REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 687/15

In the matter between:

PIONEER FOODS (PTY) LTD	Applicant
and	
WORKERS AGAINST REGRESSION (WAR)	First Respondent
CCMA	Second Respondent
Commissioner C JOHNSON N.O.	Third Respondent

Heard: 16 March 2016

Delivered: 19 April 2016

Summary: Appeal in terms of s 10(8) of Employment Equity Act.

Employees alleged unfair discrimination in terms of EEA s 6(4) (equal pay for work of equal value). Length of service not an arbitrary ground. Commissioner erred in finding that employer had unfairly discriminated against employees.

JUDGMENT

STEENKAMP J

Introduction

[1] This is one of the first appeals to be decided in terms of the newly enacted section 10(8) of the Employment Equity Act[1]. That section was introduced by the Employment Equity Amendment Act[2] and came into operation on 1 August 2014.

[2] The issues before the court raise the interpretation of and interaction between ss 6(4) and 10(8) as it relates to disputes about equal pay for work of equal value, and whether those claims must be founded on a listed or analogous arbitrary ground of discrimination.

[3] The appeal is against an arbitration award in which the third respondent, commissioner Carlton Johnson of the CCMA, upheld a claim of unfair discrimination brought by Workers Against Regression ("WAR" or "the union") on behalf of seven members. Although the union did not specifically refer to s 6(4) in its request for arbitration, it described the issues in dispute as follows:

> "1. Discrimination against drivers who are non union members.
>
> 2. Equal pay for equal work (drivers).
>
> 3. Van assistants earning more than drivers."

[4] Under "outcome required", the union stated:

> (a) Equal pay for equal work for union's drivers (work of equal value).
>
> (b) Agreement with other union to pay our members 20% less discriminatory."

[5] It was common cause that, in accordance with a collective agreement with the Food & Allied Workers Union ("FAWU"), Pioneer (the appellant) pays newly appointed employees for the first two years of their employment at

[1] Act 55 of 1998 ("the EEA").

[2] Act 47 of 2013.

80% of the rate paid to its longer serving employees. The Commissioner found that, by applying this to the seven members represented by WAR, Pioneer had unfairly discriminated against them in breach of section 6 of the EEA. He ordered the payment of damages and the correction of the remuneration rate of the employees concerned "to 100% ratio of the entry level applicable…"

[6] Pioneer contends that the Commissioner erred in numerous respects, which are set out at some length in its notice of appeal. Before I consider those grounds, the new statutory setting must be outlined.

The Statutory Setting

[7] Section 6(1) of the EEA provides :

> "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, ethnical social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language, birth or on any other arbitrary ground."[3]

[8] The highlighted portion was added by the Amendment Act that came into force on 1 August 2014.

[9] The newly enacted section 6(4) now adds the following provision:

> "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."

[10] Mr *Freund* argued that s 6(4) appears to apply only in respect of the various grounds listed in section 6(1); i.e. it does not specifically apply to unfair discrimination on "any other arbitrary ground" as referred to at the end of section 6(1). But whether this is correct or not, he accepted, is of little importance, since section 6(1) itself would seem to imply that an employer may not unfairly discriminate in respect of terms and conditions of employment on an unlisted, arbitrary ground.

[3] My underlining.

The arbitration award

[11] The Commissioner described the dispute as follows:

> "It must be determined whether [Pioneer] unfairly discriminates against the [employees] by remunerating them at 80% ratio as opposed to the 100% ratio applicable to the position of driver and paid to other drivers doing the same work."

[12] He accepted as common cause that, in terms of the collective agreement with FAWU, the 80% ratio would apply to "new entrants" for the first two years whereafter remuneration would go to the 100% ratio.

[13] The Commissioner accepted that the onus was on the employees to identify and prove the arbitrary ground on which they alleged discrimination. And in addition, the differentiation would amount to unfair discrimination only if the arbitrary ground on which the differentiation is established impairs their dignity and is a barrier to equality.

[14] Within this legal context, the Commissioner found that "the difference in remuneration is not fair and not based on rational grounds." He found that paying the new entrants at 80% in accordance with the collective agreement was "in conflict with the requirement of equal pay for equal work".

