—

- ◆ Fair discrimination; and
- ◆ Unfair discrimination

WHAT IS FAIR DISCRIMINATION

The law sets out four grounds on which discrimination is generally allowed—

- ◆ Discrimination based on affirmative action;
- ◆ Discrimination based on inherent requirements of a particular job;
- ◆ Compulsory discrimination by law; and
- ◆ Discrimination based on productivity.

DISCRIMINATION BASED ON AFFIRMATIVE ACTION

Affirmative action measures are designed to promote employment equity (fairness in favour of the designated groups — blacks, women and disabled persons). Affirmative action aims to achieve equality at work without lowering standards and without unduly limiting the prospects of existing employees, for example by getting rid of discrimination in company policies, procedures and practices. Its main aim is generally to ensure that the previously disadvantaged groups are fairly represented in the workforce of a particular employer.

DISCRIMINATION BASED ON INHERENT REQUIREMENT OF A JOB

Any discrimination based on the inherent requirement of the particular job does not constitute unfair discrimination. An inherent requirement of a job depends on the nature of the job and required qualifications. If such requirements can be shown, discrimination will be fair, for example a person with extremely poor eyesight cannot be employed as an airline pilot.

FAIR COMPULSORY DISCRIMINATION BY LAW

The law does not allow the employer to employ children under the age of 15 years, or pregnant women four weeks before confinement and six weeks after giving birth.

DISCRIMINATION BASED ON PRODUCTIVITY

It is also fair by law for the employer to discriminate on the basis of productivity when giving an increase, for example increases based on merit. This, of course, would be dependent on the fairness of the criteria utilised for assessing performance and productivity.

WHAT IS UNFAIR DISCRIMINATION

Any employer's policy or practice showing favour, prejudice or bias against employees in terms of the abovementioned grounds and which is not fair can be deemed to be unfair discrimination. There are two forms of discrimination related to 'unfair discrimination', namely—

- ◆ Direct discrimination; and
- ◆ Indirect discrimination.

Direct discrimination is easily identifiable and involves overt differential treatment between employees and job applicants on the basis of arbitrary grounds. For example an employer follows

a policy of remunerating a female employee on a lower scale simply because she is a woman, whereas a male employee is remunerated at a much higher scale for doing the same work. Indirect discrimination, on the other hand, is not as easily recognisable as it is a more subtle form of discrimination. It involves the application of policies and practices that are apparently neutral and do not explicitly distinguish between employees and job applicants but that, in reality, have a disproportionate and negative effect on certain individuals or groups. The laws also emphasise that—

- ◆ Sexual harassment will be prohibited;
- ◆ Medical testing will not be allowed unless it is an inherent requirement of the job;
- ◆ Psychological testing or other assessment cannot be done unless such tests are validated and will not be biased;
- ◆ In addition, HIV testing can only be carried out if authorised by the Labour Court; and
- ◆ All these protections also apply to applicants for employment.

Essentially one has to give consideration to the impact of actions, policies and procedures when evaluating discriminatory practices rather than the intention thereof.

WHAT STEPS SHOULD YOU TAKE WHEN UNFAIR DISCRIMINATION TAKES PLACE

Any employee who feels that he/she has been unfairly discriminated against or that an employer has contravened the laws can lodge a grievance in writing with their employer. The matter can thereafter be referred to the CCMA within six months where the issue cannot be resolved at the workplace. If the CCMA is not able to resolve the dispute through conciliation, the matter can either be referred for arbitration (if both parties agree) or to the Labour Court for adjudication.

RELEVANT LEGISLATION

The Constitution of the Republic of South Africa

DISCRIMINATION



Employment Equity Act
Basic Conditions of Employment Act
Promotion of Equality and Prevention of Unfair Discrimination
Act