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**A CRITICAL ANALYSIS OF THE 'EQUAL PAY FOR EQUAL WORK OR WORK
OF EQUAL VALUE' PROVISION AS IT RELATES TO THE SOUTH AFRICAN
LABOUR MARKET**

BY

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DECLARATION

I, Thobeka Dube, hereby declare that the work on which this dissertation is based on is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor part of it has been, is being, or is to be submitted for another degree in this or any other university. It is hereby presented in partial fulfilment of the requirements for the award of the Degree of Master of Laws in Business Law.

Thobeka Dube (213511114)

Signature

Date

DEDICATION

I dedicate this study to my mother Nokuthula Dube, whose many sacrifices and support has moulded me into the woman I am today, I appreciate everything you have done for me. I am eternally grateful for my brothers Samukelo and Kuhle for inspiring me to be the best person I can be daily. Thank you to my dear friend Sphephelo Mhlongo for your support, friendship and guidance throughout the years.

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CHAPTER ONE

Introduction

The principle of equal pay for equal work provision has its origins in pay discrepancies between men and women.¹ Discrimination in places of employment is a universal problem that occurs every day. There is discrimination when an employee is denied or granted a promotion because of their skin colour, or in instances when a fully capable female manager is refused a seat in the boardroom and is paid less than a male colleague where they perform the same duties.² The discrimination of women and the gender pay gap began with the entrance of women into the workplace after the Second World War.³ This prompted a drastic change in the world of work, no longer were women confined to productivity at home but were now active participants in the labour force. This signalled improvements for many families in that two incomes meant a better standard of living, and in the absence of a husband a woman would be able to take on the role of being able to provide for her loved ones, it was a definite win-win. It was quickly evident that this was not so, it became apparent that employers saw the income of women as more of a supplement to what was earned by their husbands who were considered the real breadwinners, also evident was how positions held by women were presumed to be inferior to those held by their male counterparts.⁴ This was just the beginning of the gender pay gap as it exists today.

In South Africa, the apartheid regime can only be said to have worsened what was an already established universal problem.⁵ The historically disadvantaged racial groups experienced this when men and women belonging to these racial groups earned significantly less when compared to their white counterparts, and women experiencing a double dose of minimal earnings by being both 'non-white' and female⁶. Although apartheid has long since been abolished and South Africa now boasts one of the most progressive constitutions⁷ in the world,

¹ Laubscher, T 'Equal pay for equal work of equal value-a South African perspective' (2016) 37 *ILJ* 806.

² 'The time for equality at work: Global report' under the follow up to the ILO declaration on fundamental principles and rights at work International Labour Conference 91st session 2003: Report 1B at 2.

³ Oelz, M, Olney, S and Tomei, M. 'Equal pay: An introductory guide' (2013) at 2, stated that women had been on the front line of production during the war in many countries.

⁴ Chicha, M 'A comparative analysis of promoting pay equity: models and impacts', pg. 6 available at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596, accessed on 22 June 2017.

⁵ Oelz, Olney and Tomei (note 3 above :3) wherein it is stated that ever since they entered the labour force, women have, in general, been paid less than men. At one time, in many countries this was an express policy.

⁶ Vettori, S 'New life for gender pay discrimination in South Africa' (2014) 26 *SA Merc LJ* 476.

⁷ The constitution of the Republic of South Africa Act 108 of 1996.

large wage discrepancies plague the labour market and if they are not adequately addressed change and transformation will forever be stifled.⁸ This dissertation will focus on the persistent wage gap that plagues the South African labour market, its possible causes and existing legislative measures put in place to address it in both the national and international context. This dissertation will focus particularly on individuals doing the same work or work of equal value as per the ‘equal pay for equal value or work of equal value’ principle. This study intends to explore this type of discrimination⁹ as it is evident that if addressed adequately could mean a vast improvement in and possible total transformation of the labour force as we know it, not to mention reducing many socio-economic problems that plague the country. From the outset, it must be stated that the dissertation will focus mainly on the South African labour market but may use other jurisdictions in *lieu* of similar provisions adopted and provisions adopted by foreign and international jurisdictions that could improve our own.

1.1 Background

The historically disadvantaged groups of the apartheid system still find themselves in a position where they earn less than their ‘non-black’ counterparts in positions of employment where they perform the same tasks and may have the same level of experience. There exists no basis for the continued discrepancy in earnings which amounts to unfair discrimination; the same goes for women in employment where they earn significantly less than men, yet are employed under the same conditions.

1.2 Rationale for study

Unfair discrimination is prohibited, and this can be seen in the enactment of our laws, it is abysmal to witness that discrepancies in wages earned by individuals performing the same tasks still exist in the labour market today with very little active discouragement from the courts. This is after many studies have been conducted and evidence obtained that is clear on the fact that the wage gap exists. The rationale for conducting this study is to identify what could potentially be the reason that this issue has not been adequately addressed when it could potentially resolve many socio-economic issues that are plaguing our country, issues that mostly are experienced by the very same group that is disadvantaged by the wage

⁸ Oelz, Olney and Tomei (note 3 above:4)

⁹ Chicha, M ‘A comparative analysis of promoting pay equity: models and impacts’, available at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596 at 3, accessed on 22 June 2017, explains that the increasing number of studies on the subject bears witness to a growing interest in the causes and continued existence of this gap.

discrepancies. In this way, the goal is to provide solutions that can be targeted at aligning the laws and ILO objectives with enforcement mechanisms that can reduce and eventually eliminate the wage gap.

1.3 Research questions

1. Does the current legislative framework allow for adequate chances of success in ‘equal pay claims’?
2. Does the current legal framework seek to reduce the gender and race pay gap discrepancies in the labour market?
3. How has the judiciary interpreted the ‘equal pay for equal work or work of equal value’ provision in such claims made? and
4. Is this interpretation in alignment with the objectives as envisioned by the International Labour Organization and Conventions¹⁰ that South Africa is signatory to?

1.4 Research methodology

The research methodology used will be in the form of a qualitative study. The qualitative study will be a desktop study dealing with South African law in the form of the Constitution, relevant legislation, case law, journal articles, books, as well as international law, comparative law in the form of International Labour Organization Conventions, books, articles, case law, foreign legislation and related materials.

1.5 Structure of dissertation

This dissertation will be divided into five chapters.

Chapter 1 will introduce this dissertation, the research questions and objective, rationale for the study, methodology, thesis structure and a brief literature review.

