

**"AN ANALYSIS OF THE CURRENT LAWFULNESS OF SOUTH
AFRICAN REMUNERATION PRACTICES AND A CRITICAL
ASSESSMENT OF THE IMPACT OF PROPOSED
LEGISLATION"**

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INTRODUCTION

The general development and history of the growth of South Africa as a dualistic society has been covered in many publications. Understanding the effect that the dichotomy in the society which existed and which was, until recently, enforced through a rigorous, complicated system of laws, rules, procedures and controls had on pay and pay systems is of crucial importance to our understanding and approval of both accepted and proposed new legislation, particularly as it pertains to remuneration.

Even before the industrialisation of South Africa began with the discovery of gold and diamonds in the latter quarter of the nineteenth century "the unskilled position of the black employee was already entrenched. Blacks, meaning the indigenous Africans, were employed mainly as servants and labourers on the farms and in the towns. Skilled work was undertaken by Whites, many of whom were immigrants, or by the slaves who came from the East. The result was a coincidence of race and skill, with the majority of the Blacks constituting the unskilled labour force and the skilled workforce being made up of Whites, Coloureds and Asians."¹

In the mining industry, which centred on the Witwatersrand, unskilled black employees, who had been specifically imported for their labour, were traditionally paid far less than the rest of the workforce. The realisation by employers that many of these employees were capable of performing skilled work for a lesser wage led to the established,

¹

S Bindex *Industrial Relations in South Africa* (1989) p 286

privileged position of white miners being threatened. White unionists, who had brought with them from Britain socialist beliefs more in keeping with the value system of the abstract labour theory of value, "began to insist on guarantees of white job security"², an insistence which led to the first regulations instituting industrial colour bars in 1897 and in 1911 when the Mines and Works Act effectively reserved thirty-two jobs for white mineworkers only.

This separation of the two groups of workers was perpetuated until the passing of the amendments to the Industrial Conciliation Act (1979) which also renamed it to the Labour Relations Act (1956) in 1979.

During the period up to this point increases in the rates of wages for the different groups of employees were established through very different means. In order to prevent the wholesale undercutting of white wages by blacks the Wage Act had been introduced and passed through Parliament in 1925. This Act "allowed for the establishment of minimum wage rates for all employees, irrespective of race, in industries where collective bargaining structures were not sufficiently developed"³. White workers, on the other hand, had full access to the machinery of collective bargaining.

The result of these differentiated labour laws was a "great discrepancy between the

² S Bendix *Industrial Relations in South Africa* (1989) p 287

³ S Bendix *Industrial Relations in South Africa* (1989) p 291

incomes of white and black South Africans"⁴, illustrated by "the fact that in 1982 a differential of 1:6 still existed between unskilled and skilled wages, in contrast to the average differential of 1:2 or 1:3 in most Western countries"⁵.

Whether, in the final analysis, this differentiation is the result of the lack of collective bargaining structures amongst black workers or because of the existence of them amongst white workers is a matter for further study and debate. There can be little doubt, however, that the removal of these differences is at the core of the current legislation being proposed by the new government. The questions that remain are:

- whether the legislation that is being proposed will, in fact equalise the situation and remove these discrepancies
- what problems can be anticipated through the implementation of such proposed legislation and
- what recommendations can be made to minimise or remove any such problems.

This dissertation attempts to answer these questions by considering, firstly, the notions of "fairness", "equity" and "equality" conceptually, both as behavioural notions and as they relate to remuneration principles; secondly, by investigating the components and structure of pay systems; thirdly, by analysing the development of "equal" and "fair" pay in a society which has not been subjected to the intervention of the separatist, apartheid policies of our past and fourthly, finally, by evaluating the current and pending legislation

⁴ S Bendix *Industrial Relations in South Africa* (1989) p 424

⁵ S Bendix *Industrial Relations in South Africa* (1989) p 424

against the yardsticks which have hopefully emerged in the opening chapters.

CHAPTER ONE:

FAIRNESS AND EQUITY AS ORGANISATIONAL BEHAVIOUR CONCEPTS

1. Describing Fairness

The notion of fairness is one of the "most prevalent concepts"⁶ affecting organisational life. Managers and employees are constantly bombarded with exhortations to pursue fair labour practices, and the requirement that an employer's actions are fair is a common and consistent theme throughout the current and emerging labour legislation in South Africa.

This concern for "equal and fair" employment practices was originally identified by Weber: "unless the members of a modern organisation believe that people are being hired, compensated, promoted, disciplined, retrenched and so on, on the basis of reasonable company rules applied impartially and consistently, they are not likely to regard the organisation's demands as legitimate, or its rules as binding."⁷

The problem, however, arises in the definition of the terms "fair" and "equal".

⁶ S Bendix *Industrial Relations in South Africa* (1989)

⁷ M L Mill in W Bendix (ed) *South African Industrial Relations of the Eighties* (1988), p 357

According to Salomon⁸, fairness is a “relative and variable” concept which is entirely dependant on a persons’ perceptions.

Perceptions, defined as “a process by which individuals organise and interpret their sensory perceptions in order to give meaning to their environment”⁹ differ from person to person and, because “what one perceives can be substantially different from objective reality”¹⁰, it may happen that the perception that one person or one group of persons has as to the fairness of another person’s (or group of persons) actions may have little or no relationship to the actual fairness of those actions.

It may also happen that attempts to treat one person fairly lead to the blatantly unfair treatment of another. Thus: “What is fair in one circumstance may not be fair in another. It may be quite fair to retrench an employee who has an assured future income and no dependants, whereas it would be obviously unfair to retrench another individual who has no pension and five dependants. Alternatively, in a society where there is equal opportunity and labour mobility, the regulation of wages by market principles would appear a fair policy, but this would not be so in a society which lacks these basic freedoms.”¹¹

⁸ M Salomon *Industrial Relations Theory and Practice* (1987)

⁹ S P Robbins *Organisational Behaviour* (1996)

¹⁰ S P Robbins *Organisational Behaviour* (1996)

¹¹ S Bendix *Industrial relations in South Africa* (1989)

To compound the problem further, perceptions are not only influenced by reality, by the actual characteristics of the overall environment and the specifics of the situation, they are also influenced by the various components of an individual's psychological construction, such as:

- biographical attributes (height, weight, race, gender, physical skills etc)
- basic philosophic positions (various values, beliefs and ideologies)
- personality types (introverted, extroverted etc)
- personal stores of knowledge, skills and abilities (educational background etc), and
- personal wants, needs and desires (collectively termed "motivation"), as well as
- the propensity to seek / store knowledge (learning).

The result of all these independent variables is, for example, that one individual subscribing to an ideology based on absolute equality will view any inequality in wages, benefits etc as unfair, whereas another individual who subscribes to an individualistic philosophy will view such inequalities as quite natural.

Whilst there can be little doubt that several or all of the independent variables will affect the individual's perceptions of fairness in relation to their own remuneration or compensation or those of another person, generally, however, an individual's perception of compensatory fairness will be dependent on just two variable principles: the person or persons to whom the individual makes the comparison

or comparisons, and the individual's notion of value.

2. The Equity Theory

The person or persons to whom the comparison is made is of crucial importance to the resultant perception of fairness or unfairness. In organisational behaviour terms this other person (or these other persons) is termed the referent other (or others).

According to J Stacey Adams, who "pioneered [the] application of the equity principle to the workplace"¹² individuals persistently make comparisons, often subconsciously, between their work factors, i.e.:

- the job of work that they do
- the effort they put into that work and
- the rewards (remuneration, compensation, benefits) they receive for that effort

and the work factors of other employees - their referents:

- the work that they do
- the effort they put into their jobs and
- the rewards they receive.

When that comparison results in a perception that the ratio between one job-

¹² R Kreitner & A Kinicki *Organisational Behaviour* (1995) p 172

effort-reward combination (also termed the “input-output variables”¹³) is equal to the ratio between another job-effort-reward combination, a state of equity is said to exist: the situation is perceived as fair and just.

However, when the ratio is perceived to be unequal, the perceiver experiences “equity tension” (or cognitive dissonance, or psychological discomfort). This is a negative state which, J Stacey Adams suggests, provides the motivation or inducement for a person to behave in such a way or perform such actions as are required to correct the situation.

This notion is referred to as the Equity Theory, and it is made more complex because: “Evidence indicates that the referent chosen is an important variable in equity theory. There are four referent comparisons an employee can use:

1. ***Self-inside:*** An employee’s experiences in a different position inside his or her current organisation
2. ***Self-outside:*** An employee’s experiences in a situation or position outside his or her current organisation
3. ***Other-inside:*** Another individual or group of individuals inside the employee’s organisation
4. ***Other-outside:*** Another individual or group of individuals outside the employee’s organisation.

¹³ F Luthans *Organisational Behaviour* (1989) p 251

So employees might compare themselves to friends, neighbours, coworkers, colleagues in other organisations, or past jobs they themselves have had.”¹⁴

According to Luthans, both the work factors of the individual employee him or herself and the work factors of the referent other or others chosen by the individual are based upon his or her perceptions. “Age, sex, education, social status, organisational position, qualifications and how hard the person works are examples of perceived input variables. Outcomes consist primarily of rewards such as pay, status, promotion, and intrinsic interest in the job. In essence the ratio is based upon the person’s *perception* of what the person is giving (inputs) and receiving (outcomes) versus the ratio of what the relevant other is giving and receiving. This cognition may or may not be the same as someone else’s observation of the ratios or the same as the actual, realistic situation.”¹⁵

Furthermore, “which referent an employee chooses will be influenced by the information the employee holds about referents as well as by the attractiveness of the referent. This has led to focussing on four moderating variables - gender, length of tenure (service), level in the organisation, and amount of education or professionalism.

Research shows that both men and women prefer same-sex comparisons. The

¹⁴ S P Robbins *Organisational Behaviour* (1996) p 227

¹⁵ F Luthans *Organisational Behaviour* (1989) p 251

research also demonstrates that women are typically paid less than men in comparable jobs and have lower pay expectations than men for the same work. So a female who uses another female as a referent tends to result in a lower comparative standard. This leads us to conclude that employees in jobs that are not sex-segregated will make more cross-sex comparisons than those in jobs which are either male or female dominated. This also suggests that if women are tolerant of lower pay it may be due to the comparative standard they use.¹⁶

As indicated above, research findings have generally supported the equity theory, determining, for example, that overpaid subjects on a piece-rate system lowered the quantity of their performance and increased the quality, whilst underpaid subjects increased the quantity and decreased the quality of their performance. In addition, a recent study, in which 102 undergraduate students were paid either equitably or less-than-equitably for performing a clerical task, found that "underpaid students stole money to compensate for their negative inequity."¹⁷

3. The Notion of Value in Relation to Fairness

Besides these comparisons, much of how an individual interprets or measures fairness in the workplace is also dependant on the fundamental ideology of that same individual in respect of his or her notion of the value of labour. This makes common sense. If an individual perceives work as the sole means to the

¹⁶ S P Robbins *Organisational Behaviour* (1996) p 227

¹⁷ R Kreitner & A Kinicki *Organisational Behaviour* (1995) p 177

acquisition of personal fame, fortune and power, then that person will have a different perception of fairness from another person who believes that work is something merely to be tolerated in exchange for the opportunity to indulge his or her leisure preferences.

Cameron, Cole and Edwards classified the different philosophies of value into three fundamental schools of thought.¹⁸

According to them, "In the past, judgements of valuation and worth were not the prerogative of people called economists, but belonged to other people, often calling themselves bishops and kings. Theology has always concerned itself with value and worth, as has the study of the exercise of law [but] ... a change in society ... came with the development of exchange through relatively anonymous markets. The market grants the experience of not being directly governed by representatives of either gods or kings. The extension of markets into more and more areas of life was thus a revolutionary, and in many ways liberating, experience for the mass of people and a threat to vested interests. The expression of this experience in the realm of ideas was a shift towards justifying the valuation of activities produced by markets [such as labour] in the form of prices [such as wages]."¹⁹

¹⁸ Cameron, Cole and Edwards *Why Economists Differ*

¹⁹ Cameron, Cole and Edwards *Why Economists Differ* p 7

Following on from the thinking of sixteenth and seventeenth century authors Thomas More and Thomas Hobbes, the first writer “who raised value as revealed in the market place to a dominant position”²⁰ was the eighteenth century author, Adam Smith. He “identified the market as the arena in which prices appear as the form in which valuations are expressed”²¹ and was the forerunner of a series of writers stretching up to the current day who supported what Cameron, Cole and Edwards term the “subjective preference theory of value”.