[15] The Commissioner's reason for this conclusion was that the employees had performed services as drivers to Pioneer through a labour broker before they were employed by Pioneer. For example, Shakoer Arnold was employed by Pioneer as a driver. He resigned and took up employment with the labour broker or temporary employment service (TES). He was employed by Pioneer again as from 1 November 2014. The Commissioner concluded:

> "In the circumstances the differentiation in remuneration is unfair as it appears to be based on the fact that the [employees'] previous indirect employment via the temporary employment service is ignored. The [employees] are not new entrants in the true sense of the word."

[16] Although he accepted that the dispute before him was not one in terms of s 198A of the LRA[4], the Commissioner took into account the provision in that Act that, after three months, the "client" is deemed to be the employer of an employee employed by a TES. He found that those workers had to be employed on no less favourable terms than existing employees; and that the differentiation agreed to in the collective agreement was "arbitrary and manifestly unfair."

[17] The Commissioner concluded that the employees had established that Pioneer unfairly discriminates against them and that they are entitled to damages. He ordered Pioneer to pay them the equivalent of the difference in remuneration between them and the longer serving drivers for the period 1 November 2014 to 1 August 2015. He also ordered Pioneer to correct their remuneration to 100% ratio of the applicable grade with effect from 1 August 2015.

Evaluation of the union's claim

[18] It is common cause that the union did not allege discrimination on any of the grounds listed in section 6(1). It follows that, as regards the burden of proof, section 11(1) has no application and that section 11(2) is in point. That subsection 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. "

Complainant must prove differentiation on a listed or "other arbitrary" ground

[19] To establish pay discrimination it is necessary for a complainant to show that:

19.1 the work performed by the complainant is equal or of equal value to that of a more highly remunerated comparator; and

[4] Labour Relations Act 66 of 1995.

19.2 such difference in pay is based on a prohibited ground of discrimination.[5]

[20] In order to prove that the conduct complained of "amounts to discrimination" in terms of section 11(2)(b), the complainant must identify the listed or unlisted arbitrary ground of discrimination relied upon; establish that that ground is an "other arbitrary ground"; and prove that that ground is the reason for the disparate treatment complained of. As this Court observed in *Ntai & Others v SA Breweries Ltd* :[6]

> "Litigants who bring discrimination cases to the Labour Court and simply allege that there was 'discrimination" on some or other 'arbitrary' ground, without identifying such ground, would be well advised to take note that the mere "arbitrary' actions of an employer do not, as such, amount to 'discrimination' within the accepted legal definition of the concept."

[21] In *Louw v Golden Arrow Bus Services (Pty) Ltd*[7] , this Court held:

> "Discrimination on a particular ground means that the ground is the reason for disparate treatment complained of. "

[22] In an unfair discrimination claim where the act or omission is shown to constitute differentiation between people or categories of people, the Court embarks on the following two-stage analysis, as laid down in the seminal decision of the Constitutional Court, *Harksen v Lane N.O.* [8]:

> "(i) Firstly, does the differentiation amount to 'discrimination"? If it is on a specified ground, then the discrimination will have been established. If it 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 adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it is found to have been on a specified ground, then

[5] Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (6 ed 2015, LexisNexis) p 705 (my underlining).

[6] (2001) 22 *ILJ* 214 (LC) para 73.

[7] (2000) 21 *ILJ* 188 (LC) at 197B. (Emphasis in the original).

[8] 1998 (1) SA 300 (CC) at 325 A-D.

> unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses on the impact of the discrimination on the complainant and others in his or her situation."

[23] See also: *Ntai & Others v SA Breweries Ltd* [9]:

> "It is only when such differentiation is based on or linked to an unacceptable ground that it becomes discrimination within its pejorative meaning."

[24] And in *IMATU & ano v City of Cape Town* [10] the Court added:

> "The impact of the discrimination complained of on the complainant is generally the determining factor regarding the unfairness of alleged discrimination. Factors which must be taken into account include: the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage; the nature of the provision or power and the purpose sought to be achieved by it; the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."