Chapter 2 will explore the contextual and legislative frameworks around equal pay for equal work. The chapter will explain what the equal pay for equal work or work of equal value provision is as a concept; conventions applicable in the international context and the measures taken by the International labour organisation to reduce the wage gap; and how these measures are implemented into our domestic law (legislative framework).

¹⁰ C100 Equal Remuneration Convention, 1951, Article 4 states that ‘Each Member shall co-operate as appropriate with the employers’ and workers’ organisations concerned for the purpose of giving effect to the provisions of this Convention’.

Chapter 3 focuses on the Employment Equity Act ¹¹, its amendments and cases that have been heard by the courts in relation to the wage gap and equal remuneration claims and how the courts have dealt with equal pay for equal work or work of equal value claims.

Chapter 4 will look at other jurisdictions namely the UK and Canada to establish a comparative analysis of how these countries have dealt with similar claims and what can be incorporated in the South African legislation in reduction of the wage gap.

Chapter 5 will be the conclusion which will recapture important factors established from the chapters preceding it.

¹¹ Act 55 of 1998

1.6 Literature review

Equal pay for equal work

It would appear that the demand for ‘equal pay for equal work’ had its roots in the Industrial revolution of the early 19th century in the United Kingdom when women in the workforce started to demand equal pay.¹² To understand the ‘equal pay for equal work’ principle one needs to understand what the statement means. It infers that individuals who perform the same work and under the same conditions should be paid the same amount regardless of their gender, the limitation of the provision is evident in its application as it would only apply in cases where the work done is under identical conditions and in the same enterprise.¹³ Chicha refers to this as one of two types of pay discrimination.¹⁴ The first type of pay discrimination is relatively easy to prove as it parallels the entry of women into traditionally male occupations. The second type is ‘work of equal value’ this differs from equal work in that it is premised upon the ideal that men and women in the workplace may perform the same, similar and even different types of occupations that are of equal value. This means that the work could possibly include different responsibilities, skills, and qualifications but when viewed is ultimately of the same value. If this set of conditions exist, then employees should receive the same remuneration, when this is not done it results in pay discriminations. This type of pay discrimination runs rampant as women are often concentrated in a limited number of occupations which means that even though they might be of equal value to positions held by men the concentration results in the job being undervalued.¹⁵ This second type of pay discrimination is one that runs rampant and is harder to prove in order to eliminate it.¹⁶

¹² Davis, M ‘An historical introduction to the campaign for equal pay’ available at <http://www.unionhistory.info/equalpay/roaddisplay.php?irn=820> accessed on 22 June 2017;

¹³ Oelz, M. Olney, S and Tomei M. ‘Equal pay: An introductory guide’ (2013) 30, available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1304&context=intl>. accessed on 3 March 2017.

¹⁴ Chicha M, ‘A comparative analysis of promoting pay equity: models and impacts’, available at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596 at 5 accessed on 22 June 2017; Hlongwane, N ‘Commentary on South Africa’s position regarding equal pay for work of equal value’ (2007) 11(1) *Law, Democracy and Development* 69-84; Grogan, J *Workplace Law* 12ed (2017) 109.

¹⁵ Oelz Olney and Tomei (note 3 above: 31).

¹⁶ Chicha M (note 4 above: 5).

1.6.1 Legislation and Conventions.

South Africa is signatory to a convention established by the International Labour Organisation on 21 June 1951, where the International Labour Organisation Convention's Equal Remuneration Convention No.100 was adopted, which, in article 2(1) requires states to "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value".¹⁷ These principles have not been enshrined into domestic statute but are principles that are taken into account in equal pay claims where unfair discrimination is raised¹⁸ in the Employment Equity Act.¹⁹ It is submitted that until recently pay dispute discrepancies were hardly ever raised, not because they did not exist but because other more important interests such as democracy were still being pursued.²⁰ What has been highlighted is that deep economic and social equalities exist and this was further worsened by the fact that women and non-whites are massed in jobs that usually pay less.²¹ The case of *SACWU v Sentrachim*²² was the first to hold that pay discrimination that was grounded on race and on any difference between employees excluding skills and experience is an unfair labour practice. Prohibition of direct wage discrimination was affirmed by the South African court of Appeal when the industrial court decision was taken on appeal. It was common cause between the parties that where a black person is paid a lesser wage from that of a white performing the same duties, having the same length of service, qualifications and skills is a labour practice of wage discrimination based on race.²³ Meintjies-Van der Walt holds that, 'To define equal pay in such a way would seriously limit its application; such an application will only be effective in cases of flagrant discrimination but will not necessarily remove wage discrimination against women in women-only occupations or against blacks in occupations where they are predominant'.²⁴

¹⁷ Equal Remuneration Convention, 1951 (No. 100).

¹⁸ Landman, A 'The anatomy of disputes about equal pay for equal work' (2002) *SA Merc LJ* 341.

¹⁹ Act 55 of 1998.

²⁰ Landman (note 18 above: 341). see also Vettori, S 'New life for gender pay discrimination in South Africa' (2014) 26 *SA Merc LJ* 476-486, wherein it is stated that "Discrimination on the basis of race was politically motivated in the apartheid era in South Africa. Gender discrimination, on the other hand, has its roots in sociocultural dictates of all groups".

²¹ Meintjies-Van der Walt, L 'Levelling the 'paying' fields' (1998) 19 *ILJ* 22.

²² (1988) 9 *ILJ* 410 (IC).

²³ Meintjies-Van der Walt (note 21 above: 25).

²⁴ *Ibid* 26.