3.1 The Subjective Preference Theory of Value

“Their starting point is *the individual [who is] endowed with tastes and talents and who calculates actions so as to maximise personal welfare or utility*. The individual’s tastes define preferences between alternative consumption patterns including leisure. The individual’s talents, on the other hand, determine the ability to fulfil these desires through productive activity.”²²

Adherents or proponents of this school of thought believe that originally productivity was increased by individuals who specialised in the production of particular commodities. This caused excesses which had to be exchanged for goods and services which the individual, in his drive to overproduce, was unable to generate through his own toil. This caused a separation of the individual as a

²⁰ Cameron, Cole and Edwards *Why Economists Differ* p 7

²¹ Cameron, Cole and Edwards *Why Economists Differ* p 7

²² Cameron, Cole and Edwards *Why Economists Differ* p 7

consumer and as a producer. This separation in turn led to an interdependence between individuals "necessitating exchange[s of goods and services] through markets, with relative rates of exchange or prices determined by the relative utility derived by individuals from the consumption of goods and leisure. The decisions to consume and talents to produce are coordinated using a special talent, entrepreneurship."²³

Within this theory lies the belief that governmental intervention in the marketplace should be restricted to the regulation of the supply of money to prevent inflation and that the "determination of economic activity is the maximisation of individual utility from consumption. And, because each person has particular tastes and, therefore, preferences, this can only be achieved for society as a whole if there is free exchange with no individuals entering into a contract to buy or sell unless it is in their own interests."²⁴

The subjective preference theory of value therefore suggests that the employment contract is a contract which has been concluded between equals and would seem to suggest that a wage must be fair if it is accepted in exchange for labour by the giving of that labour. It would also suggest that adherents of this philosophy would support the idea of treating and paying individuals as individuals - as opposed to paying a "rate for the job".

²³ Cameron, Cole and Edwards *Why Economists Differ* p 8

²⁴ Cameron, Cole and Edwards *Why Economists Differ* p 8

David Ricardo, writing in the early part of the nineteenth century developed an alternative line of thinking to that of Smith by starting from the proposition that value originates in and is determined by decisions to produce, rather than decisions to consume. He also concluded, from his observations of the physical world, that "as the supply of subsistence goods increases, so does the size of the labouring population, and as more land is brought into cultivation, agricultural productivity declines" which led him to believe "that the operation of free markets leads eventually to economic stagnation, with the mass of the people living at a minimum subsistence level, facing a group of landowners conspicuously consuming the economic surplus."²⁵ The writings of Ricardo led "on the one hand, through interpretations by Mill and Marshall, to the establishment of the cost-of-production theory of value ... and, on the other hand, to the abstract labour theory of value through Marx and Engels."²⁶

3.2 The Cost-of-Production Theory of Value

The cost-of-production theory of value has the following hallmarks:

- Firstly, a central concern with the production decision
- Secondly, the subsequent distribution of output between the "contributors" and
- Thirdly, the belief that market forces left to their own devices will at best

²⁵ Cameron, Cole and Edwards *Why Economists Differ* p 10

²⁶ Cameron, Cole and Edwards *Why Economists Differ* p 10

lead to inefficiency and at worst to stagnation.²⁷

Adherents to this philosophy believe that "the prevailing technology dictates what can be produced and how it is produced, and therefore determines the technical division of labour; ... [P]rices will be determined by the cost of production of each good; ... [T]he cost of production of any particular good is ... determined by technical factors such as the quantity of labour time [and] ... the amount of ... raw material required per unit of output [and is] also affected by the distribution of the social product between wages and profit; ... [T]he subsequent division of output will depend on the relative bargaining strengths of the various interest groups within society, leading possibly to social conflict; ... [T]he antidote [to this social conflict] lies in pluralist politics through which competing interests can reach compromise in a neutral bureaucracy [which will] mediate in disputes and promote new ideas and investment. Detailed state intervention in the economy [and also, therefore, in the employer-employee relationship] is, therefore, considered as essential and desirable."²⁸

It is from within this school of thought that supporters of the belief that the proportion of the cost-of-production that is allocated to wages should be kept as low as possible are to be found.

²⁷ Cameron, Cole and Edwards *Why Economists Differ* p 10

²⁸ Cameron, Cole and Edwards *Why Economists Differ* p 10 - 11

3.3 The Abstract Labour Theory of Value

Following on from the writings of Ricardo, and largely in response to the dissertations of Mills and Marshall, Marx, in dealing with the notion of value, started with the supposition that "in every society the material environment is transformed through production into things that individuals wish to use"²⁹ - products and/or services with utility value.

Whilst the type of technology employed will, as in the cost-of-production theory, determine the technical division of labour, it will also be based upon a relationship of power over the use of the economic surplus, or profit. The source of that power is the control over the means of production, or economic resources, of a society by a particular group, or class, of people. The whole structure of production, distribution, exchange and consumption will therefore reflect these *social/power* relationships.

When considering the notion of value within a society there are, therefore, two interdependent relationships that have to be taken into consideration:

- Firstly, the relationship between producer and consumer that results from the *technical* division of labour, and
- Secondly, the *class* relationship between those who control the means of production (and, therefore, the use of the profit, or economic surplus) and those who are dependant upon that ruling class for access to the means

²⁹ Cameron, Cole and Edwards *Why Economists Differ* p 12

of subsistence.

The abstract labour theory of value is thus more than a theory of value, it is also a theory of power in capitalist society.

Within capitalistic societies the dynamic for social change is provided by competition between capitalists for a share of the profit (economic surplus). Either they have to innovate, or increase productivity, or they face bankruptcy. However, according to Marx, it is this very drive to increase labour productivity (or reduce the wage-cost of production) in order to improve profitability that ultimately results in the actual profitability of capital as a whole to fall (which, in turn, threatens the continued survival of capitalists as a class).

This then leads to increased pressure by capitalists on the labour force to increase profitability further, a move which only serves to exacerbate the situation.

The fundamental drive by capitalists to keep the cost of labour as low as possible whilst at the same time increasing the production of goods or services is the cornerstone of the class conflict which is, according to Marx, fundamental to capitalism. Further, this is a conflict which cannot be resolved by the action of the state - it can only be resolved by "a *revolutionary* change in social interests."³⁰

³⁰ Cameron, Cole and Edwards *Why Economists Differ* p 13

Whilst there is no empirical evidence to support the premise that the majority of employees in South Africa are at least partially sympathetic to the abstract labour theory of value, it is not difficult, given the history of the country, to accept that this is the most widely-held value system amongst labour.

It is important to note that these three schools of thought developed in relation to each other coincidentally with the rise of industrial capitalism from the mid-nineteenth century onwards. It is also important to note that, according to Cameron, Cole and Edwards, "each of ... [the] three theories of value reconstructs economic reality from the view of each of ... [three] interest groups respectively"³¹, that is, the owners of the productive resources (shareholders) support the subjective preference theory whilst the organisers of production (managers, planners etc) support the cost-of-production theory and labour supports the abstract labour theory of value.

Therefore, ones perceptions as to the relative fairness or equity or otherwise of remuneration rates and practices will be significantly influenced by one's perception of the value of labour, or the school of economic thought one supports.

Also, whilst there is no empirical support for this, either, it is suggested that these perceptions are subject to change. For example, whilst one may support the abstract labour theory of value whilst one is compelled to perform manual labour

³¹ Cameron, Cole and Edwards *Why Economists Differ* p 14

for subsistence, it is likely that one's perceptions will be subtly altered and move in favour of the cost-of-production theory once one is promoted into a managerial position, and will ultimately favour the subjective preference theory should one eventually become the owner of a business.

4. Differentiating Between Fairness, Equity and Equality

In common practise the terms "fairness" and "equity" are often used synonymously which, when considering the dictionary definitions, is apparently acceptable.

"Equity", for example, is defined as "The state, ideal, or quality of being just, impartial and fair".³² "Fairness", on the other hand, is defined as "Free of favouritism or bias; impartial: *a fair judge*. 9. Just to all parties; equitable: *a fair compromise*. 10. Consistent with rules, standards, logic, or ethics: *a fair tactic*."³³

However, a problem arises when dealing with matters of industrial relations and/or labour legislation is that "equity" and "fairness" are often used synonymously with the term "equality", which is a different notion altogether.

"Equal" is defined as "1. Having the same capability, quantity, or effect as another: *equal strength*. 2. *Mathematics*. Related by a reflexive, symmetrical, and

³² Universal Dictionary (1987) p 521

³³ Universal Dictionary (1987) p 550

transitive relationship; broadly alike or in agreement in a specific sense with respect to specific properties. 3. Having the same privileges, status or rights: *equal before the law.*"³⁴

"Equality", furthermore, is defined as "1. The state of an instance of being equal; especially, the state of enjoying equal rights in political, economic, and social affairs. 2. A mathematical statement, usually and equation, the one thing equals another."³⁵

According to Bendix, equality "signifies 'an exact correspondence between magnitudes and numbers in respect of quantity'" and indicates that "equality relates to sameness in all aspects and especially in substantive benefits."³⁶

"The difference between equality and equity becomes clearer by differentiating between an 'equitable distribution' and an 'equal distribution'. Whilst the first merely signifies that the distribution should be fair, the second means that there should be a mathematically correct division into portions of the same size."³⁷

There can be little doubt that the terms are often both confused and confusing.

³⁴ Universal Dictionary (1987) p 521

³⁵ Universal Dictionary (1987) p 521

³⁶ S Bendix *Industrial Relations in South Africa* (1988) p 32

³⁷ S Bendix *Industrial Relations in South Africa* (1988) p 32

As Will states: "Granted that equal and fair employment practices are important, it is not so clear that we know how to recognise them when the need arises; ... decisions which at first sight seem wholly equitable are hard to justify when they are analysed in greater detail ... different types of employment practices raise somewhat different questions about fairness and equality ... there seems to be no criterion of fairness that everyone will accept ..." .³⁸

D B Ehlers also differentiates between equity and fairness when he acknowledges the difficulties associated with defining and describing the concepts: "As you would probably by now realise, the word *equity*, although it can be understood to be to some degree at least analogous to the concept of *fairness* is not easily defined or described".³⁹ He goes on to say "According to Dr Hoyningen-Heine: *Die Billigkeit in Arbeitsrecht*. - (Munchen, 1978) the notion of fairness or equity is a concept that is acknowledged in German labour law.

Instead of defining the word, he writes:

'It is evident that the notion of fairness is philosophically as well as rationally difficult to understand. Therefore a definite hesitation even a clear mistrust against fairness can be deduced.' (at 12). He stated: 'Fairness is the righteousness of the particular case; it can therefore only become exclusively

³⁸ M L Will *The Unfairness of Hiring and Promoting on Merit* in W Bendix (ed) *South African Industrial Relations of the Eighties* (1988) p 357

³⁹ D B Ehlers *The Industrial Court - Establishing Equity* in W L Bendix (ed) *South African Industrial Relations of the Eighties* (1988) p 180

relevant in specific situations' (at 228) and at 229: 'In so far as fairness is applicable all relevant matters surrounding the specific case in the framework that reasonably belongs to the actual supposition are to be taken into account and the deciding criteria are to be uncovered, evaluated and weighed" (Free translation)."⁴⁰

4.1 Measuring Fairness

Based on the simple rationale that if you cannot define it you cannot measure it, a natural conclusion to be drawn from the above is that there is no absolute measure of these concepts.

Bendix suggests, however: "This does not preclude an attempt to establish some generally acceptable criteria by which to measure fairness. According to Salamon, the following have in the past been suggested as possible criteria:

- the best customs and traditions and social rules
- majority agreement
- technical criteria such as market forces, job evaluation or the legal process."⁴¹

⁴⁰ D B Ehlers *The Industrial Court - Establishing Equity* in W L Bendix (ed) *South African Industrial Relations of the Eighties* (1988) p 180

⁴¹ S Bendix *Industrial Relations in South Africa* (1988) p 31

These criteria, however, are all open to criticism. For example, difficulties would arise in determining which were the 'best' customs and traditions. Each society has its own rules and traditions and each society would regard its own customs and rules as the 'best', even if they were not always fair. Majority agreements may be a poor criterion because there is always a minority and they might regard some of the decisions which are taken by the majority as unfair. "The third criterion suggests that if there is a neutral measure of an action, if, for example, persons are promoted on the basis of job evaluation, then that action is fair. Yet these neutral measures have been established by people and the criteria adopted in these measures might in themselves be unfair or other circumstances might impact which make them unfair."⁴²

The 'best' criteria of fairness appear to be those adopted by Salomon. He states that:

- "There should, firstly, be balance and reciprocity between the parties concerned. This means that one party should not obtain all the benefits to the detriment of the other parties. There should be an equitable exchange, both in substance and behaviours, and the participants themselves should consider their positions to be fair.
- Secondly, others outside the relationship should consider the relationship and its processes to be fair. The actions of the parties

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S Bendix *Industrial Relations in South Africa* (1988) p 31

should stand up to impartial judgement and universal standards.

- Thirdly, both parties should receive equal treatment and consideration. The same criteria and judgements should be applicable to both parties and the treatment of persons should, as a whole, be consistent. The last point is of particular importance, since perceptions of fairness rest, more often than not, on comparisons with others.⁴³

Whilst not for a moment disavowing the importance of the concepts, their similarities and their differences within the studies or disciplines of both industrial relations and organisational behaviour, the distinction between equity and fairness on the one hand and equality on the other is also of crucial importance to the discipline of remuneration management, where these concepts are also paid very special attention.

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S Bendix *Industrial Relations in South Africa* (1988) p 31

CHAPTER TWO:

FAIRNESS AND EQUITY AS CONCEPTS IN COMPENSATION MANAGEMENT

1. Compensation terminology and definitions

According to Milkovitch and Newman⁴⁴, compensation (or remuneration - the terms are used interchangeably⁴⁵) refers to all forms of financial returns and tangible services and benefits employees receive as part of an employment relationship.

Pay may be received directly in the form of cash (e.g. wages, bonuses, incentives) or indirectly through services and benefits (e.g. pensions, health insurance, vacations). This definition excludes other forms of rewards or returns that employees may receive, such as promotions, recognition for desired behaviours, feelings of accomplishment and the like.

