

SALARIES ARE THESE CONFIDENTIAL?

Differentials in salaries paid within the same job grade, or between jobs of equal Status within an organisation, have since time immemorial been a source of disaffection often leading to conflict in the work place.

In the past the information relating to the salaries paid to employees were confidential and could only be discussed between the employee and management. Contracts of employment contained a clause to this effect, and employees could be disciplined if salaries were discussed amongst themselves.

The Basic Conditions of Employment Act (75/97) changed this. In Chapter 10, part C which deals with the protection of employees against discrimination the following is stated:-

“78 Rights of employees. – (1) *Every employee has the right to –*

- (a) make a complaint to a trade union representative, a trade union official or a labour inspector concerning any alleged failure or refusal by an employer to comply with this Act;*
- (b) discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person;*
- (c) refuse to comply with an instruction that is contrary to this Act or any sectoral determination;*
- (d) refuse to agree to any term or condition of employment that is contrary to this Act or any sectoral determination;*
- (e) inspect any record kept in terms of this Act that relates to the employment of that employee;*
- (f) participate in proceedings in terms of this Act;*
- (g) request a trade union representative or a labour inspector to inspect any record kept in terms of this Act and that relates to the employment of that employee.*

(2) Every trade union representative has the right, at the request of an employee, to inspect any record kept in terms of this Act that relates to the employment of that employee.”

The problem lies in “*(b) discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person*”, in terms of this, an employee can no longer be disciplined for discussing his or her conditions of employment with fellow employees, and any such disciplinary action would fall foul of the Labour Relations Act, unfair labour practice.¹

¹ s 186 (2) LRA

The words “*any other person*” are problematic. Does it mean, that such discussion is limited to trade union representatives or officials and labour inspectors only, or does it include all other persons, including other employers? Given its ordinary meaning, it appears the term does not exclude any person, who may not be employed by the same employer as the employee.

However, given that Part C deals with the protection of employees against discrimination, I believe the term is inclusive of trade union representatives or officials, labour inspectors and may well include lawyers and consultants. Other persons would not have an interest in whether the employee is being discriminated against, either in salary or benefits.

It must be remembered that the Employment Equity Act (55/98)² has a bearing, as that Act outlaws discrimination in the workplace.

Employers will need to be proactive, in order to avoid claims of discrimination, and where this does exist, be able to prove that such discrimination is not unfair.

In order to achieve this, employers must ensure each job has a job description, each job is graded; the minimum, medium and maximum salary scale is established for each grade. Actual salaries paid to be plotted (do a scatter gram) highlighting those above the maximum and those below the minimum, identify the reason for the discrepancies, and draw up a plan to rectify these. It will be necessary to plot the salary curve.

The procedure for the resolution of disputes concerning discrimination in terms of this Act, are the same as those in the Labour Relations Act. The dispute must be referred to the CCMA or a Bargaining Council for conciliation and, if this fails, may be referred to the Labour Court.³

Our legislation mentions the following possible defences, in justifying discrimination:

- An inherent requirement of a job;
- Affirmative action consistent with the purposes of the EEA;
- The normal or agreed to retirement age.

Remember, the onus is on the employer to prove there is no discrimination, and if there is, that it is not unfair. It is therefore important that employers ensure that they can defend such allegations successfully, prior to the allegations being made.

² Chapter 2, BCEA

³ s 80 BCEA