



WHAT IS DISCRIMINATION?

Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds¹.

TYPES OF DISCRIMINATION

There are two (2) types of discrimination namely:

- Fair discrimination; and
- Unfair discrimination

WHAT IS FAIR DISCRIMINATION

Fair discrimination involves measures that are designed and implemented to advance previously disadvantaged persons². Legislation sets out four grounds upon which discrimination is generally considered fair:

- Discrimination based on affirmative action - under these circumstances, affirmative action measures may be implemented to achieve the targets set in employment equity plans aimed at addressing under-representation of population groups within the workplace;
- Discrimination based on inherent requirements of the job – for example, where an applicant or employee who suffers from poor hearing cannot be employed as a choir conductor;

- Discrimination based on productivity, where an employer may, based on fair criteria used to evaluate performance and productivity, differentiate in salary increases provided to employees; and
- Compulsory discrimination by law, where an employer is prohibited by law from employing anyone under the age of 15 years or employing a pregnant woman four weeks before giving birth and six weeks after giving birth.

WHAT IS UNFAIR DISCRIMINATION

Unfair discrimination means any distinction, exclusion, restriction or preference, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.

There are two forms of discrimination related to unfair discrimination, namely:

1. **Direct Unfair Discrimination**
2. **Indirect Unfair Discrimination**

1. Direct Unfair Discrimination

Involves an overt act of discrimination which occurs when a person is treated less favourably than another person based on any of the prohibited grounds listed or any other legally recognised grounds.

2. Indirect Unfair Discrimination

Occurs when an unreasonable requirement, condition or practice, which appears neutral on the surface, is imposed in order to exclude person/s upon one or more prohibited grounds or any other legally recognised grounds. Such a distinction, exclusion, restriction or preference unfairly discriminates against individuals or groups of individuals. It is not unfair discrimination to:

- take affirmative action measures consistent with the purpose of the Employment Equity Act, No. 55 of 1998; and/or
- distinguish, exclude or prefer any person on the basis of an inherent requirement of a job or learning programme.

¹ Section 2.28 of the NMU Integrated Policy for the Promotion of Equality and the Prevention and Protection against Unfair Discrimination outlines prohibited grounds as:
• race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth; or
• Any other ground where discrimination based on that other ground:

• Causes or perpetuates systematic disadvantage, such as socio-economic status/class, nationality,
• Undermines human dignity; or
• Adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground outlined above.
² Previously disadvantaged groups were blacks, coloureds and Indians, whilst previously disadvantaged persons are women, children and the physically disabled.

HOW DO I DIFFERENTIATE BETWEEN FAIR AND UNFAIR DISCRIMINATION?

If the discrimination is based on affirmative action, inherent requirement of the job, law or productivity then it is fair discrimination.

For example:

- If a company advertises a job and one of the requirements for getting the job is for a candidate to have a certain level of education and previous work experience.
- The prohibition on alcohol sales to anyone below the age of 18.

On the other hand, discrimination will automatically be unfair if it is based on one of more of the prohibited grounds.

For example:

- If a company refuses to hire a potential candidate because that candidate is black. This is unfair discrimination based on race.
- If a company turns down a job applicant because he/she is Christian, Jewish, Muslim or a believer in any other religion. This is unfair discrimination based on religion.
- Annie works in a toy store and has a physical disability preventing her from carrying heavy items. She recently found out her co-workers earn more than her despite having the same experience and working just as hard. When she asked her manager about it, she said it was

because “you just don’t carry as much weight around here.” This is unfair discrimination based on a disability.

HOW TO DETERMINE FAIRNESS AND UNFAIRNESS?

To prove that discrimination is fair the following is taken into account:

- the context;
- whether the discrimination impairs or is likely to impair human dignity;
- the impact of the discrimination on the Complainant;
- the position of the Complainant in society and whether they suffer from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- the nature and extent of the discrimination;
- whether the discrimination is systemic in nature;
- whether the discrimination has a legitimate purpose;
- whether, and to what extent, the discrimination achieves its purpose;
- whether there are less restrictive and less disadvantageous means to achieve the purpose;
- whether, and to what extent, the Respondent has taken such steps as being reasonable in the circumstances to:

- o address the disadvantage which arises from or is related to one or more of the prohibited grounds;
- or
- o accommodate diversity;
- whether viewed objectively the discrimination complained of is reasonable and justifiable.

WHERE DO I REPORT UNFAIR DISCRIMINATION?

Via the [online reporting page](#) on the [student and staff portals](#).

The screenshot shows the Nelson Mandela University website interface. At the top, there is a navigation bar with various icons. Below this is a table with COVID-19 statistics. The table has columns for Campus, Staff, Undergraduate, Postgraduate, and Total, with sub-columns for Confirmed, Cleared, Active, Deaths, and Confirmed contacts. A row for 'All' shows 144341 Staff, 84070 Undergraduate, 17851 Postgraduate, 223262 Total, 222 Confirmed, 208 Cleared, 3 Active, 11 Deaths, 464 Confirmed contacts, 448 Cleared contacts, 16 Active contacts, and 2 PUH. Below the table are sections for 'Returning to Campus Information', '#2021AY', 'COVID-19 Information site', and 'Report Harassment or Discrimination'. At the bottom, there is a 'Reporting Page of Incidents of Harassment (including Sexual Harassment and Offences) and Discrimination' with a 'Report an Incident' button and a 'View Incident Status' button.

Campus	Staff	Undergraduate	Postgraduate	Total	Confirmed	Cleared	Active	Deaths	Confirmed contacts	Cleared contacts	Active contacts	PUH
All	144341	84070	17851	223262	222	208	3	11	464	448	16	2

