

2004 Pension Lawyers Association Conference
15 - 17 February 2004
Cape Town International Convention Centre

CHANGING TOMORROW
SHARING KNOWLEDGE AND EXPERIENCE.
Preparing For The Future.

Topic: When is Discrimination By a Fund
Justifiable?

Speaker: Bob von Witt

Employer /

Organisation: (Director) Bowman Gilfillan
Findlay & Tait

When is discrimination by a fund justifiable?

Justifiable / Fair?

Statutes

□ Constitution Act 108 of 1996

- Sec “9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
 - (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Statutes

❑ Constitution Act 108 of 1996

Sec “9 (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

Statutes

□ Constitution Act 108 of 1996

- Sec 36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

□ Purpose

To give effect to Section 9 of the Constitution, in other words to prevent and prohibit unfair discrimination and harassment.

□ Definition of “Discrimination”

means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

□ Application

This Act does not apply to any person to whom and to the extent to which the Employment Equity Act (Act 55 of 1998) applies.

Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

□ Schedule of Unfair Practices in certain sectors

Pensions

- (a) unfairly excluding any person from membership of a retirement fund or from receiving any benefits from the fund on one or more of the prohibited grounds;
- (b) unfairly discriminating against members or beneficiaries of a retirement fund.

Statutes

☐ Employment Equity Act No 55 of 1998

Section 6 Prohibition of unfair discrimination

- (1) 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 and birth.

- (2) It is not unfair discrimination to –
 - (a) Take affirmative action measures consistent with the purpose of this Act; or
Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Statutes

□ Labour Relations Act No 66 of 1995

Section 187 Automatically unfair dismissals:

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –
 - (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

Direct and Indirect Acts

Direct Discrimination

- The Association of Professional Teachers and another V Minister of Education and others (1995)
16 ILJ 1048 IC

Indirect Discrimination

Harksen V Lane (1998) 1 SA 300 (CC)

- ❑ “Differentiation, in the sense of distinguishing between employees, excluding an employee from something, or preferring certain employees over others, whether through treatment or the impact of a facially neutral criterion, is a necessary pre-condition for a finding of discrimination.
- ❑ But when does differentiation amount to unfair discrimination? Judge Goldstone says this requires a two stage analysis:

Harksen V Lane (1998) 1 SA 300 (CC)

- ❑ 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 is discrimination will depend on 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.
- ❑ If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been 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 or her situation.

Case Law

- ❑ Leonard Dingler Employee Representative Council V Leonard Dingler (Pty) Limited and other (1998) 19 ILJ 285 (LC)
- ❑ Findings
- ❑ Could discrimination have been justified?
- ❑ O'Connor and others V First Rand Insurance Group Pension Fund (2003) 9 BPLR 5118
- ❑ Jenkins V Denel Retrenchment Fund (2003) 10 BPLR 5210
- ❑ Vercueil V Eskom Pension and Provident Fund 2000 (1) BPLR 74 (PFA)
- ❑ Woodroffe V Tongaat Hulett Pension Fund and another (2000) 4 BPLR

Case Law Cont.

- ❑ Meyer V Iscor Pension Fund 2003 (3) BPLR 4427 (SCA)
- ❑ Ferguson V Sapref Pension Fund and other (2002) 6 BPLR
- ❑ JB Maltman V Natal Joint Municipal Pension Fund and Dundee TLC

Backloading?

Onus

- ❑ Applicant must prove discrimination
- ❑ Employer must prove justification.