Pay is usually referred to as a wage if it is the "payment to a worker for labour or services; especially , remuneration on an hourly, daily or weekly basis or by the piece"⁴⁶, whilst pay which is "a fixed amount of money, usually for nonmanual services, paid to a person on a regular, often monthly or quarterly, basis"⁴⁷ is

⁴⁴ G T Milkovitch and J M Newman *Compensation* (1984)

⁴⁵ The Universal Dictionary (1987) defines compensation as "Something given or received as an equivalent or as reparation for a loss, service, or debt" (p 326) and to remunerate as "To pay (a person) for goods provided, services rendered, or losses incurred. 2. To compensate for; make up for" (p 1297)

⁴⁶ Universal Dictionary (1987) p 1685

⁴⁷ Universal Dictionary (1987) p 1348

usually referred to as a salary.

Pay delivery programmes typically fall into five forms: base pay, merit pay, short-term incentives, long-term incentives and employee services and benefits.

1.1 Base pay

Base pay is the basic cash compensation that an employer pays for the work performed. Base pay tends to reflect the value of the work itself and ignores differences in contribution attributable to individual employees. For example, the base pay for a training officer may be R 3 500 per month, but some individual training officers may receive more because of their experience and/or performance.

1.2 Merit pay

Merit pay rewards past work behaviours. It can be given as lump-sum payments or as increments to the base pay. Merit programmes are commonly designed to pay different amounts (often at different times) depending upon the degree of experience and/or performance.

For example, outstanding performers may receive a 15% merit increase, whereas a satisfactory performer may receive, say, a 10% merit increase.

Thus, annual increments are merit pay but cost-of-living increases are increases

to the levels of base pay. So if, for example, the inflation rate for a particular year is 10% and the negotiated settlement is concluded at 12%, then 10% of the increase will be an increase to the base pay and 2% will be considered, in compensation terminology, to be merit pay.

Whilst there is an infrequent separation of these terms during wage negotiations, consideration should perhaps be given to the issue of whether proposals are addressing the need for merit pay or whether the demand is addressing the need to increase the level of the base pay - and why.

1.3 Short-term incentives

These may be offered for individual or total business unit performance or a combination thereof. Usually very specific performance standards are required, e.g. for every 'widget' over 20 manufactured, an extra 5c is paid. Performance results may be defined as cost savings, 'widgets' produced, quality, revenues, returns on investments or profits. The possibilities are endless.

Incentives and merit pay differ. While both may influence performance, incentives do so by offering pay as an inducement. Merit, on the other hand, is a reward in recognition of past performance. The distinction is a matter of timing. Incentive systems are offered prior to the actual performance whilst merit pay, on the other hand, typically is not communicated beforehand.

Merit pay and incentives are clearly related. Insofar as employees begin to anticipate their merit pay, it acts as an incentive to induce performance. Thus, anticipated rewards sometimes act as incentives - which accounts for why employees are sometimes seen to be working harder or performing better in the period leading up to annual increases.

1.4 Long-term incentives

Long-term incentives are intended to induce longer-range (multi-year) results. Top managers or professionals are often offered long-term incentives to focus on long-term organisational objectives, such as return on investment, market share, return on net assets and the like.

1.5 Employee services and benefits

These are non-cash programmes that include a wide array of alternative pay forms from payments for time not worked (vacations, sick leave), services (army duty) and protection (medical aid, insurance, pensions). These services and benefits have been increasing as a percentage of labour costs and are an increasingly important form of pay.

2. Equity in Compensation

According to Milkovitch and Newman⁴⁸, equity is a basic concept underlying compensation. They identify three types of equity: internal, external and

⁴⁸ G T Milkovitch and J M Newman *Compensation* (1984)

employee. According to them, equity forms the building block, the foundation on which pay systems are designed, including the requirement that these pay systems must also be equitably administered.

2.1 Internal equity

Internal equity means comparisons inside an organisation - comparisons among jobs. Internal equity weighs jobs in terms of the relative value of their contributions to the objectives of the organisation. How, for example, does the work of a keypunch operator compare to the work of a computer operator to the work of a computer programmer to the work of a systems analyst? Is the output from one job more valued than the output from another?

Internal equity has two aspects:

2.1.1. The relative similarities and differences in the work content of jobs.

2.1.2. The relative value or contribution of the work to the organisation's objectives.

The most commonly used means by organisations of determining the relative similarities and/or differences in the work content of jobs and the relative value or contribution of the work to the organisation's objectives is job evaluation.

2.1.3 Job evaluation is defined as "a systematic determination of the value of each job in relation to other jobs in the organisation."⁴⁹ A fundamental requirement of job evaluation is job analysis, which is the process most commonly used to determine the actual and relative content and worth of the job a person does. Job analysis has been defined as "The systematic process of collecting and making certain judgements about all of the important information related to the nature of a specific job"⁵⁰. Job evaluation, on the other hand, is a method of establishing the relative positions of jobs in an organisation hierarchy.

Job evaluation systems typically use a scoring system to assign points, based on such things as the amount of responsibility the job involves or the variety of tasks performed, to a job. These points are then converted into pay rates. Personal characteristics, such as age, education and length of service, are then also sometimes used to make additional adjustments in what an individual is paid.

In many cases, the use of job evaluation and grading systems is a reasonable approach. "Management, together with labour, must seek to apply equitable payment systems, and job evaluation provides a technique

⁴⁹ Lloyd L Byars and Leslie W Rue *Human Resource Management* (Fourth Edition) p 340

⁵⁰ G T Milkovitch and J M Newman *Compensation* (1984) p 42

for realising this objective"⁵¹. Coghill and Taylor contend that the concept of job evaluation and the hierarchy of differentially remunerated jobs is widely accepted and that "without a systematic and logical method for determining pay, anomalies, confusion and unrest will occur on an increasing scale ... Without a logically defensible pay structure spanning all jobs, organisations will react haphazardly to organised labour, thereby promoting pay dissatisfaction. Such a situation is likely to prompt an acceleration in mechanisation and also unemployment."⁵²

Job analysis and job evaluation, however, cannot be regarded as the panacea to all forms of compensation equity. Job evaluation is, in itself, not without problems. Issues such as the acceptability of the process and the fundamental judgements made on the basis of job analysis provide room for concern. As Armstrong⁵³ says, it is essentially a comparative process, and makes comparisons with other jobs, with defined standards or to the degree to which a common criterion or factor is present in different jobs.

He⁵⁴ suggests the following points are most frequently offered for

⁵¹ M Armstrong *A Handbook of Personnel Management Practice* (1988)

⁵² J Taylor and C Coghill *Job Evaluation: A basis for equitable payment?* in J Barling, C Fullagar and S Bluen (eds) *Behaviour in Organisations* (1987) p 251

⁵³ M Armstrong *A Handbook of Personnel Management Practice* (1988)

⁵⁴ M Armstrong *A Handbook of Personnel Management Practice* (1988)

consideration as favouring job evaluation schemes:

- 2.1.3.1 **Objectivity.** This claim has not been substantiated, according to Armstrong, who says that the only basis for job evaluation is the job description, which is extracted from the job analysis, and which can never "convey the full flavour of the job, no matter how carefully written."⁵⁵
- 2.1.3.2 **Logical Pay Structure.** Whilst acknowledging this to be true, as far as it goes, there is no evidence, according to Armstrong⁵⁶ that the more elaborate the job evaluation, the more logical the pay structure.
- 2.1.3.3 **Fairness.** As a value-loaded word, there are, obviously, as many applications of fairness as there are situations in an organisation. However, it is generally accepted that job evaluation systems, properly implemented and carried out, are felt to be fair, which, when gaining acceptance of the results produced, is all, really, that counts.

As Taylor and Coghill quote: "Job evaluation, with all its imperfections:"exists as a major technique for determining pay because it is the best system yet devised which incorporates the concepts of logic, justice and equity, which can be made acceptable to all parties, which

⁵⁵ M Armstrong *A Handbook of Personnel Management Practice* (1986) p 241

⁵⁶ M Armstrong *A Handbook of Personnel Management Practice* (1986)

incorporates a high degree of flexibility, and which is capable of modification and updating according to changing circumstances" (Livy (1975), p.157)⁵⁷.

However, there is a groundswell of people who think that there are valid and acceptable alternatives to job analysis and job evaluation systems. Job evaluation is not without its negative aspects, according to Armstrong⁵⁸, who cites the following problems:

2.1.3.4 **Cost.** Job analysis and evaluation systems are extremely costly to install and maintain. Not only are there outside consultancy fees to be paid, usually, there is also the cost of management and staff time taken to conduct the evaluations etc. Also, if the system is to be installed from scratch or to be re-installed, there will, inevitably, be people who are paid below the recommended rate, and these adjustments, if made, can be very expensive.

2.1.3.5 **Validity and reliability.** As Armstrong says, "no scheme has been proved to be valid in that it measures what it sets out to measure, or reliable in that it produces consistent results. An act of faith is required to believe in job

⁵⁷ J Taylor and C Coghill *Job Evaluation: A basis for equitable payment?* in J Barling, C Fullagar and S Bluen *Behaviour in Organisations* (1987) p 251

⁵⁸ M Armstrong *A Handbook of Personnel Management Practice* (1988)

evaluation."⁵⁹

2.1.3.6 **Lack of objectivity.** The simple fact is that job evaluation relies on human judgement, however clear the guidelines and however sincere the practitioners. Furthermore, as the organisation changes and as evaluators grow more adept at manipulating the system, objectivity becomes a victim rather than an objective.

2.1.3.7 **Grade drift.** When an incumbent has reached the upper limit of his pay scale the organisation may feel the need to upgrade the job unnecessarily in order to increase the pay of the incumbent. This grade drift, or grade creep, is seen as one of the major drawbacks of job evaluation systems, as it imposes the need for judgement of judgements already previously made and no longer "justified".

Furthermore, says Lawler⁶⁰, job evaluation can be actually dysfunctional in other respects, too. It can lead to increased bureaucratisation and to a decrease in people's motivation to acquire new skills and abilities.

2.1.4 Internal Equity and the Equity Theory. In terms of the Equity Theory referred to previously, internal equity is perceived from comparisons of

⁵⁹ M Armstrong *A Handbook of Personnel Management Practice* (1988) p 363

⁶⁰ E E Lawler III *Pay and Organisation Development* (1983)

"*self-inside*" and "*other-inside*" referents, i.e. an individual compares his/her remuneration to that which they received when they were doing another (perhaps more junior) job inside their present organisation or they compare their remuneration to that received by others inside the same organisation. The "*other-inside*" referents will be employees in positions perceived as doing jobs of higher or lower levels of complexity.

As can be seen from the above, there are numerous comparisons an individual can make, either consciously or subconsciously, and there is little the organisation can do to prevent such comparisons from being made. There is even less that the organisation can do to influence the resultant perceptions or to correct perceived inequities if individuals elect not to disclose their perceptions.

2.2 External equity

Whilst internal equity concerns itself with comparisons of jobs within an organisation and is mostly measured using one or other job evaluation system, external equity refers to comparisons outside an organisation. How much do other organisations pay training officers, and how much do we wish to pay training officers in comparison with what other employers would pay them? There are several options regarding external equity. Some employers may set their pay levels higher than their competition, hoping to attract the best applicants. (Of course, this assumes that someone is able to identify and hire "the best" from the

pool of applicants.) Another employer may offer lower base pay but greater opportunity to work overtime, greater job security or better benefits than other employers.

External equity has a twofold concern:

- 2.2.1. to ensure that the pay rates are sufficient to attract and retain employees, whilst at the same time
- 2.2.2 to control the costs of human resources so the organisation's prices of products or services can remain competitive.

Inasmuch as internal equity is measured using job evaluation systems, organisations measure external equity mostly by using remuneration surveys.

Remuneration surveys range from, at one end of the scale, sophisticated surveys conducted and provided by professional remuneration consultancies who gather data relating to levels of all types of remuneration, i.e. base pay, incentives, benefits etc, for all types of jobs and all types of organisations, industries or services. This data is typically sorted by job type into job evaluation grade or score ranges and the related minimum, mean, median and maximum pay levels. The information is also available as having been sorted into various specific industries or service types and/or various provinces and major cities.

At the other end of the scale are the simple surveys conducted by scanning

"Situations Vacant" columns in newspapers for advertised pay packages or offer and making direct comparisons with those packages for similar jobs within one's own organisation, or doing the same using information from recruitment consultancies.

Any one of these or other surveys will provide some information about the levels of compensation for jobs in other organisations and enable one to make comparisons to determine whether similar jobs inside one's own organisation receive comparable levels of remuneration.

2.2.3 External Equity and the Equity Theory Again, in terms of the Equity Theory described in Chapter One, individuals perceive external equity based on comparisons with "*self-outside*" and "*other-outside*" referents. For example, an individual will compare what he or she is currently earning to what he or she earned either doing a different job or doing a similar one in another organisation previously ("*self-outside*"). Alternatively, he or she will gather information, from newspapers, recruitment consultants, friends or other sources, regarding the earnings of others, either doing similar or different jobs ("*other-outside*") and compare these earnings to their own. Based on the comparison the individual will feel positive or negative inequity, or a state of neutrality will exist.

