IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No: **C523/2001**

In the matter between:

NUMSA	First Applicant
HENDRICKS & 2 OTHERS	Second to Fourth Applicants

and

GABRIELS (PTY) LTD	Respondent

JUDGMENT

WAGLAY J:

[1] The second to fourth Applicants, (hereinafter the "Applicants"), are employed as foremen by the Respondent. Over recent years, it came to their attention that they were being paid less than other foremen employed by the Respondent. The Applicants claim that the pay disparities amongst the Respondent's foremen, amount to direct unfair discrimination within the

meaning of section 6 (1) of the Employment Equity Act No.55 of 1998 (hereinafter the "EEA"), and have accordingly instituted proceedings in terms of the aforesaid section of the EEA.

[2] The Respondent opposes the matter and has raised two grounds of exception to the Applicants' Statement of Case, namely:

2.1 that the factual allegations made by the Applicants do not disclose a cause of action, and;

2.2 that this Court has no jurisdiction to decide the matter, as the referral to the Commission for Conciliation Mediation and Arbitration (CCMA) was out of time; alternatively, as the alleged acts of discrimination took place before the EEA came into operation on 9 August 1999, this Court has no jurisdiction to entertain this matter.

[3] These exceptions are before me for determination. The first exception raises the question of what must be pleaded by an applicant, in order to disclose a cause of action of direct unfair discrimination in terms of s 6(1) of the EEA.

[4] 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, ethic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth" (my emphasis).

[5] In terms of this section, if a party differentiates between two persons, or categories of persons on the grounds listed therein, then such differentiation will amount to discrimination. The use, however, of the term "including" (as emphasized above), indicates that the grounds as listed in this section, are not exhaustive, and that there may be grounds which are not listed, which can constitute discrimination. Hence, in dealing with section 6(1) of the EEA, one could deal with either the listed, or unlisted grounds of discrimination.

[6] In the matter before me, the Applicants do not rely on any of the grounds listed in section 6(1) of the EEA.

[7] Section 6(1) of the EEA, loosely mirrors section 9 (3) of the Constitution of the Republic of South Africa Act No 108 of 1996 (the "Constitution"), which provides that:

" The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethic or social origin, colour, sexual orientation, age, disability, religious conscience, belief, culture, language and birth."

[8] Because of the similarity between section 6(1) of the EEA and section 9(3) of the Constitution, guidance can be sought from the decisions handed down by the Constitutional Court in determining when differentiation which is not based on any of the grounds listed in section 6(1), will amount to discrimination.

[9] In the matter of Harksen v Lane NO and Others 1998 (1) SA 300(CC), the Constitutional Court established a two – pronged test for determining whether differentiation between people amounted to unfair discrimination. The test is set out as follows, at paragraph 54:

"…

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there has been discrimination will depend upon whether, objectively, the grounds are based on attributes and characteristics which have the ability to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner;

42 If the differentiation amounts to ‘discrimination,’ does it amount to ‘unfair discrimination’? If it has been found to be on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his situation.”

[10]The Court in Harksen, made it clear at paragraph 47, that section 8(2) of the Interim
Constitution (substantially similar to section 9(3) of the Constitution for present purposes), contemplates two categories of discrimination:

“ The first is differentiation on one (or more) of the 14 grounds specified in the
subsection (a ‘specified ground’). The second is differentiation on a ground not
specified in subsection (2) but analogous to such ground… There will be
discrimination on an unspecified ground if it is based on attributes or characteristics
which have the potential to impair the fundamental dignity of human beings, or to
affect them adversely in a comparably serious manner.”

[11] It is clear from this decision that discrimination in the Constitutional sense, takes on a pejorative meaning, which must be established by any complainant relying on an unspecified ground. The following passage gives content to the type of ground that will have to be linked to the differential treatment by the complainant, in order to succeed in establishing that discrimination has taken place:

> " … 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 categorize, marginalize and often oppress persons who have had, or who have been 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, 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. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of

disadvantage such as has occurred only too visibly in our history." (at paragraph 50)

[12] The question of whether there has been differentiation on a specified or

unspecified ground must be answered objectively. If the Court finds that

discrimination is based neither on a listed nor analogous ground, in the sense

described above, then the complainant will not have established discrimination (at paragraph 48).