[25] It is against this analysis that the alleged discrimination asserted by the complainants must be assessed.

Lack of clarity during the trial as to the alleged ground of discrimination

[26] After all the evidence in the arbitration had already been led, and in the course of making arrangements for the filing of heads of argument, the Commissioner reminded the union that:

> "…you need to also be very clear about what ground of discrimination you are relying [on] in this matter."

[27] He emphasised that the mere fact that there was a difference in salary, without that difference being linked to a specific ground, did not amount to discrimination. He directed that only "once you have identified your

[9] (2001) 22 *ILJ* 214 (LC) at para 17.

[10] [2005] 10 BLLR 1084 (LC) [per Murphy AJ, as he then was] para 82.

ground and you've submitted your arguments" would the Appellant be in a position to submit its heads of argument in response.

[28] As Mr *Freund* submitted, the Commissioner's direction at this late stage demonstrates that the arbitration had been run without the arbitrator, much less the appellant, having any clear idea as to the essence of the case against which the appellant had been called on during the arbitration to defend itself. If there is thought to be any doubt in this regard, it was dispelled by the response to the above direction by the union's representative, Mr Hendriks:

> "We don't know the ground."

[29] In other words, the union confirmed that the arbitration had run its course without the union's claiming to know – much less to have revealed – the unlisted arbitrary ground on which it relied.

[30] In its subsequently produced heads of argument, the union for the first time asserted unambiguously that the unlisted arbitrary ground relied upon was the following:

> "The applicants allege that they have been discriminated against because they are being paid less than other employees performing the same or substantially the same work on an arbitrary ground. That ground is the fact of their being newer employees, their having started working for [Pioneer]] later than their colleagues. It is submitted that [Pioneer's] conduct on paying them less for that reason (because there appears to be no other) was not rational, amounted to discrimination and was unfair."

[31] As Mr *Freund* pointed out, it is striking that this allegation was cast in broad and general terms and was not related in any way to new employees with previous service to Pioneer via a labour broker.

[32] Differentiation on the basis of "being newer employees" is not an unlisted arbitrary ground of discrimination; and a practice of paying newer employees at a lower rate for a two year period is in any event neither irrational nor unfair. The Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value[11] specifically states that it is not

[11] GN 448 in *Government Gazette* 38837 of 1 June 2015 clause 7.3.1.

unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following factors:

> "the individuals' respective seniority or length of service".

[33] And this justification must in any event be seen against the background that the Commissioner allowed the case to proceed without first requiring WAR to identify what the unlisted ground of discrimination on which its case was premised was alleged to be. In terms of section 138(1) of the Labour Relations Act, read with section 10(7) of the EEA, a commissioner is obliged to determine the dispute "fairly". This necessarily implies, as the Constitutional Court has held, that he or she "must act fairly to all the parties"[12], including the employer. It is not fair to the employer for an arbitration to run without the complainant union being required to identify – and then being held to – the unlisted arbitrary ground of discrimination relied upon. That fact in itself would have made the award reviewable; there can be little doubt that it is also a valid ground for appeal.

"Labour broker permanency" as the ground relied upon

[34] It is common cause that all seven of the complainant employees had, prior to becoming employees of Pioneer on 1 November 2014, rendered services to it for an unknown or unspecified period "in some form of indirect labour broking or whatever", as the Commissioner put in when debating the case with Pioneer's representative during his opening address at the arbitration.

[35] But the union did not assert "labour broker permanency" as the unlisted arbitrary ground on which it based its case at arbitration. Had the union articulated that previous employment by a labour broker (or by a "temporary employment service") was the arbitrary unlisted ground of discrimination on which it relied, this might have constituted a case which was intelligible, albeit fundamentally flawed on the facts. It would have been flawed on the facts because it was common cause throughout that the 80% rate was paid to all new entrants in accordance with a collective agreement. It thus became common cause that the seven members' 80%

[12] *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 at 224c.

starting rate was not caused by the fact that they had formerly been employed by labour brokers, but by the fact that they – like all other new entrants – started for two years at the 80% rate agreed with FAWU for new entrants.