Once again, however, it can be seen that not only are the opportunities for

comparisons numerous, but there is also very little that the organisation can do to prevent such comparisons from taking place, or influence the resultant perceptions unless the individual makes those perceptions known.

2.3 Employee equity

Individual or employee equity concerns itself with comparisons between individuals doing the same job for the same organisation. Should all such employees receive the same pay? Or should one training officer be paid differently from another? What if one has better performance and/or greater seniority?

2.3.1 Employee Equity and the Equity Theory Employee or individual equity is a more specific form of internal equity (whilst individual equity concerns itself with comparisons of what, for example, a junior machinist earns compared with the earnings of a senior machinist, employee equity concerns itself with comparisons specifically between all senior machinists or all junior machinists within the same organisation). The perceptions of individuals regarding this type of equity are formed by comparisons using "*other-inside*" (for example, if the individual is a data-capture clerk, they will compare their current earnings to their perceptions of what other data-capture clerks in the same organisation are earning) referents only.

2.4 Administration

The manner in which it is administered is the last building block in any compensation system. Whilst it may be possible to design a system that incorporates internal, external and employee equity, it will not achieve its objectives unless it is administered properly. The greatest system design in the world is useless without competent administration. Administration includes monitoring and evaluating how the pay system is operating and judging whether it is achieving its objectives.

Inasmuch as the notions of fairness and equity have received much attention and consideration as concepts in compensation management, they have also been subjects of much negotiation and debate in industrial relations in Britain, as shall be seen in the chapter that follows.

CHAPTER THREE:

FAIRNESS AND EQUITY IN LAW: AN HISTORICAL OVERVIEW OF THE QUEST FOR FAIR AND EQUAL PAY IN BRITAIN

1. Introduction

Even a cursory glance at the development of legislative interventions controlling the payment of wages in Britain will identify that there is much to be learned from their history.

2. The Early Years: 1883 - 1891

The quest for legislation aimed at compelling the payment of fair wages in Britain had to have begun even before 1884, when the London Society of Compositors circulated flyers urging that candidates for the General Election of the year "be interrogated on their willingness to insist on Fair Wages".⁶¹

Later, in 1888 a Parliamentary Committee reported "We have it on authority - an authority from our own ranks - that many religious publications that are presumed to have for their object the elevation of the people and the advocacy of their cause, are produced in printing offices where fair wages and other equitable conditions of labour are ignored for the sake of obtaining extra profit".⁶² However, in that same year a call for all government contracts to include clauses to the effect that

⁶¹ B Bercusson *Fair Wages Resolutions* (1978) p 3

⁶² B Bercusson *Fair Wages Resolutions* (1978) p 5

all contractors be required to pay the trade union or standard rate of wages was rejected by the government on the grounds firstly, that such clauses would infringe the principle of Freedom of Contract, secondly, that the government's sole duty was to look at the solvency of the contractor and thirdly, that "the question of payment of fair wages was a matter in which they had no concern".⁶³

It was in the same year, however (1888), that the Trades Union Congress (TUC) also "unanimously passed a motion that: 'in the opinion of this Congress it is desirable, in the interests of both men and women, that in trades where women do the same work as men, they shall receive the same payment', and this was reiterated by Congress on more than 40 occasions in the following 75 years. However, it was not until 1963 that Congress called for legislative intervention to secure equal pay"⁶⁴ for workers of both genders.

The first real breakthrough for fair wages of any description came in early 1889 via the London School Board who declared "that it would henceforth insist on the payment of 'fair wages' by all its contractors"⁶⁵ and they were followed by the Nottingham Corporation and the London County Council who, after adopting the principle required that all contractors sign the following clause which was added to all contracts: "We hereby declare that we pay such rates of wages and observe

⁶³ B Bercusson *Fair Wages Resolutions* (1978) p 7

⁶⁴ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 1

⁶⁵ B Bercusson *Fair Wages Resolutions* (1978) p 7

such hours of labour as are generally accepted as fair in our trade".⁶⁶

Thereafter, in 1891, following successful campaigning by the Trades Union Congress, the Fair Wages Resolution was adopted by the House of Commons which read: "That in the opinion of the House it is the duty of the Government in all Government contracts to make provision against the evils which have recently been disclosed before the House of Lords' Sweating Committee, and to insert such conditions as may prevent the abuses arising from subletting, and make every effort to secure the payment of the rate of wages generally accepted as current for a competent workman in his trade".⁶⁷

3. The Fair Wages Resolution of 1909

Although "widespread dissatisfaction with the substance and administration of 1891 resolution had been voiced for years in complaints by trade unionists to government departments and M.P.s"⁶⁸, this resolution was to remain in force until 1909 when it was superceded by the Fair Wages Resolution of that year which read: "Clauses in Government contracts should be so amended as to provide as follows: The contractor shall, under the penalty of a fine or otherwise, pay rates of wages and observe hours of labour not less favourable than those commonly recognised by employers and trade societies (or, in the absence of such

⁶⁶ B Bercusson *Fair Wages Resolutions* (1978) p 7

⁶⁷ B Bercusson *Fair Wages Resolutions* (1978) p 11

⁶⁸ B Bercusson *Fair Wages Resolutions* (1978) p 111

recognized wages and hours, those which in practice prevail amongst good employers) in the trade in the district where the work is carried out. Where there are no such wages and hours recognized or prevailing in the district, those recognized or prevailing in the nearest district in which the general industrial circumstances are similar shall be adopted. Further the conditions of employment generally accepted in the district on the trade concerned shall be taken into account in considering how far the terms of the fair wages clauses are being observed. The contractor shall be prohibited from transferring or assigning, either directly or indirectly, to any person or persons whatever, any portion of his contract without the written permission of the department. Sub-letting, other than that which may be customary in the trade concerned shall be prohibited. The contractor shall be responsible for the observance of the fair wages clauses by the sub-contractor instead thereof.⁶⁹

Whilst the passing of this resolution may have been cause for celebration at the time, the celebration was short-lived because, according to Bercussion, the enforcement of the resolution was less than consistent because of the “uncertainty which reigned over the imposition of penalties on defaulting contractors”.⁷⁰ This led to the appointment of a “Fair Wages Advisory Committee” which was tasked with investigating the administrative and legal difficulties imposed by the Resolution. The Committee sought the opinion of the Law Officers of the Crown

⁶⁹ B Bercussen *Fair Wages Resolutions* (1978) p 111

⁷⁰ B Bercussen *Fair Wages Resolutions* (1978) p 136

who confirmed the Committee's suspicions and suggested it would be "necessary to insert a clause giving power to some specified person to decide the various matters mentioned in the Fair Wages Clause upon which the question whether the wages paid are fair, or not, depends."⁷¹

The following questions were also raised: "Who is to say what are the 'rates or wages, &c., commonly recognized', or who are the 'good employers', or whose practice is to be followed? What constitutes a district? What is the nearest district with corresponding industrial circumstances? And finally, what are the 'conditions of employment' which are to be taken into account?"⁷²

The Committee responded to the legal problems by suggesting administrative rather than legal action be taken in response to breaches of the resolution because of "the lack of legal precision which to some extent appears to be unavoidable in such clauses"⁷³, thus reducing the debate to not what constituted a "fair wage" but how to administer the Resolution and how to penalise contractors found guilty of contravening it.

4. From 1909 to World War II

Little changed during the following 35 years. In the early part of this period there

⁷¹ B Bercusson *Fair Wages Resolutions* (1978) p 137

⁷² B Bercusson *Fair Wages Resolutions* (1978) p 138

⁷³ B Bercusson *Fair Wages Resolutions* (1978) p 138

was not much of a problem because "the scarcity of labour, the growth of collective bargaining and the general rise in wages resulted in such an accession of strength to the workers that the Fair Wages Clause had to be invoked in few cases".⁷⁴

The determination of what constitutes a "fair wage" was therefore left up to the increasingly organised collective bargaining machinery of the unions. Indeed, in 1918 the First Commissioner of Works, Sir Alfred Mond, expressed the view that "fair" rates were "only such rates as have been agreed upon between representative Associations of Masters and Men, in essence the recognized trade Union rate".⁷⁵

However, very little progress was made in respect of administering and enforcing the Fair Wages Clause, even though the higher degree of organisation amongst workers meant that collective agreements were more numerous and more important, and even though the TUC persistently pressured government to amend the Resolution and/or introduce new legislation.

For example, in 1931 an attempt was made to convert the Fair Wages Resolution into legislation with the introduction of the Living Wage Bill into Parliament. This Bill had as its primary object the securing of a minimum living wage which was

⁷⁴ B Bercusson *Fair Wages Resolutions* (1978) p 143

⁷⁵ B Bercusson *Fair Wages Resolutions* (1978) p 150

defined as "a wage at least sufficient to meet the normal needs of the average worker regarded as a human being living in a civilized community, including the satisfaction of reasonable minimum requirements of health and efficiency and of cultural life and the provision of reasonable rest and recreation".⁷⁶

The Bill was never enacted but it did mark a departure from the previous caution and the dawning of recognition that the Fair Wages Resolution was in need of a more relevant approach. For example, in 1935 the TUC issued a pamphlet which pointed out that the "terms of the Fair Wages Clause, drafted so long ago, were quite inappropriate to modern industry"⁷⁷ but still made "explicit reference to the standards set by collective agreements as being 'fair' standards"⁷⁸ suggesting that no real thought had yet been given to the measurement or evaluation of fairness.

For example, a subsequent pamphlet entitled *Distributive Workers and the Fair Wages Clause* recommended that union members consider the rates and conditions established by collective agreements for the area or district as minima and, where possible, to secure higher rates and better conditions than those contained in Sectional Agreements, stating, "In such cases the more favourable wages and conditions will, of course, be regarded as 'fair' for this particular district

⁷⁶ B Bercusson *Fair Wages Resolutions* (1978) p 171

⁷⁷ B Bercusson *Fair Wages Resolutions* (1978) p 181

⁷⁸ B Bercusson *Fair Wages Resolutions* (1978) p 187

where they operate".⁷⁹

The government continued to resist attempts by unionists to get them to enforce minimum wage standards but there was a growing "realisation that the incongruity between an out-dated Resolution and the current collective bargaining system"⁸⁰ had to be remedied.

The principle difficulty in determining such a remedy lay in determining in whose quarter responsibility for such a task fell: the Fair Wages Advisory Committee, the Ministry of Labour, the Treasury or the Industrial Court. Eventually, in 1937, a separate Committee of Enquiry into Fair Wages was formed comprising representatives of the Treasury, the Admiralty, War Office, Air Ministry, Ministry of Health and the General Post Office (being the major government contractors), as well as representatives nominated by the National Confederation of Employers Organisations (NCEO) and the TUC.

The Industrial Court had declined involvement, contending that "It [was] no part of the duty of the Court to determine under the present reference what ... rates [of wages] should be".⁸¹

⁷⁹ B Bercusson *Fair Wages Resolutions* (1978) p 184

⁸⁰ B Bercusson *Fair Wages Resolutions* (1978) p 187

⁸¹ B Bercusson *Fair Wages Resolutions* (1978) p 210

This, however, changed with the passing of the Road Haulage Wages Act of 1938. Embodied in this Act was, for the first time in Britain, the machinery for the regulation of the wages of a specific group of employees, more specifically, drivers or statutory attendants of road haulage vehicles. "Part II of the Act provided for a complaints procedure against "unfair" remuneration through the Minister [of Labour] to the Industrial Court. Remuneration was not unfair if it was:

- (i) equivalent to the remuneration payable in respect of corresponding work in connection with 'A' or 'B' licensed vehicles and fixed by a Minister's Order made under Part I of the Act; or
- (ii) in accordance with an agreement in force between a trade union and the particular employer concerned, or an employers' organisation of which he is a member; or
- (iii) equivalent to the remuneration payable in respect of corresponding work by employers in the same trade or industry in the same district in pursuance of an agreement between a trade union and an organization of employers which represents a substantial number of employers in the trade or industry; or
- (iv) equivalent to the remuneration payable in respect of corresponding work by an employer in the same trade or industry in the same district in pursuance of a decision by the Industrial Court; or
- (v) equivalent to the remuneration payable in respect of corresponding work by similar employers in the same trade or industry in the same district in pursuance of a decision of a Joint Industrial Council, Conciliation Board,

or similar body".⁸²

The role of the Industrial Court was, it should be noted, still judicial in the traditional sense. The Court was compelled to measure wages being paid by the alleged offending employer against one or all of the five "measuring rods" defined above. As Kahn-Freund put it: "If the employer can show that the remuneration paid by him was 'fair' in the technical sense defined above, the complaint will be dismissed".⁸³

The Industrial Court therefore had no role to play in determining if a wage was "fair" except by measuring it against the established standards which were invariably set by collective agreements between organised employers and organised labour.

