

What amounts to discrimination in employment?



Discrimination of any form is prohibited under the Constitution, the Employment Act and ILO conventions. Section 5(2) of the Employment Act requires an employer to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. The Act also prohibits an employer from discriminating directly or indirectly, against an employee or prospective employee or harassing an employee or prospective employee on grounds of **race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status**. It also prohibits discrimination in respect of recruitment,

training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment. You will note that when it comes to discrimination, even a prospective employee is considered an employee.

Discrimination can therefore occur at three stages: during recruitment, in the course of employment and at the end of the employment contract.

Before Employment

During the recruitment process, refusing to hire an employee based on any of the factors listed above amounts to discrimination. For instance, it was found to be discriminatory where an employer had 19 employees, out of which only three were women. It was also considered discriminatory where an employer interviewed and 'hired' an employee but failed to effect the hiring after finding out the HIV positive status of the employee.

In the course of employment

1. *Disparity in remuneration*

Getting less remuneration for the same amount of work for the same position is the most common form of discrimination. It is common to have disparities in payment of employees, and this may not always be based on unlawful considerations. An employment contract just like any other contract is determined partly by the law and partly by the parties themselves and a difference in remuneration may not necessarily mean discrimination. This is because parties negotiate contract sums. So when does a disparity in payment become discrimination? An employer is by law required to pay his employees equal remuneration for work of equal value and contravening this provision is an offence.

For instance, it was considered discriminatory in a case where a black employee who had stayed with the company for 25 years was paid less

than white employees who had been with the company for a shorter period. It would have helped the employer to argue that the white employees had superior qualifications and skills that the black employee did not have. However, the court put more weight on experience and found that the white employees' purported superior qualifications did not add more value to the Company than the black employee's years of experience.

Employers have to be particularly careful in the way they treat employees in the event of illness and pregnancy. For instance, failure to pay a female employee for the period of maternity leave can be construed as discrimination based on pregnancy. An employee who claims discrimination because of pregnancy or HIV status has to prove that her pregnancy or status was known to the employer and that the difference in treatment is not merely a coincidence but an obvious mistreatment based on pregnancy or HIV Status.

2. Promotions and distribution of roles

It is only logical that merit is awarded. Most employers have policies that guide the manner in which roles are distributed and promotions awarded. These are mostly based on the length of service with the employer, expertise, experience and qualifications. It is therefore discriminatory to base promotions and awarding of roles on unlawful considerations. For instance, it was found to be discriminatory where a Korean National who had little experience and little understanding of English was employed to supervise more highly qualified Kenyan employees.

3. Training, benefits and leave days

In the course of employment, employers will often give training opportunities and benefits to employees. There are statutory benefits that are imposed on the employer by law as well as voluntary benefits that an employer chooses to give his employees. For the latter, the employer has to ensure that the same is given fairly and is not a ground

for discrimination. For instance, an employer could choose to give his employees a car allowance. Even though this is the employer's choice, it should be done in a manner that ensures equality among the employees of the same rank.

The Act grants all employees a minimum of 21 leave days, although employers have the discretion to allow employees more leave days. This should however be done in a manner that does not constitute discrimination. For instance, giving more leave days to employees than is given to others, where those employees are at the same rank can constitute discrimination.

After Employment

Discrimination can extend beyond the employment contract. An employer is supposed to ensure fairness in termination of services in terms of payment of employees' terminal dues and exit benefits.

Conduct that does not amount to discrimination

- a) *Taking affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace.* Affirmative action is a positive bias that is meant to create equality. For instance, it would not be considered discriminatory where an employer makes preference of an employee with disabilities or an employee from a marginalized community, if the preference is made with the aim of creating equality.
- b) *Distinguishing, excluding or preferring any person based on an inherent requirement of a job;* it is common knowledge that some positions will require more expertise than others will. For instance, where an employer offered education allowance to its managerial staff, this was found not to be discriminatory since the managerial staff required more skills than the non-managerial staff.



- c) *Employing a citizen in accordance with the National employment policy.* The National Employment Policy may create a bias that requires that employers within Kenya give priority to Kenyan employees before foreign employees. This can therefore not be considered discriminatory, since it is a requirement imposed by the law, which is meant to give an advantage to Kenyan Nationals.
- d) *Restricting access to limited categories of employment where it is necessary in the interest of state security.* This applies to certain positions within public service, especially the military, which require one to be a Kenyan citizen. This is not discriminatory since it is done with the aim of preserving state security.

Conclusion

Generally, discrimination stems from the manner in which the employer treats his employees. The court usually considers each case independently, and conduct that may constitute discrimination in one case may not necessarily constitute discrimination in another. The burden of proving that there was no discrimination is always upon the employer. It is therefore upon the employer to give reasons for his conduct towards an employee or a certain group of employees.

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