South Africa does not have a developed jurisprudence on the question of equal pay.²⁵ Despite the fact that the first categorical rejection of unfair discrimination by the industrial court dealt with equal pay for equal work, relatively few equity cases have reached the courts under the new labour and constitutional dispensation.²⁶ What is suggested is the need for a systemic approach to prevent further unfair discrimination and address the effects of long-term structural discrimination.²⁷ In the cases that have made it before the courts, a significant burden of proof is put on the claimant such that they rarely ever succeed.²⁸ A need for an explicit provision on equal remuneration exists as its absence signals non-compliance with the International Labour Organisation conventions.²⁹ There also seems to be a need for effective enforcement and data to monitor progress on the remuneration gap.³⁰ An observation at how other jurisdictions have dealt with equal remuneration claims will also be of assistance. Although there exists an analysis with other jurisdictions, what is important to establish is which enforcement mechanism will be appropriate in South Africa considering social and economic factors that are unique to the country such as past racial injustices, Chica contends that no single policy measure is sufficient in this regard.³¹

1.6.2 Application

The role of the judiciary in the implementation of labour related statutes in case law and its interpretation by judges has not been made in a way that encourages lasting future change in cases of unfair discrimination.³² In cases involving the problems faced by individuals in terms of unfair discrimination, the court has failed to grant relief that would act as both a deterrent to other employers and as a means to rehabilitate the discriminatory behaviour.³³ This part of the research paper will assess the extent of legitimacy in the claims of authors in putting significant blame on the judiciary and the shortcomings of the legislation in both its wording and interpretation in the context of pay discrimination. Providing a setting where suggestions³⁴

²⁵ Dupper, 'Old wine in a new bottle? Indirect discrimination and its application in the South African workplace' (2002) *SA Merc LJ* 189.

²⁶ *Ibid* 198.

²⁷ McGregor, M 'Equal remuneration for the same work or work of equal value' (2011) *SA Merc LJ* 488.

²⁸ *Ibid* 489.

²⁹ *Ibid* 498.

³⁰ *Ibid* 502.

³¹ Chicha (note 4 above: iii)

³² Collier, D and Fergus, E 'Race and gender equality at work: The role of the judiciary in promoting workplace transformation' (2014)30 *SAJHR* 484-507

³³ *Ibid* at 496. Authors suggest rehabilitation mechanisms could include broad gender-sensitivity training at the relevant stations to counsel the offender.

³⁴ Ebrahim, S 'Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom' (2016) 19 *PER / PELJ* . The author is of

of a legislative framework that could work better than the current one, and remedies that could yield more concrete results, if it is found that the courts do make matters worse, will be explored. What will also be explored is how the current state hinders the equal pay provisions and how this can be remedied in the South African labour market.

the view that the United Kingdom has a more than adequate legislative framework in the form of the Equity Act which can give effect to the principle of equal pay for work or work of equal value.

CHAPTER TWO

2.1 Introduction

The second chapter of this dissertation will mainly be exploring the contextual and legislative framework that necessitates the equal pay for equal work provision in the South African labour market. The chapter will also look at the international conventions that apply and how these are implemented into South African law.

2.2 The contextual framework of the equal pay for equal work or work of equal value in the South African labour market

As it has already been mentioned in chapter one, unequal pay is a persistent and globally present problem. Ever since women first entered into the labour force they have often received less remuneration than men.³⁵ Women have often been considered as secondary income earners which only serves to perpetuate the cycle of low paying jobs and policies that justify setting disparate wage rates for women doing the same or similar work. Despite these policies being disallowed everywhere, pay differences persist for men and women doing work that is different but is of equal value.³⁶

An additional consequence of historical and stereotypical attitudes towards women in employment is that a range of occupations are held mostly or even exclusively by women than by men. This concentrated pool of women in these occupations creates a pressure on the average income earned thus discouraging men from entering these occupations and further broadening the pay disparity between men and women.³⁷

In the context of the South African labour market, apartheid led to racially discriminatory and bigot practices and laws that resulted in discrimination and inequality in the country.³⁸ In the report *Restructuring the labour market: The South African Challenge: An ILO Country Review*³⁹ (hereafter 'Labour market report'), it was asserted that there are many labour market procedures that contributed to racial and gender-related market divisions in the South African labour arena. The labour report further acknowledged that for Africans and other non-whites

³⁵ Oelz, Olney and Tomei (note 3 above: 3).

³⁶ Ibid.

³⁷ Ibid.

³⁸ McGregor, M 'Equal remuneration for the same work or equal value' (2011) *SA Merc LJ* 488.

³⁹ Standing, G, Sender, J and Weeks, J *Restructuring the labour market: The South African Challenge: an ILO country Review* (1996) at 381, available at http://staging.ilo.org/public/libdoc/ilo/1996/96B09_304_engl.pdf. accessed on 23 April 2017.

there have been so many forms of discrimination and disadvantage in the labour market that it was difficult to identify which was the most important and of utmost urgency.⁴⁰ Amongst the disadvantages⁴¹ suffered by Africans and other non-whites, the labour report identified the disadvantage caused by income, and that the racial income gap has been identified as being so endemic in South Africa that it is considered to be a defining characteristic of the labour market.⁴²

Over decades there have been labour market mechanisms that served to systematically widen pay differences and restrict non-whites to certain types of activities and jobs.⁴³ What was of no contest is that average wages continued to be different for the different racial groups.⁴⁴ An example of income inequality was access to occupational welfare, entitlement to benefits or compensation as these are usually granted to higher income earners and are a source of income security for privileged groups.⁴⁵ Another example noted by the Labour report is the effect of work experience on an individual's wage. Income levels have been much higher for whites; this was speculatively attributed to labour market discrimination which blocked the entrance of non-whites to managerial positions and inferior schooling which made individuals less suitable for promotion.⁴⁶

The Labour report concluded by considering gender-based discrimination and disadvantages and remarked that the disadvantages and forms of discrimination faced by women in the South African labour market seem critical by international standards.⁴⁷ One of these disadvantages is the previously mentioned concentration of women in 'segments' of the labour market where it is found that incomes, opportunities, and working conditions are comparatively unfavourable.⁴⁸ The main form in which women have been found to be disadvantaged is through the lower rates of pay for 'equal work', this hurdle was covered in legislation under the Labour Relations Act and Wage Act⁴⁹ both of which made it illegal to have separate minimum wages for women and men doing the same job. This victory was short lived as these

⁴⁰ Ibid 385.

⁴¹ The labour market report listed and discussed some of the different disadvantages suffered by non-whites as disadvantages due to schooling and training, recruitment practices, occupational crowding, sector employment and work status at 386-395.

⁴² Ibid 396.

⁴³ Ibid 367.

⁴⁴ Ibid 398.

⁴⁵ Ibid 399.

⁴⁶ Ibid 400.

⁴⁷ Ibid 401.

⁴⁸ Ibid 405.