Indeed, the perspective that "fairness" was a level or standard that had to be established by negotiation still persisted, as can be seen from the proposals of the Joint Committee of the NCEO and the TUC which were placed before the Joint Consultative Committee, a body which consisted of seven representatives from the both the TUC and the NCEO and which had replaced the Committee of Enquiry into Fair Wages Policy in May 1940, which, in part, read: "the new clause says, in effect, that the fairness of wages and working conditions shall be tested

⁸² B Bercusson *Fair Wages Resolutions* (1978) p 212

⁸³ B Bercusson *Fair Wages Resolutions* (1978) p 213

by reference to wages and conditions established for a trade by agreement between organisations substantially representative of both employers and workers".⁸⁴

5. The Fair Wages Resolution of 1946

This perspective was still clearly the prevailing thinking behind the Fair Wages Resolution of 1946, which reads, in part:

- "1. (a) The Contractor shall pay rates of wages, and observe hours and conditions of labour, not less favourable than those established for the trade or industry, in the district where the work is carried out, by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representatives, respectively, of substantial proportions of the employers and workers engaged in the trade or industry in the district.
(b) In the absence of any rates of wages, hours or conditions of labour so established the contractor shall pay rates of wages and observe hours and conditions of labour, which are not less favourable than the general level of wages, hours and conditions observed by other employers whose general circumstances in the trade or industry in which the contractor is engaged are similar.
2. The Contractor shall in respect of all persons employed by him (whether in execution of the contract or otherwise) in every factory, workshop or

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B Bercusson *Fair Wages Resolutions* (1978) p 222

place occupied by him for the execution of the contract comply with the general conditions required by the Resolution. Before a contractor is placed upon a department's list of firms to be invited to tender, the department shall obtain from him an assurance that to the best of his knowledge and belief he has complied with the general conditions required by this Resolution for at least the previous three months.

3. In the event of any question arising as to whether the requirements of the Resolution are being observed, the question shall, if not otherwise disposed of, be referred by the Minister of Labour to an independent Tribunal for decision.”⁸⁵

It is interesting to note that, prior to the introduction of this Resolution the TUC “put forward the view that the references to ‘wages’ appeared unduly restrictive as the term was intended to include all wages, salaries and remuneration of every description. They suggested that the reference ought to be to ‘remuneration’ ... so that not only the wage earners, but salaried and otherwise remunerated employees would [also] be covered by the Resolution.”⁸⁶

The fact that the Resolution only refers to wages indicates the reluctance, not only of government but also of organised employers, to involve themselves fully in the issue of fairness as it related to the setting of remunerative levels beyond those

⁸⁵ B Bercusson *Fair Wages Resolutions* (1978) p 225

⁸⁶ B Bercusson *Fair Wages Resolutions* (1978) p 224

of the bargaining unit.

This can be seen in the comments of the Minister, in his introduction of the Resolution: "We must not interfere with the full play of the labour market. It will not do for the State in any way to fix the rate of wages ... This holds true today, as it held true 55 years ago. Wages are open to negotiation between employers and workers, and it has proved quite satisfactory."⁸⁷

The new Resolution was not without criticism: "even the most superficial reading indicates that its lack of precision was equal, if not inferior to the long outmoded and heavily criticised Resolution of 1891 ... The clear intent of the TUC, manifested in innumerable statements and resolutions, was that nationally agreed standards should be those stipulated as 'fair'. The wording of the Fair Wages Resolution of 1946 as passed, however, was extremely ambiguous in the standards it prescribed."⁸⁸

6. From 1945 to 1959

Although the struggle of the unions right up to the end of World War II had been to "ensure that rates negotiated through recognised procedures of collective bargaining were adhered to by employers ... the difficulties of achieving this in the circumstances of economic depression and mass unemployment [following the

⁸⁷ B Bercusson *Fair Wages Resolutions* (1978) p 226

⁸⁸ B Bercusson *Fair Wages Resolutions* (1978) p 230

end of the War] were evident in the widespread evasion or blatant disregard of negotiated rates.”⁸⁹

1941, however, saw the largely unheralded introduction into case law of the minimum basic rate for adult unskilled labourers, subsequently called the “M” rate, an issue which was first alluded to in Award 2072 of November 1941 when the argument by the Shipbuilding Trade Joint Council for Government Departments that rates in Admiralty shipyards had fallen below those of workers in comparable standards, and which contained the demand for a minimum base rate of 57s. 6d., was denied because the basic rate of the Miscellaneous Trades Joint Council was, at the time, 53s. 6d.⁹⁰

The method which arose of fixing or determining the “M” rate was to average out a number of local rates. This meant that the “M” rate differed from district to district and from area to area and differed on the number of and which local rates were used in the calculation. The possibilities of discrepancies arising from this practice did not receive any significant attention until a study by Geoff Latta⁹¹ focussed on the “failures of mechanisms of enforcement by complaint”⁹² to

⁸⁹ B Bercusson *Fair Wages Resolutions* (1978) p 259

⁹⁰ B Bercusson *Fair Wages Resolutions* (1978) p 268

⁹¹ G Latta *The Legal Extension of Collective Bargaining: A study of Section 8 of the Terms and Conditions of Employment Act 1959* in the *Industrial Law Journal* 4 (March 1975)

⁹² B Bercusson *Fair Wages Resolutions* (1978) p 278

remedy defects. Latta noted that "the standards of national agreements do not provide a satisfactory basis for determining fair wages: 'the weakness of most national agreements makes it arguable that for many terms and conditions the standards would be far too low' (p. 232) ... [and] the implementation of a policy on Fair Wages is subject to the overwhelming influence of the existing system of collective bargaining."⁹³

7. The Terms and Conditions of Employment Act of 1959

The Fair Wages Resolution of 1946, together with the wartime Order 1305 of 1940 and the post-war Order 1376 of 1951 were eventually superceded by the enactment of the Terms and Conditions of Employment Act of 1959.

The principle change brought about by the new legislation was that "the first two paragraphs of Schedule II complete[d] the incorporation of clause 1(a) and 1(b) of the 1946 Resolution into statute law [with the result that the] statute law [was henceforth] applicable to all employers"⁹⁴, not just employers with government contracts to protect. This meant that "employers, whether government contractors or not were liable to be summoned before an independent arbitration tribunal ... and charged with non-compliance with 'fair' standards: ... The Fair Wages policy, originally intended for the benefit only of employees of government contractors, ha[d] been embodied in statute and expanded to cover the whole of British

⁹³ B Bercusson *Fair Wages Resolutions* (1978) p 278

⁹⁴ B Bercusson *Fair Wages Resolutions* (1978) p 246

industry.”⁹⁵

These improvements aside, by 1974 there was general and widespread recognition of the inadequacies of the Fair Wages policy since 1946.

8. The Employment Protection Act of 1975

In 1975, in consequence of this recognition, the Employment Protection Act was passed.

The essence of the new Fair Wages policy of the British government was contained in the first two paragraphs of Schedule II which, for the first time, referred to “comparable employment” and “comparable workers”, although claims of unfair treatment could only be made where “the claim is founded upon recognized terms and conditions, by an employers’ association or an independent trade union being one of the parties”⁹⁶ or “founded upon the general level of terms and conditions by -

- (a) an employers’ association having members engaged in the trade, industry or section, in the district to which the claim relates; or
 - (b) ... a trade union of which any worker concerned is a member”⁹⁷,
- thereby effectively ruling out claims from non-unionised wage-earners.

⁹⁵ B Bercusson *Fair Wages Resolutions* (1978) p 247

⁹⁶ B Bercusson *Fair Wages Resolutions* (1978) p 506

⁹⁷ B Bercusson *Fair Wages Resolutions* (1978) p 506

It soon also became apparent that the challenge of determining "comparable employment" and "comparable workers" was fraught with difficulty. The simple three-tiered classification system of skilled, semi-skilled and unskilled workers could not provide enough detail for effective guidance and the selection of "benchmark" jobs was found to be subjective and incomplete. Indeed, "disputes invariably arose over classification"⁹⁸, with companies arguing that trade unions overstated the extent and responsibility of work, that accurate comparisons with employees in directly competing companies was extremely difficult and "that virtually identical jobs in different companies are frequently given different job titles. Inevitably, therefore, accurate comparisons ... are extremely hard to make."⁹⁹

On the other hand, it was also felt: "It is unreasonable to suggest that in a section of ... industry where specific skills and qualifications are widely recognised and freely transferrable between employers, there is no general level."¹⁰⁰

However, "the problem of deciding whether workers or groups are in comparable employment is one often encountered in collective bargaining over grading or job evaluation schemes. If comparisons can be found, a claim for a higher rate of pay may be justified. It might be thought that Schedule II could enable workers to

⁹⁸ B Bercusson *Fair Wages Resolutions* (1978) p 454

⁹⁹ B Bercusson *Fair Wages Resolutions* (1978) p 455 - 456

¹⁰⁰ B Bercusson *Fair Wages Resolutions* (1978) p 456

appeal to the Committee when faced with an employers' adamant refusal to re-grade where this is thought to be clearly justified. The Committee is understandably reluctant to become what would be in effect a grading court of appeal. Such claims, unless overwhelmingly indicative of a situation of blatant unfairness, are unlikely to succeed.¹⁰¹

9. **Eliminating Differentials Based on Gender: The Equal Pay Act of 1970**

Running as an undercurrent to the struggle by the unions for fair wages to be paid was the struggle for the elimination of pay differentials between men and women. So it was no surprise then, in the years following the enactment of the first Terms and Conditions of Employment Act of 1959 which saw the application of the Fair Wages Policy move from being limited to government contractors to the whole of British industry, that the focus of employment reform moved from fair wages to equal pay.

As stated earlier in this chapter, the first TUC motion to call for equal pay for men and women engaged in the same trades was passed at the Trades Union Congress of 1988.

During the following 75 years three Royal Commissions (the MacDonnell Commission of 1912 - 1916, the Tomlin Commission on the Civil Service of 1929 - 1931 and the Asquith Commission on Equal Pay of 1944 - 1946) and three

¹⁰¹ B Bercusson *Fair Wages Resolutions* (1978) p 458

Governmental Committees (the Women's Employment Committee of 1918, the Atkin War Cabinet Committee on the Employment of Women in Industry of 1919 and the Anderson Committee on the Pay etc of State Servants of 1923) examined the issue and the issue was also raised "on numerous occasions in both Houses of Parliament".¹⁰²

"There was also a considerable amount of extra-parliamentary pressure and, following an agreement on January 25, 1955, with the staff side of the civil service Whitely Council, equality of pay in the civil service was achieved in 1961"¹⁰³ marking the first real breakthrough in the quest for the removal of sex-based pay differentials. These conditions did not, however, extend to the rest of British industry.

So, following the election of the Labour Government in 1964 (which had committed itself as part of its election platform to legislate on equal pay in the private sector) an Equal Pay Bill was introduced to the House of Commons and received the Royal Assent in 1970. There followed several years of debate, however, before it was finally enacted, following a period of grace and together with the Sex Discrimination Act, on December 29, 1975. Amendments to the Equal Pay Act had also been made by the Employment Protection Act 1975 and the Wages Councils Act of 1979.

¹⁰² B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 1

¹⁰³ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 1

10. The Period From 1975 Onwards

The Equal Pay Act did not in any way attempt to identify what constituted a "fair" wage or salary. It focussed entirely on removing discriminatory differentials in rates of pay between men and women in that it "required equal terms and conditions of employment for men and women in the same employment in two situations: (a) when employed on *like work*, that is work of 'the same' or a 'broadly similar' nature (s.1(2)(a)); or (b) when employed on *work rated as equivalent* under a job evaluation study (J.E.S.) (S.1(2)(b)), but there was no obligation to undertake such a study. There was [still, however,] no general right to equal pay for work of equal value."¹⁰⁴

However, prior to the eventual enactment of the Equal Pay Act of 1970 (which only happened in 1975) Britain had acceded to the European Economic Community Treaty of Rome in 1973. Article 119 of that Treaty reads as follows:

"Each Member State shall ... ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

¹⁰⁴

B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 2

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.”¹⁰⁵

The effect of this Article was that it, together with article 1 of the subsequent Equal Pay Directive of the European Court of Justice, was found “to apply to a number of situations not covered by the British Equal Pay Act. This raised difficult and, as yet, unresolved questions about the relationship between EEC law and the British Act.”¹⁰⁶

In consequence the Department of Employment published a *Specification for Amending the Equal Pay Act to Provide Equal Pay for Men and Women for Work to which Equal Value is Attributed* in August 1982 and a consultative paper entitled *Amendment to the Equal Pay Act 1970* in 1983 which led to the Equal Pay (Amendment) Regulations which came into force on 1 January 1984.

“The gist of the 1983 Regulations is that they add a new residual basis for establishing entitlement to equal pay in addition to ‘like work’ and ‘work rated as equivalent’. This new ‘remedy of last resort’ ... is a claim to an industrial tribunal for equal pay ‘where a woman is employed on work which ... is, in terms of

¹⁰⁵ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 47

¹⁰⁶ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 2

demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment.”¹⁰⁷ This limited approach was contrary to the advice of the Equal Opportunities Commission (EOC) which wanted “equal pay for work of equal value” to be regarded as the generic concept of the Equal Pay Act because of the “relative failure of the 1970 Act to achieve equal pay for men and women”.¹⁰⁸

11. The Application, Implementation and Problems of the Current Legislation

The main objective of the Equal Pay Act had been to equalise *rates* of pay, not earnings. “A major study of the implementation and effects of the Acts in 26 organisations (from 1974 to 1977) concluded that ‘women have made tangible gains as a result of the Acts, particularly with respect to pay. The vast majority of women in the organisations studied were entitled to and received some increase in their rates of pay as a result of the Equal Pay Act and most were getting equal pay as defined in the Act.’ (M.W. Snell, P. Glucklich and M. Povall, *Equal Pay and Opportunities*. Research Paper No. 20, D.E., April 1981, p.90). However, the study found that the Acts had not had much success in achieving equal pay and opportunities in the wider sense.