[13] Prior to the enactment of the EEA, claims of unfair discrimination in an employment relationship were dealt with under Schedule 7, item 2 (1) (a) of the Labour Relations Act (LRA), which prohibited:

" unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, language, marital status or family responsibility" (my emphasis).

[14] The inclusion of the word "arbitrary" in this section appeared to

have caused some debate in this Court, regarding the structure of a discrimination claim. In Kadiaka v Amalgamated Beverage Industries (1999) 20 ILJ (LC), the Court held that the failure to hire an applicant because of his prior association with the employer's rival constituted unfair discrimination on an unlisted ground. In determining this question, however, the court ignored the first step of the enquiry as set out in Harksen *supra*, namely, whether the differentiation in question amounted to discrimination in the pejorative sense by virtue of it being linked to a ground analogous to the listed grounds. In Kadiaka, the Court incorrectly equated differentiation with discrimination, and went on directly to the second stage of the enquiry (that is, whether the discrimination was unfair).

[15] Also, in Lagadien v University of Cape Town (2000) 21 ILJ 2469 (LC), the Court failed to apply the first stage of the Harksen test, and directed its attention solely to the issue of fairness. The position now, however, appears to be corrected. In Middleton v Industrial Chemical Comets (Pty) Ltd (2001) 22 ILJ 472 (LC) this Court expressly endorsed the approach as set out in Harksen, and first considered the question of whether the differentiation in question amounted to discrimination.

[16] In Ntai v SA Breweries (2001) 22 ILJ 214 (LC), the Applicants

alleged that they had been discriminated against on grounds of race, alternatively, on arbitrary grounds. The Court, in applying the test as set out in Harksen, concluded that the Applicants had not succeeded in linking the differential treatment to race. In dealing with the allegation of discrimination on the basis of arbitrary treatment, the court had the following to say:

> " The Applicants, in alleging 'arbitrary' discrimination, failed to identify the specific (unlisted) ground upon which they alleged that they have been discriminated against. In the event, the applicants failed to cross the very first hurdle to establish discrimination on an unlisted ground. In other words, in the absence of an identified unlisted ground it is impossible to determine whether the ground that is relied upon is comparable to the listed grounds (such as race) in that it is based upon 'attributes and characteristics which have the potential to impair the fundamental human dignity of the applicants as human beings…"

[17] The Court then went on to sound a note of warning to complainants in discrimination cases relying on unlisted grounds, stating:

> " 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…”

This warning applies with equal, if not stronger, force to s 6(1) of the EEA, which does not include the word “arbitrary” in its provisions.

[18] A complainant alleging unfair discrimination within the meaning of s 6(1) of the EEA, must establish that the differential treatment complained of, amounts to discrimination that is unfair. Where the complainant can link the differentiation to a listed ground, a presumption of both discrimination and unfairness is triggered. Where the differential treatment is not based on a listed ground, it is not sufficient to merely allege that the employment policy or practice in question is arbitrary; the complainant must allege and prove that the policy and practice is based on an analogous ground to the listed ground.

[19] What is therefore required, is that a complainant must clearly identify the ground relied upon and illustrate that it shares the common trend of listed grounds, namely, that “it 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 comparable manner".

[20] A complainant relying on an unlisted ground is further required to establish that the alleged discrimination is unfair. This stage of the test "focuses primarily on the impact of discrimination on the complainant and others in his or her situation."

[21] Applying the above to the exception raised by the Respondent, that the Applicant's statement of case, as amplified by the further particulars, fails to disclose a cause of action: The statement of claim, as amplified, makes the following allegations -

42.1 The Applicants were paid less than certain other foremen employed by

the Respondent;

21.2 " The Respondent unfairly discriminated between foremen who are performing similar functions and duties";

21.3 " The Respondent failed to justify the disparities that exist among the foremen, in that, no proper assessment/evaluation was conducted to measure performance levels of foremen";

21.4 " The Respondent discriminated against the Third and Fourth Applicants in that it failed to adjust their salaries on 17 March, when other foremen were awarded salary appraisals";

21.5 there was no particular policy followed by the respondent that brought about the unfair discrimination complained of;

42.2 “it was the practice of sporadically and arbitrarily granting certain

foremen increases…that brought about the unfair discrimination against the individual applicants”;

42.3 “it is not alleged that the applicants were paid less than the foremen…on the basis of race”;

42.4 “the applicants were paid less because of the arbitrary capricious and irrational actions/practices of the respondent”;

42.5 “the difference in salary was “ disproportional, irrational, arbitrary and capricious”.

