

# Equal work, equal pay: What is fair differentiation when reviewing remuneration?

The Employment Equity Act provides for the equitable treatment of people in the workplace by ensuring that there is no unfair discrimination on the basis of race, gender, religion, language, political affiliation, disability, age, etc.



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However, there are certain instances where employers may differentiate the terms and conditions of their employees, so long as such differentiation is not based on the above grounds or any other impermissible arbitrary ground.

Lindiwe Sebeshe, master reward specialist and executive committee member of the South African Reward Association (SARA), says with the introduction of the “equal pay for work of equal value” legislation, a lot has been said about when employers can justifiably differentiate the way they pay their employees.

## The grounds

The grounds on which an assessment of whether differentiation is permissible and fair are quite specific and include, amongst others - seniority or length of service; qualifications, ability, competence or potential; performance, quantity or quality of work; demotion, skills shortage, type of employment contract (permanent vs temporary).

It is important that employers consider these factors holistically to ensure their justification for the differentiation is sound:

- **Seniority or length of service:** Although people who have been with a company for many years could generally be paid more than someone entering the labour market, scarcity of particular skills in a particular sector may result in new entrants starting at higher pay rates.
- **Qualifications:** The inherent requirements of the position may allow the employer to treat people with qualifications higher than the minimum required for the job differently. Employers may also recognise prior learning as the basis for differentiation in instances where employees do not have the minimum qualification, but their years of experience allow them to perform tasks at the same level as someone with the qualification.

- **Performance based:** A performance-based remuneration policy is considered an allowable discriminator, so long as its performance conditions include clear and fair criteria through which to evaluate performance.

## Burden of proof

Sebesho says the fact that the burden of proof is on the employee makes it very difficult for employees to raise issues or concerns related to perceived unfair differentiation. “It can be expensive and emotionally draining as the complainant employee has to make a *prima facie* case of discrimination and set out the grounds on which he/she believes they have been discriminated against.”

A claim of discrimination has to be based on listed or arbitrary grounds. Listed grounds include discrimination on the basis of race, gender, language, political affiliation or age and religion, etc.

In terms of arbitrary grounds, the employee will have to show what conduct of the employer has impaired his/her fundamental human dignity.

Sebesho advises employers and employees alike to arm themselves with knowledge about the “equal pay for work of equal value” provisions of the Employment Equity Act and know what allowable differentiation entails.



Lindiwe Sebesho

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