More recent evidence, from the *New Earnings Survey* (1970 - 82, Part A, Tables 10 and 11) shows that the initial effects of the equal pay legislation have now

¹⁰⁷ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 3

¹⁰⁸ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 3

been exhausted. In 1970, women's average gross hourly earnings (excluding the effects of overtime, employees aged 18 and over) were 63.1 per cent. of men's. They reached a peak of 75.5 per cent. in 1977 and in the following years to 1982 settled in the range 73 - 75 per cent.¹⁰⁹

Many reasons for the continued differences between male and female earnings have been suggested, but perhaps the most important is the continued occupational segregation of women in low-paid jobs, especially those where trade unions are weak.

Furthermore, it has been reported¹¹⁰ that although more than 25% of all organisations reported using some form of job evaluation scheme, there was a tendency for the incidence of job evaluation schemes to increase in line with increases in the size of the establishment and "there was a strong tendency for workplaces to be less likely to have job evaluation schemes the *larger* was the proportion of women who were employed. It is clear that systematic job evaluation was markedly less common in circumstances where a relatively large proportion of the workforce was female."¹¹¹

However, even where job evaluation schemes are used within an organisation,

¹⁰⁹ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 3

¹¹⁰ W W Daniel and N Milward *Workplace Industrial Relations in Britain* (1983)

¹¹¹ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 4

this “cannot be expected to result in an even spread of sexes throughout the grades and the average woman’s pay being equal to that of the average man, where women have been recruited in the past to the less skilled and less demanding jobs and not to the skilled or craft jobs.’ At the same time ‘many schemes were implemented prior to the present understanding of many of the implicit or hidden forms of sex discrimination’, such as those which give disproportionate weight to factors related to male jobs such as physical strength, experience in the job or shift-work and use men’s jobs as ‘benchmarks’ against which other jobs are assessed.”¹¹²

Whilst the main thrust of the 1983 Regulations was to allow the independent evaluation of jobs where there is neither “like work” nor a non-discriminatory job evaluation study, this is unlikely to overcome any inequalities due to job segregation because, according to the Act a woman

- still has to compare herself with a man “in the same employment”
- whilst allowed to compare herself with a man who is not *contemporaneously* employed, still cannot compare herself with what a man *would* get if he were doing her job, and
- “there appear to be only limited circumstances in which British and EEC law can be used to overcome indirect discrimination in pay”¹¹³. For example, “a woman part-time secretary could ... not succeed under the

¹¹² B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 4

¹¹³ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 4

Equal Pay Act because there were no male secretaries, part-time or full-time, with whom she could compare herself.”¹¹⁴

In addition, an employer is still entitled to prove, by way of defence, that a variation in terms and conditions of employment is “genuinely due to a material difference which is not the difference of sex”. ... The nature of the ‘material difference’ ... is not specified, but an example given ... was that of a female clerk who claims equal pay with a male computer programmer. ‘The employer might admit that the work is of equal value but might argue that he has to pay the computer programmers more in order to retain their services, otherwise they would simply leave for higher pay elsewhere.’¹¹⁵

“These ... features ... plainly limit its effectiveness even within the narrow objective of equalising rates of pay. There is also the problem ... of the failure of women to identify and act upon clear-cut or potential cases of non-compliance, the adoption of ‘minimising strategies’ by employers, and the passive or even obstructive attitude of some trade unions at the workplace, where women are not effectively organised.

The low level of enforcement is dramatically indicated by the statistics. The number of completed applications to industrial tribunals fell from 1,742 in 1976

¹¹⁴ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 5

¹¹⁵ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 5

to 39 in 1982. The success rate of those whose cases went to a hearing in this period ranged from 12.2 per cent. in 1976 to only 4.4 per cent. in 1980. The high rate of failure reinforces the tendency not to use the law. Explanations for this include the complexity ... of the legislation, the inadequacy of representation in tribunal proceedings, and the lack of expertise and experience of tribunals in this field".¹¹⁶

In addition to the above, another reason for the low number of cases brought forward could be because "The compensation that can be awarded to an individual who has been discriminated against on grounds of race or sex is relatively nominal. The maximum possible award arising out of an incident of discrimination, e.g. loss of employment is £10,000 (as from 1 April 1991). That award can include an element for 'injury to feelings' but this generally ranges only from between £500 to £5,000."¹¹⁷

It is, however, interesting to note that whilst "Currently [in 1991], claims to the industrial tribunal are running at between 500 to 700 claims each year for both race and sex discrimination ... the statistics ... indicate that many more people take preliminary steps towards making a claim in the industrial tribunal without a claim actually being made"¹¹⁸ which suggests that perhaps employers are quick to take

¹¹⁶ B A Hepple *Equal Pay and the Industrial Tribunals* (1984) p 6

¹¹⁷ P Nicholls *Discrimination Law Handbook* (1991) p 4

¹¹⁸ P Nicholls *Discrimination Law Handbook* (1991) p 4

remedial action in the face of potential claims. However, the following is a more likely scenario: "Women have not been rushing to make claims, and those that have commenced actions have found themselves in a quagmire of procedural niceties and legal argument. Whilst the potential of the legislation is far-reaching and should be of significant impact, the reality has been one of a failure of the legislation to achieve its primary purpose of equalising the historical pay differential between men and women. Between 1970 and 1975 there was a significant reduction in that differential, but the differential remains marked and there has been no evidence of further progress".¹¹⁹

12. Lessons from Britain's Equal / Fair Pay Legislative History

It is clear from British legislative history that the concepts of "fair pay" and "equal pay" have remained separate issues, and, given the differences as discussed in previously, this is as it should be. It should also be a lesson for South African legislators.

Two additional lessons are apparent.

Firstly, whilst there is clear resistance to legislating a definition of "fair" as it pertains to either wages or salaries, there is an obvious limitation to the notion that a "fair" wage can only be one which has been established through a process of collective bargaining. This definition clearly restricts itself to wages and thus

¹¹⁹ P Nicholls *Discrimination Law Handbook* (1991) p 92

there has been scant, if any, attention paid to the notion of a "fair" salary.

As at least a reasonable percentage of the employed population earn salaries as opposed to wages, this differentiation has the result that salary-earners are not afforded the same degree of protection as wage-earners, an issue which in itself could be considered discriminatory. This may be because "discrimination legislation is a contemporary phenomenon"¹²⁰ and the social reformers have, up to now, been addressing themselves only to those areas where unions, through their collective power, have made themselves felt or it may be that there exists a perception that the power equation between salary-earners and employers is more equal than that between wage-earners and employers because of the (typically) higher levels of education, skills and experience amongst the former.

The other group of people who are not afforded the same degree of protection as the wage-earner who belongs to a representative and recognised union is, of course, the non-unionised wage-earner. If their wages are not negotiated and agreed upon through the mechanisms of collective bargaining, they have no recourse before the law to appeal for the payment of a "fair" wage.

Secondly, in Britain, "equal pay" is determined only through reference to or comparison to another person: "To establish an equal pay claim, a woman has to show that a man is employed, at a higher rate of pay than she is receiving, in

¹²⁰ P Nicholls *Discrimination Law Handbook* (1991) p 2

doing similar work or work of equal value".¹²¹

The selection of the comparator is critical to the process. In British law the comparator must:

- be a real man (comparison with a theoretical man is not acceptable) and
- be in the same employment (the Act "provides that the comparable male must be employed by the same employer or any associated employer at the same establishment or at establishments of the employer or associated employer in Great Britain ... for which there are common terms and conditions of employment generally or for the relevant class of employees.

The terms need not be identical, but can include staff on the same terms at different grades."¹²²)

In Britain the determination of similar work or work of equal value can only be made through the use of a job evaluation system. British law, therefore, by implication, is supportive of this practice.

However, comparators cannot be selected from outside organisations or contracting organisations. The emphasis of the equal pay legislation is, therefore, entirely on *internal equity* for the select few and, whilst consideration may be given (through the process of comparisons being made between employee

¹²¹ P Nicholls *Discrimination Law Handbook* (1991) p 33

¹²² P Nicholls *Discrimination Law Handbook* (1991) p 33

earnings and comparable wages for employees in other trades or industries in an area through collective bargaining) to *external equity* in the Employment Protection Act, not only is this protection also exclusionary, it is also extremely limited.

CHAPTER FOUR:

FAIR AND EQUAL PAY IN SOUTH AFRICA

1. The Introduction of Job Evaluation Systems to South Africa

Whilst the use of job evaluation systems is widespread throughout the developed world and whilst they may be regarded as "arcane", it is entirely probable that the wage differentials or discrepancies alluded to in the introduction to this dissertation were perpetuated, accentuated and even "justified" by the application of job evaluation systems in South Africa.

The development of job evaluation as a widely-used management technique has its roots in the scientific management approach spawned by Frederick W. Taylor during the first two decades of this century in America.

In South Africa, during the 1910's and 1920's, when the fledgling mining industry moved from being "crude, arbitrary and openly exploitative"¹²³ to being more concerned with the optimal utilisation of the workforce, the principles of scientific management were adopted in an effort to increase the productive efficiency of workers and maximise profits. According to Fullagar¹²⁴, whereas in America the application of scientific management principles was resisted by unions because they were perceived to be an invasion of privacy and exploitative, in South Africa

¹²³ B Bozzoli in C Fullagar in J Barling, C Fullagar and S Bluen (eds) *Behaviour in Organisations* (1987) p 6

¹²⁴ C Fullagar in J Barling, C Fullagar and S Bluen (eds) *Behaviour in Organisations* (1987) p 6

they were met with little or no resistance. Indeed, the feasibility of scientific management was promoted by emphasising the fact that “the particular type of native labour available’ was unorganised and in a weak position”¹²⁵.

Thus, with the following as one of the foundations of scientific management: “The principle objective of management should be to secure maximum prosperity for the employer, coupled with maximum prosperity for each employee”¹²⁶, this rationale was introduced into South Africa in the form of various incentive schemes whose purpose was to increase productivity by directly relating a man’s production to the extent of his possible earnings¹²⁷

As explained by Fullagar, the management philosophy of a “fair pay for a fair day’s work”, which was based on Taylor’s rationale, was therefore implemented on a scientific basis - “what constituted a fair day’s work was a question for scientific investigation instead of a subject to be bargained over”¹²⁸. The use of the piece-rate system, whereby a predetermined amount of work was set for the worker as a minimum daily output, for which a day’s wage was paid, was the most popular incentive system in the early part of this century and, indeed, remains a

¹²⁵ J S Ford in C Fullagar in J Barling, C Fullagar and S Bluen (eds) *Behaviour in Organisations* (1987) p 6

¹²⁶ F W Taylor in C Fullagar in J Barling, C Fullagar and S Bluen (eds) *Behaviour in Organisations* (1987) p 9

¹²⁷ J Koorts in C Fullagar in J Barling, C Fullagar and S Bluen (eds) *Behaviour in Organisations* (1987) p 9

¹²⁸ C Fullagar in C Fullagar in J Barling, C Fullagar and S Bluen (eds) *Behaviour in Organisations* (1987) p 9

popular system of remuneration in South Africa still.

Job evaluation systems were popularised in the period between the two Wars, when organisations and industries began to become more complex, when jobs began to change as a result of new technologies and when management began to need greater financial and administrative control over pay systems. It was also during this time that the emphasis of management turned from the "scientific" approach to the "humanistic" approach which resulted from the experiments carried out at Western Electric's Hawthorne, Illinois plant. This approach de-emphasised the importance of pay as a motivator and turned the attention, instead, to the other factors of management, such as the quality of supervision, managerial attitudes, interpersonal relationships and cultural attitudes and values.

This change in the focus of managerial attention also led to a change in the perception of remuneration, from a "fair day's pay for a fair day's work" to "equal pay for equal work". This notion was not exactly new, having been in the consciousness of social reformers since the late nineteenth century in Britain at least, but it gained authority as Article 23 (2) of the Universal Declaration of Human Rights, which was adopted and promulgated on December 10 1948 by the General Assembly of the United Nations which reads "Everyone, without discrimination, has the right to equal pay for equal work"¹²⁹. However, South Africa was one of only two of the original member countries who abstained from

¹²⁹

Article 23 (2) *Universal Declaration of Human Rights* (1948)

voting in favour of the Declaration.

In 1950 support for Article 23 was obtained from the promulgation of Convention 100 by the International Labour Organization which also provides that "there should be equal pay for work of equal value"¹³⁰ and a further call for equal pay for equal work was made in the Freedom Charter which was adopted by the Congress of the People at Kliptown near Johannesburg in 1955 wherein under the article headed "There shall be work and security" is expressed the requirement that "Men and women of all races shall receive equal pay for equal work"¹³¹

However, by the early 1970's, when (particularly black) unions were beginning to flex their muscles, pay regained attention as the principal collective issue and "equal pay for work of equal value" was put on the back-burner in favour of a call for a "fair wage" or "living wage". At the same time the need for a methodology through which the "chaotic wage rates or pay structures"¹³² could be rationalised was great, and it became even greater as organisations and industries became larger.