Award contrary to the case argued by the union and not based on proved facts

[36] The case that Pioneer was called upon to meet in WAR's heads of argument was that the arbitrary ground was "the fact of their being newer employees, their having started work for [Pioneer] later than their colleagues". Inexplicably, the arbitrator makes no reference to this in his award. Instead he finds that it was the employees' "status as former temporary employment service employees" that triggered the difference in remuneration.

[37] It is irregular and contrary to the principles of fairness to find against an employer on a basis different from that which was argued against it and which it was called upon to argue. The union should have been held to the case which it argued (even though I hold below that that case was in any event without merit).

[38] Moreover, the arbitrator's finding that it was the employees' status as former temporary employment service employees that triggered the difference in remuneration is not founded on the facts as proved. There was no evidence to contradict Pioneer's evidence that the 80% rate was paid to all those taken into its employment on 1 November 2014 (the date on which the seven complainants were employed) and was not paid only to former labour broker employees.

[39] Secondly, the award overlooked the material differences between the circumstances of the three complainants who testified, and overlooked the absence of evidence or relevant agreed facts in relation to the other four complainant employees. It unfairly and inappropriately treated the case of Mr Shakoer Arnold as typical of all seven.

[40] Mr Robert Xakaza had some years previously been employed by Pioneer but had resigned in July 2013 to take up alternative employment in Umtata. More than a year later, in August 2014, he became employed by

a labour broker, Capacity. Within three months of becoming a labour broker employee (i.e. on 1 November 2014) he was again employed by Pioneer (at the 80% rate). Thus if Mr Xakaza is to treated as having a claim based on his former status as a labour broker employee, he only enjoyed this status for three months or so. It cannot be that every driver employed by a labour broker who has ever rendered any services to Pioneer, no matter how short the period concerned, thereby acquires a right to equal terms and conditions of employment with all its long serving employees from the date of appointment.

[41] It does not appear from the record that Mr Raymond Willie had previously been employed by Pioneer. This seems to indicate that a previous period of direct employment with Pioneer formed no part of the basis on which the Commissioner found against it. What does appear from the record is that Mr Willie had been employed by a labour broker since 2010 and that he was then employed by Pioneer with effect from 1 November 2014.

[42] Mr Shakoer Arnold was a former Pioneer employee who, after 16 years' service, decided in March 2011 to resign to cash in his provident fund. The consequence, as he expressly volunteered in his evidence in chief, was that he had "broken service". Thereafter he took up employment with a labour broker and was again employed by Pioneer, like the others, on 1 November 2014.

[43] There is no evidence at all in respect of the other four employee applicants. Although it is common cause that they had rendered services to the company whilst employed by a labour broker, there is nothing to show for what period or periods this took place. So far as appears from the record, it could be that they had not served in this capacity any longer than Mr Xakaza's three months.

[44] It therefore emerges that the Commissioner's approach rests on nothing more than a finding that it amounts to unfair discrimination for the Appellant to pay a newly appointed employee previously employed by a labour broker at a rate lower than the rate paid to existing long-service employees, no matter how short the period of previous employment with the labour broker.

[45] That cannot be correct. Nothing in the EEA precludes an employer from adopting and applying a rule in terms of which newly appointed employees start at a rate lower than existing long-serving employees. This applies whether or not the newly appointed employee had previous substantial experience, whether with the employer concerned or some other employer. It also applies whether or not the employee had, in the past, rendered services to the employer concerned via a labour broker. But first it is necessary to refer in a little more detail to the concrete facts of this matter.

Reason for the differential rates

[46] The lower rate of remuneration paid to the seven complainants was a consequence of a term in two successive collective agreements between Pioneer and FAWU, concluded on 25 June 2013 and 12 August 2014 respectively. Of importance is the fourth bullet point in clause 2.2 of the first of these agreements , which provides:

> "New entry minimums for new employees from outside the Company; to be at 80% of the current Grades in each category for two years."