42.6 The Applicants further claimed in reply to questions from the Respondent that the discrimination they complain about is “direct discrimination”.

[22] It is clear from the above, and on a reading of the Applicants’ Statement of Case, as amplified, that the Applicants have not ascribed the differential treatment in question, to any ground analogous to the listed grounds in s 6 (1) of the EEA. The Applicants have failed to allege that the reason for the differentiation is some characteristic that impacts upon their human dignity. They do no more than attempt to describe the

difference in pay as being “disproportional, irrational, arbitrary and capricious,” and “arbitrary, capricious and irrational actions/practices of the respondent”.

[23] The Applicants have, accordingly, failed to make the minimum sufficient allegations to sustain a claim of unfair discrimination, or direct unfair discrimination, within the meaning of s 6(1) of the EEA. The first exception must accordingly succeed. The Applicants will, however, be given an opportunity to address this shortcoming within a specified period, if they so wish to do.

[24] Turning, then, to the second exception: the Respondent states that during the conciliation process, it raised a point *in limine* before the Commissioner, to the effect that the CCMA did not have jurisdiction over the dispute, as it had not been timeously referred by the Applicant for conciliation. The commissioner dismissed the point *in limine*, finding that, as the alleged discrimination was ongoing in nature, the Applicant was not out of time in its referral.

[25] Although the commissioner’s decision aforesaid was not taken on review, the Respondent proceeds with this jurisdictional point, on

the basis that no jurisdiction can be conferred on this Court by the commissioner's decision, where none exists. The Respondent maintains that:

42.7 the dispute was not timeously referred for conciliation the Applicant;

25.2 in any event, the Applicant's claim arose before the inception of the EEA.

[26] Section 10(2) of the EEA states:

"Any party to a dispute concerning this Chapter [Chapter 11] may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination."

[27] Although the section used the words "act or omission", it can be accepted, for purposes of uniform interpretation, that these words refer to the broader terms in section 6(1) of the EEA: "employment policy or practice".

[28] "Employment policy or practice" is defined in section 1 of the EEA as including, but not limited to, the following:

28.1 recruitment procedures, advertising and selection

criteria;

28.2 appointments and the appointment process;

28.3 job classification and grading;

28.4 remuneration, employment benefits and terms and conditions of employment;

28.5 job assignments;

28.6 the working environment and facilities;

28.7 training and development;

28.8 performance and evaluation systems;

28.9 promotion, transfer and demotion;

28.10 disciplinary measures other than dismissals;

28.11 dismissal.

[29] The Respondent argued that the focus of this section is on the specific act of discrimination alleged, and not on the consequences thereof. As all the specific acts of discrimination complained of, by the Applicant, so Respondent continued, took place before the operation of the EEA, this Court does not have jurisdiction to determine the dispute. Alternatively, more than six months have elapsed since the last act of alleged discrimination complained of.

[30] In the present matter, the “policy or practice” complained of, is related to remuneration. The Applicants allege that the Respondent’s remuneration practices are discriminatory. In Louw v Golden Arrow Bus Services (Pty) Ltd (1998) 19 ILJ 1173 (LC), Basson J distinguished between discrimination that is constituted by a single act, and discrimination that is ongoing in nature, stating at paragraph 16:

> “ I am firmly of the view that, although unfair discrimination can be constituted by a single act or omission, unfair discrimination as an unfair labour practice can also be a continuous act. In fact the ordinary meaning of the word “practice” connotes ongoing cause of conduct.”

[31] The Court in the Louw matter *(supra)* held that whether or not a particular policy or practice constituted a single act or ongoing discrimination, would depend on the facts of each case and went on to specifically find that an alleged discriminatory remuneration policy could amount to discrimination of an ongoing nature. It said at paragraph 17:

> “…However unfair discrimination as an unfair labour practice can also be the result of a (policy) decision introduced by the employer in terms of which the employer, for example, pays employees who do the same work as other employees less on the basis of their race. This then

clearly is a continuing activity which commences as soon as this practice is introduced and ceases only when the employer stops implementing the decision or policy. The employer is not committing a single and separate unfair labour practice each and every time an employee is either underpaid or overpaid but these payments are merely facts by way of which the existence of such continuous unfair discriminatory practice is indicated."