¹³⁰ H Cheadle, PAK le Roux, C Thompson & A van Niekerk *Current Labour Law 1995* (1995) p 88

¹³¹ The ANC's Freedom Charter in M Robertson (ed) *Human Rights for South Africans* (1991) p 221

¹³² J Taylor and C Coghill in C Fullagar in J Barling, C Fullagar and S Bluen (eds) *Behaviour in Organisations* (1987) p 215

In consequence job evaluation usage became increasingly used as a methodology by management for developing, implementing and controlling pay structures in South Africa.

2. The Reaction and Response of Unions to Job Evaluation

The reaction and response of unions to job evaluations and grading systems has changed over time.

During the early 1970's, when job evaluation systems were gaining popularity amongst personnel practitioners and management, as has already been noted, the unions were just beginning to gain real bargaining power and probably could have prevented the implementation of job evaluation systems. They did not do so, however, because during this period they, on the whole, lacked an understanding of the process of job evaluation due to a lack of technical expertise and were thus prevented from confidently challenging either the system, the resultant decisions or the procedures. Instead the unions usually found "themselves buying into job evaluation in return for higher pay"¹³³. As a consequence of the acceptance and tolerance of job evaluation based on this widespread lack of understanding amongst unions, job evaluations were also used to suppress demands for higher individual wages, citing the low scores or low values obtained for a job in an evaluation exercise as a reason why higher pay

¹³³ R Snelgar in W Bendix (ed) *South African Industrial Relations of the Eighties* (1988) p 374

could not be justified.

As the unions gained knowledge of and experience in job evaluation systems, however, the basis for their acceptance of job evaluation changed. As explained by Snelgar, "A comparative study by Jones [published in 1979] on union views on job evaluation revealed that the [job evaluation] ... tend[ed] to restrict collective bargaining in wage adjustments, and union concern centred on the fact that it often became the sole criterion for establishing wage scales, rather than a guide. More recent studies have revealed a general decrease in union opposition to job evaluation. This is linked to the increased use of the grievance/arbitration procedures which allow for challenge of the job evaluation system at any time."¹³⁴

According to Snelgar an unpublished report from 1981 revealed that all the unions surveyed desired to participate in the formulation of job evaluation systems even though "it was *management* who initiated and developed the job evaluation system".¹³⁵

This passive tolerance of job evaluation systems by unions in South Africa has changed in more recent times. In 1993 the Congress of South African Trade Unions (COSATU) Participatory Research Project (PRP) published an opinion on

¹³⁴ R Snelgar in W Bendix (ed) *South African Industrial Relations of the Eighties* (1988) p 374

¹³⁵ R Snelgar in W Bendix (ed) *South African Industrial Relations of the Eighties* (1988) p 377

grading, wages and work organisation wherein the following extract is quoted:

"According to the 'Work place information centre' Job grading is a way of saying how important jobs are for management. Job Grading is a way of comparing different jobs and saying that some jobs are very important, and other jobs are not so important.

Most job grading systems say that managers and engineers are very important, and that labourers and operators are not important. A worker with an important job will earn higher wages than a worker with a job that is not so important. So negotiations about job grading are also negotiations about wages. *Jobs Grading and Wages* (Oct. 1988.)"¹³⁶

The report goes on to list the following problems associated with the current grading systems, stating "The following problems were drawn from the research conducted by participants in their workplaces and the supplementary research commissioned)

2.1 Values/biases in grading systems

- Although methods are said to be scientific, the grading systems are normally based on defined job descriptions, consequently many workers are paid wages at levels lower than their skills
- The grading systems are complicated, job specific and task based
- Prior learning, knowledge and experience are often not taken into account

¹³⁶

Source unknown

- when grading people
- Points are allocated on personal judgements of whoever evaluated the job
- The grading system is sometimes based on company set values
- In some companies, different grading systems are applicable to different categories of workers
- Where there are industrial council grading committees, agreements are often not extended to cover workers outside the industrial council
- Most appeal mechanisms remain very complicated where people have been wrongly graded
- Some systems are derivations/hybrids from the original grading systems and are very complex to challenge
- Gender bias is still applicable or built within some grading systems traditional jobs for women (sic)
- Grading systems have been further complicated by addition of issues such as:
 - market wage levels
 - race
 - seniority
 - favouritism and merit systems
- Uneven wages are paid to workers falling under the same grade or doing a similar job as defined in their job descriptions:-
 - small, medium and major industries
 - across different sectors

- different regions, SGTs 'homelands' and TBVCs
- different 'racial' grouping
- men and women

2.2 Little or no role for unions

- Management still takes the final decision even in cases where there is union involvement within grading committees
- Most companies still use outside consultants to grade and evaluate jobs
- Grading and re-assessment of workers remains the responsibility of the immediate supervisor in some workplaces
- The fairness of the system remains difficult to challenge as unions were often not consulted when they were introduced
- Most grading systems negotiations have depended on power relations between management and unions
- Lack of national approach has led to uneven development within COSATU affiliates in taking up grading issues

2.3 No clear links between grading, skills and wages

- The emphasis on decision making as a criterion is a problem because it is based on Taylorism ... - it restricts full participation of workers in job design, process, planning and innovation
- The lack of linkages between the training system and the grading system restrict the development of a highly skilled workforce capable of producing high quality goods, and innovative and flexible in adapting to new technology. As a result there is no system of higher remuneration as

- motivation
- The system does not encourage career pathing - it does not create opportunities for workers to progress to higher grades/wage levels through skills development
 - *Wage relativities* between grades remain too high within a similar grading structure in most industries,
 - little difference between ‘unskilled workers’
 - percentages ranging between 30% and 80% in comparing rates of general workers and artisan/artisan equivalent".¹³⁷

3. Support for the Need for Job Evaluation in South Africa

Even though the above is a fairly damning indictment of job evaluation systems in South Africa, the criticism is targeted at the types of job evaluation systems used and the implementation and maintenance procedures applicable in South Africa rather than at the actual concept of job evaluation itself because under item 4 of the document, entitled *Policy Proposals: Developing a Skills Grading System* is the comment “Existing grading systems have many problems. None of them is better or worse than the others. Challenging the grading system is linked to the whole struggle around work-organisation.”¹³⁸

This is probably just as well, because it is difficult to envisage how the problem

¹³⁷ Source unknown

¹³⁸ Source unknown

of comparing jobs to establish either equality or fairness would be resolved without job evaluation.

There is general acceptance, albeit grudging, that job evaluation is a necessary basis for the establishment of comparators. For example, van Niekerk states: "while lawyers and judicial officers in particular may be more comfortable with comparisons of like work or work which is broadly the same, equal value claims place the adjudication of equal pay claims of this nature in the realms of the arcane science of job evaluation".¹³⁹

Similarly, Moodley comments: "It should be emphasized that the right to equal pay is enforceable only if the value or worth of the jobs themselves is regarded as equal. ... 'Equal work' implies that the value of the jobs can be measured and, therefore, compared. The value of work is measured through job evaluation systems of job grading".¹⁴⁰

4. Job Evaluation Systems in Common Usage in South Africa

According to COSATU's PRP "The most commonly used grading (job evaluation) systems in South Africa's public and private sectors are:

¹³⁹ A van Niekerk in H Cheadle, PAK le Roux, C Thompson and A van Niekerk *Current Labour Law 1995* (1995) p 89

¹⁴⁰ I Moodley in M Robertson (ed) *Human Rights for South Africans* (1991) p 164

- Paterson system which uses the decision making factors
- Peromnes which uses eight factors in measuring each job
- Castellian which works on point systems based on six factors
- HAY-MSL profile method based on a Guide chart
- Q method derived from Paterson with four stages of decision making
- Other grading systems include some modification by local consultants of systems such as Paterson and have different names
- There are other systems normally used either in wage determination grading such as:-
 - wage notches within the public sectors
 - seniority systems which take into account the number of years spent within the enterprise
 - Merit systems based on factors differing from one industry to another”¹⁴¹

Levy states “the two most common methods of job evaluation found in South Africa are commercially called ‘Paterson’ and ‘Peromnes’ respectively”.¹⁴²

4.1 Peromnes

The Peromnes system of job evaluation is currently in use in

¹⁴¹ Source unknown

¹⁴² A Levy & Associates Job Evaluation: *The Industrial Relations Implications* (1996) p 6

approximately 57%¹⁴³ of the organisations in South Africa who use a grading system. It makes use of eight factors: Problem Solving, Consequence of Judgement, Pressure of Work, Knowledge, Job Impact, Comprehension, Educational Qualifications / Intelligence Level and Training / Experience and was originally developed by Simon Biesheuvel in 1985 for South African Breweries as a simplified version of the Castellion method.

"The scheme recognises 19 basic grades, 1 being the highest and 19 being the lowest".¹⁴⁴

4.2 Paterson

Developed in the 1950's by a professor of management, the Paterson scheme is "based on the assumption that the level of decision-making involved in the job is the most important variable when determining relative value. Paterson reduces the levels of decision-making into six bands which are applicable within any organisation.

These bands, categorised from F to A reflect the extent and complexity of decisions from policy-making at the top of the company, through to jobs

¹⁴³ S Beasley of FSA-Contact (Pty) Ltd, Durban

¹⁴⁴ A Levy & Associates *Job Evaluation: The Industrial Relations Implications* (1996) p 8

which require few, if any, decisions in their normal course ... for example, at the lowest grade of A1, ... the worker has little or not latitude in carrying out the tasks. This grade is attributable to a general labourer".¹⁴⁵

4.3 Hay-MSL

The Hay-MSL method was developed by a group of consultants in Philadelphia, USA, and is based on three compensable factors:

- Know-how: the sum total of each type of skill necessary for acceptable work performance
- Problem solving and
- Accountability and its results: the measured effect of the work on the end results of the organisation

although a "fourth compensable factor, work situation, is used for tasks that involve obstacles, an unpleasant work environment or specific physical demands".¹⁴⁶

4.4 The Process of Job Evaluation

A job is usually graded based on information contained in a job description (although this is not absolutely necessary - in Peromnes, for example, information is sometimes provided or supplemented by personal interviews with the job incumbent and/or his/her immediate supervisor/manager) by

¹⁴⁵ A Levy & Associates *Job Evaluation: The Industrial Relations Implications* (1996) p 7

¹⁴⁶ P D Gerber, P S Nel, P S van Dyk *Human Resources Management* (1987) p 249

a job evaluation panel or committee. Information pertaining to each factor is identified and used to determine the extent to which it is present in the job. Using a sliding scale or a chart, points are allocated for each factor. The points allocated to each factor for the job are totalled and the final tally compared against a table to determine the grade of the job being evaluated.

4.5 Compensable Factors

As can be seen from the above, the principle difference between the various job evaluation systems is the factors they use to determine the worth of the job. These are also called the “compensable” factors because they describe the aspects of work which the organisation recognises as determining the worth or value of the job, and, therefore, what the organisation is willing to pay for.

However, the job evaluation factors which make up a grading system are not always the only compensable factors: seniority, skills, education levels, previous pay rates and performance are examples of other compensable factors that are most often taken into account when determining the actual pay rate of an individual.

5. Pricing the Job

“In general, job evaluation cannot be used to set the wage rate; however, it

provides the basis for this determination".¹⁴⁷

In fact job evaluation is usually only the first step in the process of determining an individual wage or salary. Whilst job evaluation allows jobs within an organisation to be grouped and ranked according to the compensable factor content of each job (or relative value), job evaluation on its own does not allocate a specific rate of pay.

Instead other factors are used to identify and develop a *range* of acceptable rates for each grade of the job evaluation system. These other factors can include the examples given under the heading "Compensable Factors" above as well as others, such as the compensation levels in the market, "living wage" levels, expatriate pay, number of dependants etc.

These other factors determine the permissible upper and lower limits for each pay range. The different pay ranges, or *scales*, together make up a pay structure.

"The maximum of a pay grade's range places a ceiling on the rate that can be paid to any employee whose job is classified [or evaluated as falling] in that grade.

Similarly, the minimum of the pay grade's range places a floor on the rate that can be paid. Two general approaches for establishing pay grades and ranges are to

¹⁴⁷ LL Byars and L W Rue *Human Resource Management* (1995) p 349

have a relatively large number of grades with identical rates of pay for all jobs within each grade or to have a small number of grades with a relatively wide ... range for each grade. Most pay structures fall somewhere between these extremes.

Ranges within grades are set up so that distinctions can be made among employees within grades. Ideally, the placement of employees within pay grades should be based on performance or merit. In practice, however, the distinction is often based solely on seniority".¹⁴⁸

The general practice in South Africa is to have a relatively wide range for each grade. These ranges are often reflections of the ranges found in wage and salary surveys or reflections of the specific remuneration policy of the enterprise.

Wage negotiations have invariably centred on either calls for "across the board" increases of actual amounts or percentage increases applicable in all instances. Neither of these practices have had any effect on the actual width of each pay range within the overall scale.

6. Pay Ranges and Individual Equity

The principle advantage of the use of pay ranges for each grade is that of flexibility. They allow the unique contributions of individuals to the overall fabric

¹⁴⁸

LL Byars and L W Rue *Human Resource Management* (1995) p 354

of organisational life to be taken into account, and this practice therefore satisfies the need for *individual equity*. A pay range allows the employer the flexibility to, for example:

- pay an individual not only for the compensable factors included in the job evaluation scheme but also for other compensable factors, such as skills or education levels, performance or seniority.
- pay a premium to employees who may be graded in a fairly low grade but who, because of their shortage in the marketplace, are in short supply, thereby retaining their services
- pay lower rates to inexperienced, entry-level employee or trainees
- pay lower rates to employees who are easily replaced
- pay lower rates to employees who were underpaid in their previous positions of employment.