⁴⁹ Labour Relations Act 66 of 1995, the Wage Act 5 of 1957.

acts only applied for a short period of time and were limited to workplaces covered by the Acts, applicable to workers with the same job description and ignored the fact that women and men do not at times perform identical work, making the legislative regulation weak in its application.⁵⁰ Women and Africans were thus the most acutely and systematically disadvantaged in the South African labour market and needed to be given special consideration in the development of labour market policy.⁵¹

The contextual framework provided demonstrates that racial and gender discrimination as it pertains to income differentials is a problem that needs to be addressed. Key concepts that are used in the equal pay for equal work principle, in the understanding of the provision in the international law context need to be briefly explained before the conventions that South Africa is party to are considered; what then follows is how these conventions are given effect in the domestic labour market.

2.3 Equal pay for equal work or work of equal value key concepts

The concept of equal pay for equal work is not one that is new, the International Labour Organisation has included it as one of its objectives since as early as the year 1919.⁵² Although it is beyond the scope of this dissertation to investigate the full causes of why pay discrepancies exist, the key concepts that surround this principle need further explanation:

- ***Equal remuneration and equal pay.*** In this dissertation these terms are used to mean the same thing although they mean different things in law. The term remuneration, it is suggested should not be interpreted in a narrow manner if equality is to be achieved, it goes further than the basic pay package to include “any additional emoluments whatsoever”.⁵³
- ***Gender pay gap.*** This is an indicator that is commonly used to determine the degree of women’s disadvantage in the labour market. This gap is calculated as the female to male average earnings ratio in each labour market, this ratio is different according to the country, characteristics of the group concerned, and by the definition of the earnings

⁵⁰ Ibid 409.

⁵¹ Ibid 415.

⁵² Oelz, Olney and Tomei (note 3 above: 2).

⁵³ Ibid viii.

variable used.⁵⁴ So that means that if a women's monthly average earnings are 70 per cent of men's monthly earnings then the gender pay gap is 30 average points.⁵⁵

The gender gap can also refer to differences in both gender's hourly, weekly, or yearly earnings and in this instance the hourly gap will usually be smaller; this is due to the fact that women are found on average to work fewer hours than men due to family and domestic responsibilities which are common factors.⁵⁶

The size of the gender pay gap will vary according to sector, occupation and groups of workers but as mentioned in the Labour market report discussion above, a global trend is that the more women are concentrated in a job category the lower the wages in the occupation, essentially a female-dominated sector is considered as a low-pay risk.⁵⁷

- **Pay equity** is concerned with the fairness in pay, and the result would be that the same jobs attract the same amount and jobs that are different but are equal are also paid equally.⁵⁸
- The concept of '**work of equal value**' includes but goes beyond '**equal work**'; **equal pay for equal work** means similarly qualified women and men will be paid the same when they perform the same or virtually the same work in comparable conditions. This limits the application to the principle of work that occurs in like conditions.
- **Equal pay for work of equal value** refers to instances where men and women do different work, that have different responsibilities, requiring different skills or qualifications and is performed under different circumstances but is overall of equal value, for which then they should receive the same pay.⁵⁹ It is conceded that there will be instances where differences in pay as they pertain to work of equal value will be permitted, but these differences will only be allowed where this is a means of measuring and comparing the different jobs, where some objective criteria will be used, and what will be considered are things such as skills, working conditions, responsibilities and effort. Where these differences are highlighted do not include stereotypical notions of jobs usually undertaken by men and women, then these differences can be seen in the different levels of remuneration.⁶⁰

⁵⁴ Chica (note 4 above: 2).

⁵⁵ Oelz, Olney and Tomei (note 3 above:12)

⁵⁶ Ibid.

⁵⁷ Ibid 13.

⁵⁸ Oelz, Olney and Tomei (note 3 above :40).

⁵⁹ Ibid 30.

⁶⁰ Oelz, Olney and Tomei (note 3 above: 25)

These are terms commonly adopted under this concept in the conventions and in the pursuit of equal pay for equal work or work of equal value.

2.4 International setting for equal pay for equal work

2.4.1 International Labour Organization

International conventions and declarations are viewed as important pieces that seek to uphold and promote the right to equality in the workplace.⁶¹ When the League of Nations and the ILO were formed at the Paris Peace Conference in 1919, the importance of recognizing women's priorities and needs was highlighted.⁶² When the draft provision of the ILO constitution was drafted the ideas proposed by trade unions were seen as extreme and probably unattainable at the time;⁶³ these included the equal pay for equal work notion. Despite this setback the ILO constitution in its preamble endorsed the "recognition of the principle of equal remuneration for work of equal value".⁶⁴

2.4.2 ILO decent work agenda

In the face of divergent social and economic conditions, the ILO's mission has developed around promoting social justice, through securing decent and productive work for all men and women. The Underlying concept of decent work is premised on the idea that women and men should get decent and productive work in conditions of freedom, equity, security and human dignity. This agenda continues the historical role played by the ILO in combating discrimination not only at work but further highlights the important ties between decent work, poverty reduction and gender equality.⁶⁵

2.4.3 International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)⁶⁶

⁶¹ Hlongwane 'Commentary on South Africa's position regarding equal pay for work of equal value', 2007 *Law Democracy and Development* 70.

⁶² Gaynor, C *ILO and UN Inter-Agency Collaboration: Promoting Gender Equality in the World of Work* 2010 at 9, available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_122392.pdf accessed on 25 September 2017.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid 12.

⁶⁶ Adopted in 1975 by the UN General Assembly, available at www.ilo.org.za accessed on 20 April 2017.

In January 1996 the South African government ratified the CEDAW convention. This legally bound Parliament and the Executive to take active steps to eliminate gender discrimination.⁶⁷

Article 1 of the convention provides that:

‘[T]he term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’

Article 11(d) provides for women to have:

“The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”

This convention is a result of the ILO in collaboration with the United Nations human rights treaty bodies that deal with equality issues.⁶⁸ What is affirmed is that the governments of signatory states must not only aim to not violate the rights of women but must operate further to promote and protect these rights.⁶⁹

2.4.4 ILO Convention No. 111⁷⁰

On 5 March 1997 the South African parliament ratified the ILO Convention 111 on Discrimination in Employment.⁷¹ This convention requires member states to enact legislation “to promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in respect thereof.”⁷² The recommendation in Convention 111 highlighted the important of,

‘[T]he need to create rational policy for the prevention of discrimination in employment and occupation, having considered a number of principles. These principles included equality of opportunity and treatment in respect to remuneration for work of equal value.’⁷³

⁶⁷ Vettori (note 6 above: 478).