[32] The Respondent sought to distinguish the above matter on the basis that Louw *(supra)*
was concerned with the now repealed item 2 of schedule 7 of the LRA. While it is correct that the above judgment related to item 2 of schedule 7 of the LRA, the principles enunciated are equally applicable to s6(1) of the EEA, which clearly intends a broad meaning to be ascribed to the words 'policy and practice'.

[33] On the reasoning of Louw *(supra)*, discrimination rooted in some initial event such as the implementation of a racist remuneration policy can be validly attacked under section 6(1) of the EEA for as long as the policy continues to discriminate against employees. This is the correct approach. It is incumbent on employers not to discriminate against employees here and now, regardless of when the suspect policy or practice originated. The EEA intends to eliminate the consequences of discriminatory conduct, and not

merely the original act giving rise to these ongoing consequences. This is also in keeping with the substantive approach to equality as endorsed by the Constitutional Court. (Cf. Kentridge J "Equality" in Chaskalson et al (eds) Constitutional Law of South Africa (1998))

[34] The above is further borne out by the Preamble to the EEA, which specifically recognizes that:

> "as result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws".

It is these disparities, typically rooted in past discrimination, that the EEA intends to eradicate by, inter alia, prohibiting unfair discrimination in employment. It follows that, for example, an employee who finds herself the victim of past racist policies on an ongoing basis may rightly seek redress in terms of s6 (1) of the EEA, provided she can make out a case for unfair discrimination.

[35] The interpretation of section 6 (1) is, however, subject to item 2

of Schedule 3 of the EEA, which provides:

> "Any dispute contemplated in terms of the item 2 (1) (a) of Schedule 7 of the Labour Relations Act that arose before the commencement of this Act, must be dealt with as if the repealed provisions of the Labour Relations Act had not been repealed."

[36] In Durban City Council v Minister of Labour 1953 (3) SA 708 (D) at 712 A, the Court considered the meaning of the word "dispute" within the context of labour relations and held that the minimum requirement for the existence of a dispute was 'the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions'. This view was correctly adopted by Basson J, in Louw *(supra)*.

[37] In the present matter, it is necessary to determine when the dispute regarding the alleged unfair discrimination arose between the parties. If the dispute arose before the commencement of the EEA (9 August 1999), then item 2 of Schedule 3 of the EEA applies and this Court will not have jurisdiction to hear this matter.

[38] As this is an exception raised by the Respondent, the question of

whether this Court has jurisdiction must be answered in the light of the Applicants' Statement of Case (as amplified) alone. No extraneous evidence may be taken into account to supplement the Respondent's case (see SA Railways and Harbors v Pepeta 1926 CPD 45). Further, the exception will only succeed if, upon every interpretation which the Statement of Case (as amplified), can reasonably bear, no cause of action is disclosed. (see Pete's Warehousing and Sales CC v Bowsent Investments CC 2000 (3) SA 833 (E) at 829 G-H, and Erasmus, Superior Court Practice B1-151)

[39] Paragraph 16 of the Applicants' Statement of Case indicates that in "early 2000," the second Applicant approached the Respondent's Rodney Knipe "regarding salary disparity amongst the foremen." A meeting took place on 17 March 2000, where 'the salary adjustment was discussed'. On 20 March 2000, the Respondent replied to the Second Applicant, expressing its view that the salary increases represented parity among the foremen.

[40] Having regard to the above, it is a reasonable interpretation of the Statement of Case, that the dispute between the parties arose only on 20 March 2000, when the Respondent communicated its attitude regarding the Applicants' complaints.

[41] Accordingly, the dispute in question arose after 9 August 1999 and, therefore, the Respondent's exception concerning jurisdiction, must fail.

[42] In the result, I make the following order:

42.1 The exception in respect of the Court lacking jurisdiction to entertain

Applicants' claim is dismissed.

42.8 The exception that the Applicants have failed to make sufficient allegations to disclose a cause of action in terms of section 6 (1) of the EEA is upheld.

42.2.1 The Applicants are granted one month from the date of this order to apply for leave to amend their Statement of Case.

42.8.1 In the event that the Applicants do not seek leave to amend their claim within one month of this order, the application is dismissed.

42.3 There is no order as to costs.

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Waglay J

Date of Judgment: 2 September 2002

FOR THE APPLICANT: D Cartwright of Numsa

FOR THE RESPONDENT: C Kahanowitz instructed by Cliffe Dekker Fuller Moore Inc.