[47] This came about because FAWU persuaded Pioneer that it should reduce the extent to which it was then using the services of various forms of "precarious" employees, including employees supplied by labour brokers. At the same time FAWU proposed the creation of a scale "that showed differentiation between people who started now and people who have been in the company for years". It proposed this because "there is a lot of unhappiness from the long serving workers, that a person who start today, earn the same as a person who's been here for donkey year (sic)."

[48] The 80% scale was applied to all "new employees from outside the company"; it was not directed only at persons who happened formerly to have been employed by a labour broker. Moreover, the lower scale would only be applicable for the new employees' first two years.

Differential rates linked to periods of service

[49] The arbitrator's award, if correct, has the startling implication that it is impermissible in terms of the EEA for a South African employer to give effect to a collective agreement which prescribes differential rates for employees with different periods of service with it. The award is simply wrong in this regard, and giving effect to such agreements does not constitute "discrimination" on an unlisted "arbitrary ground", much less "unfair" discrimination.

[50] Differential treatment is ubiquitous in modern life and in the workplace. The EEA does not regulate such differential treatment at all unless and until it is established that it is both "not rational" and constitutes "discrimination". (To constitute "discrimination" the differentiation must take place on a listed ground or on any "other arbitrary ground", as contemplated to in section 6(1).) The following seminal passage from the Constitutional Court's judgment in *Prinsloo v Van der Linde* [13] is directly applicable, notwithstanding the different statutory context:

> "If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct… The courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory 'in the constitutional sense'."

[51] The Constitutional Court accepted[14] that it is impossible to regulate a modern country without differentiation and without classifications which treat people differently and which impact on people differently. The Court held:

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[13] 1997 (3) SA 1012 (CC) para 17.

[14] At para 24.

> "Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. What this further element is will be considered later."

[52] The Court described the common differentiation to which it was referring as "mere differentiation" (as distinct from "discrimination") and held[15] (at para 25) :

> "In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose…"

[53] This approach is echoed in the EEA. Section 6(1) prohibits unfair discrimination on any of the many listed grounds "or any other arbitrary ground". Section 11(1) places a burden of proof on the employer who is alleged to have discriminated on a listed ground to prove that such discrimination did not take place as alleged, or is rational and not unfair, or is otherwise justifiable. But in relation to alleged discrimination on an unlisted ground, section 11(2) obliges the complainant to prove that the conduct complained of "is not rational;" and that it "amounts to discrimination"; and that the discrimination is "unfair". Unless the complainant proves that the conduct complained of "is not rational" that is the end of the matter. In this respect section 11(2)(a) mirrors the approach adopted by the Constitutional Court in paragraph 25 of *Prinsloo*. It is only if the differentiation is arbitrary or manifests "naked preferences" that serve no legitimate purpose that one even moves on to consider whether there has been "discrimination" and, if so, whether the discrimination was unfair.

[54] According to ILO Convention 111 the criterion used in respect of an impugned 'distinction, exclusion or preference' on an unlisted ground is whether that measure 'has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."[16]

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[15] At para 25.

[16] ILO Convention 111 art 1(1)(b), discussed in Du Toit et al *Labour Relations Law: A Comprehensive Guide* (6 ed 2015) at 681.

[55] Mention has already been made above of the test articulated in *Harksen v Lane*[17] as regards the test to be applied in determining whether a proffered unlisted ground actually constitutes an "other arbitrary ground".[18] In short, if the 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.[19]

[56] Where a collective agreement stipulates different pay levels for employees with different periods of service with the employer concerned, this is not arbitrary differentiation (as contemplated in para 25 of *Prinsloo*); nor is "length of service" (or being a "new employee") an unlisted ground meeting the test just referred to.

[57] Differentiation in respect of terms and conditions of employment on the basis of length of service with the employer concerned is, on the contrary, a classic example of a ground for differentiation which is rational and legitimate and, indeed, exceedingly common. That the lawgiver shares the view that this is rational and legitimate is apparent inter alia from:

57.1 Regulation 7(1)(a) of the Employment Equity Regulations 2014 , which includes "length of service" as one of the "factors justifying differentiation in terms and conditions of employment";

57.2 Section 198D(2)(a) of the LRA, which includes "length of service" as a "justifiable reason" for differential treatment;

57.3 Clause 7.3.1 of the Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value.

[58] In WAR's heads of argument to the Commissioner, the crux of the argument advanced was that it is not rational to pay new employees less than those who have been employed longer. That was a wholly

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[17] 1997 (11) BCLR 1489 (CC).