7. South African Remuneration Practices and the Notions of Fairness

The problem with the use of pay ranges, of course, is that they can make nonsense of any legal requirement for fairness, or equity.

In South Africa there is a lawful requirement for fairness in labour matters, which means that an employee is protected, technically at least, from unfair remuneration practices by

- clause 27 (1) of the Constitution which entitles "Every person ... [to] ... the

- right to fair labour practices”¹⁴⁹ as well as
- clause 8 (2) which states that “No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language”¹⁵⁰ and also by
 - clause 2 (1)(a) of Part B of Schedule 7 of the Labour Relations Act (1995) which adds political opinion, marital status and family responsibility as prohibited grounds for discrimination and which also cites “the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee”¹⁵¹ as an unfair labour practice but excludes “any discrimination based on an inherent requirement of the particular job”.¹⁵²

Even though “the prohibition against discrimination is not a particularly radical proposal - the nature and extent of the protections ... [were] at least envisaged by the definition of unfair labour practice in the Labour Relations Act 28 of 1956”¹⁵³

¹⁴⁹ R Amato *Understanding the New Constitution* (1994) p 152

¹⁵⁰ R Amato *Understanding the New Constitution* (1994) p 149

¹⁵¹ Schedule 7 Part B Item 2(1)(a) of the Labour Relations Act 1995, in H Cheadle, PAK le Roux, C Thompson, A van Niekerk *Current Labour Law 1995* (1995) p 201

¹⁵² Schedule 7 Part B Item 2(2)(c) of the Labour Relations Act 1995, in H Cheadle, PAK le Roux, C Thompson, A van Niekerk *Current Labour Law 1995* (1995) p 201

¹⁵³ H Cheadle, PAK le Roux, C Thompson, A van Niekerk *Current Labour Law 1995* (1995) p 76

there have been "only a handful of cases on discrimination in the workplace and equal pay seen in the industrial court in the last decade".¹⁵⁴

This makes sense. "Most South African employers have no doubt arranged their affairs, and their pay structures in particular, so that there is no differentiation, at least not in an overt sense, which offends the above principles. The fact that a black and a white employee, or a man and a woman, similarly qualified and experienced and engaged in the same work or job category are paid the same wage is no doubt comforting to most personnel managers, particularly those whose mission statements and other credos of corporate culture espouse non-racialism, non-sexism and equal opportunity for all".¹⁵⁵

As it stands, to overcome a claim by an employee in terms of the Labour Relations Act (1995) that his or her pay rate is either unfair or discriminatory, the employer would, in theory at least, only need to present evidence that:

- the job in question was evaluated using a recognised job evaluation scheme (preferably one that has the involvement of the trade union) using the approved or standard procedures for grading
- the actual rate of pay for the employee falls within the pay range for that grade of job within the organisation

¹⁵⁴ H Cheadle, PAK le Roux, C Thompson, A van Niekerk *Current Labour Law 1995* (1995) p 85

¹⁵⁵ H Cheadle, PAK le Roux, C Thompson, A van Niekerk *Current Labour Law 1995* (1995) p 85

- that the pay scale of the organisation is aligned (even loosely) with the pay scales of the current remuneration survey or that it reflects the strategic vision or objectives of the organisation, and
- the final adjustment to the rate of pay was made based on experience (so long as it is not age-linked), skill (so long as the skills were not acquired as a result of discriminatory practices) or performance.

As the employee is unlikely to have been involved in the making of the decision regarding the final adjustment, it will be extremely difficult for the employee to second-guess, and/or prove the actual criteria used. These limitations appear to make the prospect of a successful claim against an employer of unfair remuneration extremely unlikely.

8. South African Remuneration Practices and the Notion of Equality

However, the entire scenario of South African remuneration practices is being confronted with the prospect of significant change.

Perhaps understanding the limitations of the existing legislation to protect employees from unfair remuneration practices, the Ministry of Labour has put forward a Green Paper containing proposals for a new employment and occupational equity statute. This Green Paper, published on 1 July 1996, introduces "programmes to foster equality, which include measures for

employment equity"¹⁵⁶

In order to achieve this objective the Green Paper proposes firstly, that all existing employment procedures be evaluated for discriminatory leanings and changed so as to eliminate them and, secondly, that an Employment Equity Plan be drawn up by employers, in conjunction with their employees, on ways and means of correcting the effects of the discriminatory practices of the past.

The Paper also moves away from the prohibition of unfair labour practices and discrimination to, instead, for the first time, propose legislation that "ensure[s] equal pay and benefits for equal work".¹⁵⁷

These calls for "equal pay and benefits for equal work" would tend to suggest a move away from the government's stated "policy underlying laws on equal pay [which] is *not* that *all employees doing the same or similar work should receive the same remuneration*. Rather, it is that employees should not be discriminated against in so far as their remuneration is concerned. In other words, where there is differentiation it should be on account of some factor which does not have as its basis generalised assumptions about the characteristics of particular groups

¹⁵⁶ Government Gazette Vol. 373 No. 17303, General Notice 804 of 1996 Department of Labour Ministry of Labour *Employment and Occupational Equity: Policy Proposals* p 10

¹⁵⁷ Government Gazette Vol. 373 No. 17303, General Notice 804 of 1996 Department of Labour Ministry of Labour *Employment and Occupational Equity: Policy Proposals* See Items 4.4. (p 8), 3.5.2.3 (p 27), and 5.3.2.4(b) (p 41)

of people. Differences in pay, therefore, which have as their basis productivity, length of service or skill would be justified - those which have as their basis, for example, race, gender, religion or ethnic origin, would not"¹⁵⁸ (emphasis added) to a far more stringent commandment - absolute equality of pay and benefits for equal work.

Within the Green Paper the terms equity and equality, and their negatives, inequity and inequality, appear to be used synonymously and are also used to account for each other, as in

- "1.3 The need for policies on employment equity arises, in the first place, from recognition of continuing inequalities associated with past discrimination, associated primarily with race and gender
- 1.4 Given these inequalities, measures to achieve employment equity necessarily reflect an analysis of the nature and extent of discrimination in the workplace, and its relationship to past discrimination outside the labour market"¹⁵⁹

and in

- "2.3 Inequalities in race and gender do not arise solely or even primarily from discrimination [inequities] in employment. The overall distribution of

¹⁵⁸ H Cheadle, PAK le Roux, C Thompson, A van Niekerk *Current Labour Law* 1995 (1995) p 85

¹⁵⁹ Government Gazette Vol. 373 No. 17303, General Notice 804 of 1996 Department of Labour Ministry of Labour *Employment and Occupational Equity: Policy Proposals* p 6

income is highly unequal"¹⁶⁰

and again in

"1.3.1 Policies on employment equity start from the recognition of inequalities arising out of past discrimination, mostly on the basis of race and gender".¹⁶¹

All of this may lead to some ambiguity, but the overall assumption of the Green Paper appears to be that equity equals equality and equality equals equity.

This is a very different yardstick against which, in terms of the Green paper, employers will not only have to measure their own policies and actions, but also publicise the results of that evaluation in the form of an organisational audit.

Whilst employers may be able at present to defend themselves against charges of discriminatory remuneration practices by hiding behind their job evaluation system, their pay ranges and scales and differentials based on other factors such as merit, skills, experience, service and the like, the proposed legislation, by making the standard of measurement "equality", has shifted the goalposts significantly.

¹⁶⁰ Government Gazette Vol. 373 No. 17303, General Notice 804 of 1996 Department of Labour Ministry of Labour *Employment and Occupational Equity: Policy Proposals* p 7

¹⁶¹ Government Gazette Vol. 373 No. 17303, General Notice 804 of 1996 Department of Labour Ministry of Labour *Employment and Occupational Equity: Policy Proposals* p 12

What remains to be seen is whether the existing practice of paying different rates for different jobs within the same grade (for example, whether it is acceptable for an industrial nurse at grade 11 to earn R 3 800 per month whilst an electrician at grade 11 earns R 7 000 per month) which supposes an understanding and acceptance of the role of the labour market and labour economics in the determination of pay rates is acceptable.

What is clear is that pay differentials based on seniority (because it discriminates against women who have family responsibilities which may result in them either leaving or entering the labour market at times not of their own choosing), skills (blacks, in particular, because of the discriminatory education policies of the past, have been precluded from gaining skills to the same extent as whites) or education (for the same reason) will be a thing of the past if the Green paper is enacted in its present form.

What is also clear is that "Equal pay claims are likely to become a feature of future industrial relations life. Pay equity is not a matter of ensuring only that those employees who do the same or broadly the same work should be remunerated equally. It is a concept which forces employers to challenge assumptions made in the past about people and the work which they are thought best able to perform. It is also about the value which attaches or ought to attach to that work.

Equal pay claims will impact on job and pay structures and require a

consideration of whether existing job evaluation schemes will withstand the rigour of judicial scrutiny. Equal pay claims also impact on the labour market. It remains to be seen to what extent South African labour courts will permit market forces to dominate in what is ultimately a balancing exercise between those forces and pressures for equity in employment"¹⁶²

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H Cheadle, PAK le Roux, C Thompson, A van Niekerk *Current Labour Law* 1995 (1995) p 93 - 94

CONCLUSION

There can be no doubt that the underlying values espoused in the proposals contained in the Green Paper on Employment and Occupational Equity have much to commend them.

There can also be no doubt that, if the proposals, and more specifically the proposal for "equal pay and benefits for equal work" contained in the Green Paper eventually become enacted, remuneration practices in South Africa will undergo a dramatic and, for both organisations and the overall economy, a probably painful metamorphosis.

The requirements the Green Paper envisages will be made of organisations are burdensome, to say the least. Whilst the information required by the organisational audit can be fairly easily gathered together in enterprises where human resource systems are computerised, the same cannot be said about the other proposed requirements.

It is clear that the authors of the Green Paper have little faith in the grading systems or job evaluation practices currently prevalent in South Africa.

For example, the Green Paper suggests "grading systems may separate groups doing virtually identical work on the basis of race and/or gender, leading to unequal pay and

benefits for equal work" in which case "redefining grades is necessary"¹⁶³, or at the very least "measures [which] seem likely to form a part of most employment equity plans ... include ... a review of grading structures to level unnecessary hierarchies and give all employees a realistic career path, supported by training".¹⁶⁴

As the cost of implementing a job evaluation system is prohibitive and the work involved complicated and arduous, not many organisations are likely to welcome these requirements. They will argue the various merits of their existing system(s) and the various demerits of any proposed alternatives with vigour and at length.

The differing perspectives of the various parties to the employment relationship and of the various individuals within those groupings, particularly in terms of their frame of reference as regards the value of work and the compensable factors to be included in any new job evaluation system proposed by the government, are bound to lead to conflict.

Until such time as the Department of Labour comes up with a new, different job evaluation system that matches or improves upon the existing job evaluation systems in common usage in South Africa, they will be left with only the general grading procedures and any specific inequities to rail against. If they cannot determine a common, generic

¹⁶³ Government Gazette Vol. 373 No. 17303, General Notice 804 of 1996 Department of Labour Ministry of Labour *Employment and Occupational Equity: Policy Proposals* p 35

¹⁶⁴ Government Gazette Vol. 373 No. 17303, General Notice 804 of 1996 Department of Labour Ministry of Labour *Employment and Occupational Equity: Policy Proposals* p 37

job evaluation system, guidelines regarding compensable factors may be possible.

In addition, the question remains as to whether an employer's approved equity plan will be sufficient defence should an individual employee raise a claim that an employer is committing an unfair labour practice because of unequal pay. It is clear that the proposed Employment Equity Plans have been designed to allow organisations a period of grace in which to get their houses in order. If individuals are to be prevented from claiming unfair or unequal pay during this period of grace, how will that contravention of the individual's constitutional rights be justified? If they are not going to be so prevented, what is the point of allowing employees a period of grace?

Further, the authors of the Green Paper need to provide clearer guidance on the following:

- how "equal work" is to be measured -is it only measured through job evaluation, or does it involve the measurement of the joules of effort expended in performing that work or does it mean the volumes or quality of the actual output
- will performance, merit or productivity be rewarded and, if so
- how performance, merit and productivity will be measured
- does "equal pay and benefits for equal work" mean that every employee in the country who is graded as Peromnes Grade 7, or Grade 8 or whatever, must earn exactly the same rate of pay, or
- how are different market conditions (for example, the abundance of clerks, the scarcity of systems analysts, the cost of living in Johannesburg compared with the

cost of living in Cape Town) going to be reflected in the requirement for equality?

An understanding of the role of and effect the Equity Theory has on the motivation of employees in the workplace should be reflected in the policy. If the requirement for absolute equality becomes the law, it follows that the law itself could be unfair.

Finally, by proposing equality as the absolute standard for pay, the Green Paper, by implication, requires that personal rates of remuneration be the subject of full disclosure - otherwise how will one employee know that what he is earning is equal to that of another employee engaged in equal work. This requirement is likely to be vigorously opposed - not only by business, but also by individuals for whom the privacy of their paypacket is a very personal matter.

Nevertheless, the Green Paper has provided employers in general in South Africa with the impetus they need to reconsider and evaluate their existing remuneration policies and practices. It is submitted that this impetus is long overdue.

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