⁶⁸ Gaynor (note 67 above: 28)

⁶⁹ ‘Convention on the Elimination of all Forms of Discrimination Against Women’ available at www.ilo.org.za accessed on 20 April 2017.

⁷⁰ ‘ILO Convention No. 111: Discrimination (Employment and Occupation) Convention, 1958’ available at http://blue.lim.ilo.org/cariblex/pdfs/ILO_Convention_111.pdf accessed on 20 April 2017.

⁷¹ Vettori (note 6 above: 478)

⁷² Articles 2-3 of ILO Convention 100.

⁷³ Discrimination (Employment and Occupation) Recommendation, 1958 (No.111), Para 2 (b)(v) available at www.ilo.org accessed on 25 April 2017.

2.4.5 ILO Convention No.100⁷⁴

On 30 March 2000 the South African parliament ratified ILO Convention 100 on Remuneration. The Equal Remuneration Convention 1951 was introduced to combat the issue of unequal remuneration.⁷⁵ It is suggested that the convention confirmed the importance of equality between men and women when it came to equal pay.

Convention No.100 essentially holds that remuneration rates are to be established without discrimination based on the gender of the workers. It further requires that men and women workers attain equal pay for work of equal value and not just for similar work. This principle requires a comparison among jobs held by men and women to determine their respective values.⁷⁶

The convention when applied in the ILO report *Time for Equality at Work*⁷⁷ article is purported to set out the common responsibility that member states and social partners have, when it is stated that

‘Ratifying States must ensure the application of the principle of equal remuneration in the areas where they are involved in wage fixing. When they are not directly involved, they have the obligation to promote the observance of this principle by those who are involved in the determination of remuneration rates. States must cooperate with employers’ and workers’ organizations to implement the Convention and must involve them in the establishment, where appropriate, of objective job evaluation methods. Employers’ and workers’ organizations are also responsible for the effective application of this principle’.⁷⁸

Additional declarations and international instruments⁷⁹ have been undertaken in the pursuit of equality but such declarations have no binding effect and are persuasive consensus statements made by governments.⁸⁰

⁷⁴ ILO ‘Equal Remuneration Convention, 1951 (No 100)’ Available at www.ilo.org.za accessed on 25 April 2017.

⁷⁵ Oelz, Olney and Tomei (note 3 above: 2).

⁷⁶ ILO *Time for Equality at Work* (2003) 48, available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_public_9221128717_en.pdf accessed on 3 May 2017.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ ILO declaration on *Equality of Opportunity and Treatment for Women Workers* 1974, adopted in 1975, The ILO ‘Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment’ 1985, adopted in 1985, The United Nations ‘Beijing Declaration and Platform for Action’ 1995, available at <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> accessed at 3 May 2017.

⁸⁰ Hlongwane (note 66 above: 20).

As previously mentioned these declarations and conventions serve as the main sources to the right of equality in places of employment but what needs further evaluation are the implications of these declarations and conventions in South Africa, and what effect do they have when it comes to domestic law.

2.4.6 Implications of International Conventions and Declarations in South African Law.

The Constitution⁸¹ of the Republic of South Africa states that “the constitution is the supreme law of the country and therefore any law of conduct inconsistent with it is invalid”.⁸² It then goes without saying that all conventions and declarations would have to be in keeping with it. The Constitution acknowledges that international law does have an effect in the Republic; it provides for a section on international agreements in sections 231-233 of the Constitution.

Section 231(4) states that,

‘(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’

The effect of this section is that it does not compel parliament to include approved and ratified international conventions and declarations into domestic law, but it is the role of parliament to decide whether it should include said international conventions and how this can be done in a way that is appropriate in the domestic law setting and will also comply with international obligations.⁸³ The norm is that South Africa usually becomes part of important human rights conventions⁸⁴ but does not incorporate them into domestic law; the harmful result of this is that it then becomes impossible for individuals to rely on obligations found in the provisions of these conventions; what then exists is an inconsistency between international law and domestic law.⁸⁵

This problem highlighted above is reconciled by section 39(1)(b) and section 233 of the Constitution. Section 39(1)(b) necessitates the courts to take international law into account

⁸¹ Constitution of the Republic of South Africa Act 108 of 1996.

⁸² Ibid Section 2.

⁸³ Sucker, F ‘Approval of an International treaty in parliament: How does section 231(1) ‘Bind the Republic?’’ *Constitutional Court Review* (2013) V 427, available at www.constitutionalcourtreview.co.za accessed on 10 October 2017.

⁸⁴ Ibid. For example, the International Covenant on Civil and Political Rights was ratified by South Africa in 1998, but has not yet been incorporated into domestic law.

⁸⁵ Ibid.

when interpreting the Bill of Rights. Since this provision allows for the inclusion of conventions that South Africa is not signatory to, there exists an obligation for the courts to take approved international conventions into account, this includes those that are not ratified, when interpreting the Bill of Rights.⁸⁶

In s 233 of the Constitution the court is tasked with the following,

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

This will be taken to mean when interpreting any legislation where a provision of a Bill of Rights is not being challenged.⁸⁷

In effect individuals can rely on international law that has been ratified but not implemented into domestic law; it would not interfere with Parliament’s discretion as to when or how to give domestic effect to South Africa’s international obligations, it just means that it should.⁸⁸

In regard to conventions that have been approved but not ratified, the first result would be that it could create an obligation on the court called upon to interpret national legislation in terms of section 233 to include international treaties that are approved but not ratified in its interpretation. Secondly it could impose a duty on the government and its organs of state to act in good faith domestically and to avoid any undertakings that would be in contravention of the purpose and object of the international convention. Thirdly it could mean the fact that parliament approved it, is a positive indication that it will act in accordance of the approved convention when exercising its power.⁸⁹

It is therefore evident that international law plays a very critical part when it comes to the interpretation of legislation. When need be domestic laws provide for instances where individuals are protected and can rely on international law even though it has been approved and not ratified, and where ratified but no domestic laws have been enacted to give effect to the obligations that go with it. There exists a remedy in the constitution as well. It is now important to look at how the South African legislature has purported to include the previously

⁸⁶ Ibid 428.

⁸⁷ Ibid.

⁸⁸ Ibid 431.

⁸⁹ Ibid 434.

discussed ratified relevant equal pay for equal work ILO conventions into South African legislation.