[18] See also *Prinsloo* at para's 29 to 33*; National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para's 15 to 18.

[19] See *IMATU v City of Cape Town* [2005] 10 BLLR 1084 (LC) para 82; *SAMWU v Nelson Mandela Bay Metropolitan Municipality* [2016] 2 BLLR 202 (LC) paras 26 and 35.

untenable legal proposition. There is quite manifestly a rational connection between using length of service as a factor determining pay, and the objective of recognising long service and loyalty of existing employees. The Commissioner ought to have dismissed the case on that basis alone.

[59] Moreover, length of service with the employer concerned as a factor affecting pay levels is not an "other arbitrary ground", as contemplated in section 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.

[60] 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:[20]

> "[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*[21] – 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."

[61] 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.

Alleged discrimination in any event not "unfair"

[62] Even if "length of service" was an "arbitrary" ground as contemplated in section 6(1) – and I have held that it is not -- paying differential rates in the

[20] Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (6 ed 2015) p 683.

[21] *Kadiaka v Amalgamated Beverage Industries* (1999) 20 *ILJ* 373 (LC) para 43.

first two years of a new employee's employment is not "unfair" discrimination. It was simply not unfair for Pioneer to agree with FAWU that new employees should earn less than those who had loyally remained in its service, and to implement this agreement. It should also be borne in mind that, underlying the collective agreements, was a desire on the part of FAWU to persuade the Appellant to create additional "permanent" jobs, so as to reduce the extent of utilisation of the various categories of "precarious" employees. Absent agreement on the 80% rate for the first two years for such employees, there is no reason to assume that the jobs would have been created at all. The very existence of the jobs must therefore weigh in the "fairness" scale.

[63] Moreover, Pioneer acted completely transparently. It candidly revealed to every applicant for the new positions that, for the first two years, employment was to be on the "80%" rate as provided for in the collective agreement. The complainants faced an election whether to agree to this or not and – unlike some others – the seven complainants elected to agree, in writing.

[64] The authorities appear to show that, where unfair discrimination is proved, the mere fact that it is authorised by a collective agreement does not disclose a defence. But this principle should not be stretched beyond its proper application. I am persuaded that, in determining whether there has been unfair discrimination in the first place, it is by no means irrelevant that the conduct complained of is the product of a collective agreement negotiated with a representative trade union. This is particularly the case where, as in this case, the reasons for reaching agreement on the relevant point have been disclosed and are in no sense illegitimate and where, but for the term now objected to, it is doubtful that the jobs concerned would ever have been created.

Failure to make an exception in respect of former TES employees

[65] The Commissioner may have been of the view that it is permissible for an employer to pay new employees at a lower rate than employees with long service but that it is nonetheless unfair discrimination not to make an

exception in respect of employees who have previously rendered services to the same employer whilst in the employ of a TES.

[66] This approach appears to me to be contrary to legal principle and untenable. There is no legal basis for concluding that failing to make such an exception amounts to unfair "discrimination" against those formerly employed by a TES.

[67] The principle at stake can be illustrated by considering various hypothetical examples cited by Mr *Freund* in his argument. Take the case of an employee employed by a company for several years who resigns and a year or two later is once again employed by the same company. Because of his broken service, he re-starts at the entry rate. Does this amount to unlawful discrimination? I think not.

[68] Take another example. For some 20 years, an employee skilfully and diligently serves employer A. He then resigns and for the first time enters the employ of employer B. Is employer B precluded by section 6 of the EEA from paying him at the rate which it pays its other new employees?

[69] Take a third example. A driver with no prior work experience at all works for a labour broker for three months. He then enters Pioneer's employ. Is it unlawful discrimination under the EEA that he should be paid at the differential 80% rate for two years? Surely not.

[70] I am persuaded that, in each of these cases, the application of a rule that employees entering the employment of the employer start off on the lower rate (e.g. 80%) on the basis that they are "new entrants" or "new employees" does not constitute differentiation on an unlisted arbitrary ground, and therefore does not constitute "discrimination" at all. There is nothing arbitrary or irrational about the uniform application of a rule which sets different pay levels for employees with different lengths of service as employees of the employer concerned. Even if the newly recruited employee has the same level of experience and expertise as the employer's existing long-service employees, this does not mean that applying a differential rate for all new employees constitutes differentiation on an arbitrary ground, nor unfair "discrimination". Put differently, there is no legal obligation to make an exception in every instance where the

newly employed employee has experience which is comparable to that of the employer's long-serving employees.

Section 198A(5) of the LRA

[71] Although the Commissioner was aware that the case before him was not a dispute in terms of section 198A of the LRA, he nonetheless found that it was "necessary" to consider the intention of that provision. He implied that this provision required him to find against the Appellant.

[72] Section 198A had no application to the dispute before the Commissioner and should therefore not have affected its outcome. First, the claim was brought as a claim under the EEA and was not brought as a claim in terms of section 198A of the LRA. A claim brought under the EEA must be determined in terms of, and by reference to, the EEA and not by reference to some other Act. Secondly, the differential treatment complained of, which arose out of a collective agreement concluded some 18 months before section 198A took effect, commenced before section 198A came into force. Section 198A should not be "applied" retrospectively. Thirdly, on the facts section 198A(5) simply had no application. By the time that it came into force the employees concerned had already become "permanent" employees of the Appellant. There was therefore no possibility of them being able to bring a case pursuant to section 198A. Its terms simply do not apply to this.

[73] Moreover, section 198A(5) only requires that a labour broker's employee must be treated "on the whole" not less favourably than an employee of the client performing the same work (absent a justifiable reason for different treatment); it does not necessarily require the basic rate of pay to be the same. The Commissioner's approach seems to imply, first, that it is permissible to focus only on one element of the remuneration package and, secondly, that applied to the seven complainant employees they had been treated in a manner incompatible with section 198A. It is, however, impossible to determine from the record whether the three employees who testified were "on the whole" financially better off in the employ of the Appellant than when they were in the employ of their previous labour broker employers. Still less is known in respect of the remaining four

complainant employees. It is therefore quite wrong to imply that section 198A somehow mandates a finding against the Appellant in respect of the claim brought against it under the EEA.

Irrelevance of regulations in terms of section 6(5)

[74] Section 6(5) empowers the Minister to "prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4)."

[75] Equal pay for "work of equal value" is a different concept from equal pay for "the same…work". "Work of equal value" raises issues of considerable complexity which are not regulated in any detail in the EEA itself. And the Code of Good Practice, which provides "practical guidance to employers and employees on how to apply the principle of equal pay / work of equal value in their workplaces",[22] specifically recognises length of service as a factor justifying differentiation in pay.

CONCLUSION

[76] In conclusion, I find that:

76.1 The differentiation complained of was not irrational; was not based on an arbitrary unlisted ground; and was not unfair;

76.2 The Commissioner ought therefore to have dismissed the claim;

76.3 The Commissioner's award should be reversed and substituted by an order dismissing the claim;

76.4 The appeal should be upheld.

[77] With regard to costs, I take into account that the union had an award in its favour; that an appeal of this nature is a novel issue before this Court pursuant to new amendments to the EEA; that the Union was represented by a trade union official; and that there is an ongoing relationship between the parties. I do not consider a costs order to be appropriate.

[22] In the Code, 'work of equal value' is used to include work that is the same or substantially the same or work of equal value as referred to in s 6(4) of the EEA.

Order

[78] I therefore make the following order:

78.1 The appeal is upheld.

78.2 The award is reversed and substituted with an award that the union's claim (on behalf of its seven members) is dismissed.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Alec Freund SC
Instructed by:	Norton Rose Fulbright.
FIRST RESPONDENT:	M G E Hendricks (union official).