2.5 Equal pay for equal work legislation in South Africa

Individuals that felt aggrieved with practices in their place of employment before the dawn of democracy had reprieve under the short-lived item 2(1)(a) of schedule 7 of the Labour Relations Act⁹⁰. The Act provided that

‘An unfair labour practice meant any unfair labour act or omission that arises between an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability.’

This item was then subsequently repealed and replaced. Although short-lived it gave rise to a significant amount of judgements some of which will be discussed in the next chapter, where the courts decided on how to determine when there was unfair discrimination (usually in pay) under this section in the workplace.⁹¹

The South African government afterwards enacted the Employment Equity Act⁹² (The Act) to promote equality in the workplace and individuals who were aggrieved with their remuneration and sought to challenge this through equal pay claims could do this by using s6(1) of the Act which states that,

‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground’.

This section was read in conjunction with section 1 of the Act which provides a definition for an employment policy that includes remuneration, employment policies, contractual terms and conditions. Employees then have legitimate grounds on which to bring their grievances on.

There were amendments made to the Act to introduce a new provision on equal pay for work of equal value. This followed an assessment by the International Labour Organisation that critiqued the South African equality legislation for not adequately dealing with pay disparity

⁹⁰ 66 of 1995.

⁹¹ Du Toit, D ‘The evolution of the concept of unfair discrimination in South African labour law’ (2006) 27 *ILJ* 1320.

⁹² No 55 of 1998.

claims.⁹³ In response, the equal pay provision in the Employment Equity Act⁹⁴ has now been amended to be aligned with the previously mentioned ratified ILO conventions.⁹⁵

The amended Act which came into operation on August 2014 by presidential proclamation amended the previous act with the introduction of s 6(4) and s 6(5).

s 6(4)

provides that a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) is unfair discrimination.

Section 6(5)

empowers the Minister, after consultation with the Commission, to prescribe the criteria and the methodology for assessing work of equal value contemplated in section 6(4).

So far, the Employment Equity Regulations⁹⁶ have been published which provide the criteria and methods to be followed when assessing work of equal value. Regulation 5 sets out that, “when assessing a claim for equal value it must be established whether the work concerned is of equal value and whether there is a difference in terms and conditions of employment”.⁹⁷ Thereafter it must be determined if this difference amounts to discrimination that is unfair.⁹⁸

Regulation 6(1) states that the relevant jobs under consideration must be assessed objectively taking the following criteria into account:

- a) the responsibility demanded of the work, including responsibility for people, finances and material;
- b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
- c) physical, mental and emotional effort required to perform the work; and

⁹³ Commission for Employment Equity *Annual Report 2015-2016*, 2016 (16th CEE Report) 9, available at <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/2015-2016/16th%20CEE%20Report.pdf> accessed on 10 October 2017.

⁹⁴ Employment Equity Act 55 of 1998 (EEA). The amendments were made in terms of the Employment Equity Amendment Act 47 of 2013.

⁹⁵ 16th CEE Report (note 99; 9).

⁹⁶ GN R595 in GG 37873 of 1 August 2014 (Employment Equity Regulations) (the Regulations).

⁹⁷ Regulation 5 (1).

⁹⁸ Regulation 5 (2).

- d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.

Regulation 6(2) will also consider any other relevant factor.

Moreover, the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value (The code)⁹⁹ was published to provide guidelines to employers on the implementation of equal pay and how to ensure adequate remuneration policies that are free from unfair discrimination.¹⁰⁰ The factors listed above in (a)-(d) are usually viewed as being more than adequate in the evaluation tasks performed in any given organisation.¹⁰¹ Important considerations to be given to the criteria will differ according to the sector, the employer and the job.¹⁰² The code further views as one of the most important of its features that the employer takes on the task of assessing jobs in its workplace in order to realise the provision of equal pay for work of equal value.¹⁰³

2.6 Conclusion

Laubscher is of the view that the introduction of the amendments made to the Act do not amount to substantive changes in the law when it comes to equal pay claims such as it purports to do.¹⁰⁴ This would seem to be in agreement with the observation made by Vettori who states that despite all this progressive legislation including the international conventions, research has shown that very few equal pay claims have been instituted in courts, and this is contrary to evidence indicating widespread discrimination especially gender based discrimination.¹⁰⁵ It is therefore important to investigate the effectiveness of the legislative framework before and after the amendments in order to see what shortcomings existed that were purported to be reconciled by the latest amendments.

⁹⁹ GN 448 in GG 38837 of 1 June 2015.

¹⁰⁰ 16th CEE Report (note 99; 9).

¹⁰¹ Item 5.5 of the Code.

¹⁰² Item 5.6 of the Code.

¹⁰³ Item 5.2 of the code.

¹⁰⁴ Laubscher, T 'Equal pay for equal work of equal value-a South African perspective' (2016) 37 *ILJ* 805.

¹⁰⁵ Vettori (note 6 above;479).

CHAPTER THREE

South African case law

3.1 Introduction

This chapter will focus on South Africa's legislative framework and how it has been applied in equal pay for equal work or work of equal value disputes. This will be done using case law under the legislation used to combat unfair discrimination in the workplace by the Labour court. These are cases that have been dealt with under the old Labour Relations Act,¹⁰⁶ the Employment Equity Act¹⁰⁷ and the latest Employment Equity Amendments Act.¹⁰⁸ This will be done to grasp how the courts have dealt with pay discrepancy disputes, and note the effectiveness thereof.

3.2 South African case law

3.2.1 SACWU v *Sentrachem*¹⁰⁹

The judgment in *SA Chemical Workers Union and Others v Sentrachem Ltd* was brought under review before the Supreme Court. The issues under review were that the employer had committed wage discrimination and that the failure to re-employ some of the workers who had been on strike was unfair.¹¹⁰ The focus here will be on the first issue under determination, the facts are as follows. SACWU as the recognized collective bargaining representative of the majority of applicants, submitted wage proposals.¹¹¹ The demand was that the basic salary be increased by R350 'across the board'.¹¹² This referred to the Peromnes job grading system which the applicant used in all its divisions; in terms of the system each job performed by a worker was part of one of the 19 grades.¹¹³ For nine of the grades the basic minimum wage was negotiated between the applicant and the representative collective bargaining union. The R350 increase was deemed excessive and although parties tried to come to an agreement they failed and subsequently a strike ensued. SACWU then applied for a conciliation board and in its statement sought that the respondent (present applicant) pay its black employees at the same rate as white employees in the same grade and /or doing the same job or alternatively requiring

¹⁰⁶ Item 2(1)(a) of schedule 7 of the Labour Relations Act 66 of 1995.

¹⁰⁷ Act 55 of 1998 (The EEA).

¹⁰⁸ Act 47 of 2013.

¹⁰⁹ (1998) 9 ILJ 410 (IC).

¹¹⁰ *SACWU v Sentrachem* at 249.

¹¹¹ *SACWU v Sentrachem* at 251.

¹¹² *Ibid.*

¹¹³ *Ibid.*

the respondent to negotiate in good faith with the applicant on the abolition of such discrimination aforesaid. This could be done by disclosing to the applicant information that would help it to determine the exact nature and extent of such discrimination and to evaluate the steps taken by the respondent to eliminate it in the past.¹¹⁴

The main findings of the first respondent was that the applicant was guilty of wage discrimination because:

- a) A wage gap existed between the average sum paid to whites and those paid to blacks in the same grade;
- b) The applicant had admitted that
 - It was guilty of wage discrimination;
 - Wage discrimination based on race was unacceptable.¹¹⁵

In response Coetzee J found that no such express acknowledgment by the applicant was found in the records presented before him.¹¹⁶ It was furthermore held that,

‘it was a known case between the parties that any practice in which a black person is paid a lesser salary from a white person doing the same job, having the same length of service, qualifications and skills is a labour practice of wage discrimination based on race and was an unfair labour practice. The first respondent was said to have misdirected himself and no evidential basis for the determination in respect of wages existed’.¹¹⁷

Meintjies¹¹⁸ asserts that the above case is unassailable authority for the equal pay principle but to define the equal pay principal in such a way as the Judge did would seriously limit its application. What would happen is that the approach would only be effective in cases of blatant discrimination but will not do anything for wage discrimination in ‘women only occupations’ or against blacks in places of employment where they are predominant.¹¹⁹

3.2.2 Leonard Dingler Employee Representative Council and Others v Leonard Dingler¹²⁰

The employer had three retirement benefit funds; a staff benefit, pension and a provident fund.¹²¹ All members of the staff benefit fund were white except for four people and were paid

¹¹⁴ SACWU v Sentrachem at 252.

¹¹⁵ SACWU v Sentrachem at 256.

¹¹⁶ SACWU v Sentrachem at 258.

¹¹⁷ SACWU v Sentrachem at 259.

¹¹⁸ Meintjies-Van der Walt, Levelling the ‘paying’ fields’ (1998) 19 ILJ 22.

¹¹⁹ Ibid 25.

¹²⁰ (1998) 19 ILJ 858 (LC).

¹²¹ Leonard Dingler supra at 287.

monthly.¹²² The members that made up the pension fund were black employees who were paid weekly. The applicants were employees and were paid their salaries monthly. They were members of the pension fund. Before to the establishment of the pension fund, they were members of the provident fund. A dispute flared up following a letter sent by the applicant employee's representative to the first respondent requesting that the applicant employees be allowed to join the staff benefit fund. They included an allegation that their marginalization amounted to direct and indirect discrimination based on race.¹²³ The company denied this allegation and the dispute could not be resolved by the CCMA¹²⁴. The matter was referred to the Labour Court in terms of item 2(1)(a) of schedule 7 to the LRA 1995.¹²⁵ The company admitted that the monthly/weekly pay difference adopted by the employer indirectly discriminated against the applicant employees.¹²⁶ The court agreed and established that,

'indirect discrimination occurs when criteria, conditions or policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain race group in circumstances where they are not justifiable'.¹²⁷

The employer's failure to pay the same amount in contribution for the pension and provident fund was also a form of discrimination against the members of those funds.¹²⁸ Consequently the monthly/weekly paid standard was arbitrary and consequently discriminatory under item 2(1)(c) of schedule 7 to the LRA.¹²⁹

The court also laid down some guidelines in noting that some discrimination is permissible but not all, and that discriminatory measures are not always unfair. In deciding whether it is unfair one needs to discern the effect of the discrimination on the group in question and the impact which the discrimination had; this involves a careful consideration of facts and context and cannot be done mechanically.¹³⁰ The court also held that the onus rested on the employer to show that there had been no discrimination by showing that the purpose of employment policy was not illegitimate and that the means to achieve it were rational.¹³¹ As mentioned previously the court did ultimately find that there existed discrimination on arbitrary grounds and on the

¹²² Ibid 288.

¹²³ Ibid 289.

¹²⁴ The Commission for Conciliation, Mediation and Arbitration.

¹²⁵ Ibid.

¹²⁶ Ibid 292.

¹²⁷ Ibid.

¹²⁸ Ibid 293.

¹²⁹ Ibid 301.

¹³⁰ Ibid 295.

¹³¹ Ibid.

basis of race. The employer had unfairly discriminated against its black employees by paying them weekly and not requiring or inviting them to be monthly paid or to join the staff benefit fund.¹³² As relief the court ordered that the parties resolve the matter between themselves.¹³³

3.2.3 *TGWU v Bayete Security Holdings*¹³⁴

The applicant in this case was employed by the respondent as a security guard and two years later was offered a 'marketing job' where he earned R1500 per month plus commission.¹³⁵ A month later the respondent hired one Mr Wynard Louw at a salary of R4500. Mr Louw was introduced as a more experienced person who would teach his colleagues how to perform the marketing job better. Over time the applicant observed that Mr Louw had no experience in the security industry and further queried the pay discrepancy of himself and Mr Louw with management.¹³⁶ Thereafter the applicant was demoted from his position and reinstated back to be a security guard. The applicant then took the matter to the CCMA where the matter was not resolved, it then fell to be heard at the Labour court. The court could only adjudicate it on the grounds of unfair discrimination specified in item 2(1)(a) of schedule 7 of the LRA 1995.¹³⁷ The court first stated that in order to move forward the applicant was obligated to show that his claims fell within the ambit of the provision,¹³⁸ in order to succeed he would have to prove that he had been victim of discrimination, only then would the onus shift to the employer to prove that said discrimination was not unfair.¹³⁹ The court importantly stated that a verbal averment that there had been discrimination is not enough to discharge the onus in this sense.¹⁴⁰ In the Judge's view the applicant failed in overcoming this first hurdle, the only facts presented to the court were that he was discriminated against, he was black, earned R1500 and that Mr Louw a white man earned R4500. The applicant further admitted that he did not do the exact work performed by Mr Louw nor was he aware of his educational qualifications, experience, where he previously worked or his length of service prior joining the company.¹⁴¹ On the grounds that Mr Louw had no experience in the security industry the applicant failed to produce evidence to prove this.¹⁴² The court, agreeing with the dicta in *SACWU v Sentrachem*, that to pay one

¹³² Ibid 301.

¹³³ Ibid 303.

¹³⁴ (1999) 20 *ILJ* 1117 (LC).

¹³⁵ Ibid para 2.

¹³⁶ Ibid.

¹³⁷ Ibid para 4.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid para 5.

¹⁴² Ibid para 6.

employee a higher salary than another where they do the same work may amount to an unfair labour practice, the same then holds for the present 1995 Act. The court concluded by asserting that discrimination occurs when two individuals that are in same set of circumstances are treated differently. Pay differentiations are commonly only reasonable and allowable if employees have different levels of responsibility, expertise, experience and skills.¹⁴³ The applicant had failed to convince the court of any evidence to validate the claims made there was then no basis to conclude that he was discriminated against.¹⁴⁴

3.2.4 *Louw v Golden Arrow Bus Service*¹⁴⁵

This matter was heard in the Labour Court. The allegation made was that Mr Baneke who was employed as a supervisor and who was of the white race was paid a higher salary than the two applicants and that this pay differentiation was due to him being white. This allegation if proven to be factual would be against the provision of equal pay for work of equal value and in the same length constitute direct discrimination on the grounds of race, colour and/or ethnic origin¹⁴⁶. It also alleged that the respondent applied criteria in its pay evaluation methods that served to result unfavourably in its results when it came to black employees. The two applicants wanted as relief, an order against the employer to pay the differences in salaries until the true value of the job has been evaluated and the correct amount established.¹⁴⁷

Golden Arrow Bus service admitted that a difference in pay between the applicants and Mr Baneke did exist but this differentiation was due to non-discriminatory reasons on its part.¹⁴⁸ The Labour Court reasoned that the different treatment of persons from different races did not amount to discrimination based on race unless the ground of race was the reason for the unequal treatment and that there was at least one grade difference between the jobs held by the applicants and the comparator Mr Baneke. The Labour Court also found that the applicants could not be said to have been successful in proving that the compared jobs were when viewed objectively of equal value but with that said went on and held that this did not mean that the reason for the pay disparity was due to racial discrimination, but it meant that racial discrimination had not been proven in this case.

¹⁴³ Ibid para 7.

¹⁴⁴ Ibid.

¹⁴⁵ (2000) 21 *ILJ* 188 (LC),

¹⁴⁶ Ibid para 5.1.

¹⁴⁷ Ibid para 6.

¹⁴⁸ Ibid para 7.

3.2.5 *Mangena v Fila South Africa (Pty) Ltd*¹⁴⁹

The court was invited to determine whether Mangena a black male was discriminated against by his employer on the grounds of race, this was done on the allegation that his colleague, a white female earned more than him even though they performed work that was of equal value.¹⁵⁰ The court saw it fitting that a claim of equal pay for equal work be determined under the EEA as it was broad enough that such a claim could be brought under it.¹⁵¹ This was further supported by the further reasoning of the court that although,

‘Equal Remuneration Convention refers only to the prohibited ground of sex, the principle of equal pay for work of equal value should be extended beyond the prohibited ground of sex to include the ground of race. There also existed an obligation of the EEA to interpret the Act in compliance with South Africa's international law obligations which includes the Equal Remuneration Convention’.¹⁵²

The court expressed that the applicant had not pleaded a claim of equal pay for work of equal value but even if it had been pleaded, the court could not be convinced that the work performed by him and his comparator attracted the same value even though the applicant was convinced that on the facts it was and urged the court to do the same in order to find the same value existed on the facts alone. The labour court found that the applicant had valued the work done by him and his comparator falsely and held that the work performed by him was of lesser value to that performed by his comparator when demand, responsibility and skills needed for both jobs were taken into consideration. The court also cautioned applicants making claims for unequal pay when they had an incorrect view of what the jobs performed by them and their comparators entailed, the applicant should duly consider the inherent skills required, skills, responsibility and effort.¹⁵³ The claim failed as the court held it had no basis.

3.2.6 *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others*¹⁵⁴

This case was one of the first appeals to be decided in terms of the Employment Equity Amendment Act.¹⁵⁵ The issue raised was the interpretation of and interaction between sections s6(4) and 10(8) as they relate to disputes about equal pay for work of equal value, and whether

¹⁴⁹ Ibid para 130.

¹⁵⁰ (2010) 31 *ILJ* 662 (LC).

¹⁵¹ Ibid para 2.

¹⁵² Ibid para 5.

¹⁵³ Ibid para 15.

¹⁵⁴ (C687/15) [2016] ZALCCT 14.

¹⁵⁵ Ibid para 1.

claims must be founded on a listed or analogous arbitrary ground of discrimination.¹⁵⁶ This was an appeal from the CCMA where the commissioner upheld a claim of unfair discrimination. The claim was brought by a union (WAR) on behalf of seven of its members.¹⁵⁷ The alleged unfair discrimination came by way of an application by Pioneer Foods. In dispute was a collective agreement that it had with the union that provides that Pioneer Foods pays newly hired employees for the first two years of employment at 80% of the ratio paid to its employees that have been employed there for a longer period of time.¹⁵⁸ The commissioner found in favour of the members represented and subsequently held that Pioneer Foods had unfairly discriminated against them and was in contravention of s6(4) of the EEA. The Commissioner found the difference in remuneration between the employees not fair and not based on rational grounds, he asserted that paying new entrants at 80% in accordance with the collective agreement was 'in conflict with the requirement of equal pay for equal work'.¹⁵⁹ He based his reasoning on the fact that the employees had worked for Pioneer previously under a labour broker and were thus not 'entrants' in the true sense of the word. He then concluded that the employees have established that they had been unfairly discriminated against and were accordingly entitled to damages.¹⁶⁰

The Labour Court disagreed with the Commissioner's analysis and conclusion and sought to evaluate the claims made by the union, the court ultimately found that the union had not alleged discrimination on any of the listed grounds and therefore bore the onus of proving on a balance of probabilities that the conduct complained of is not one that is rational and when viewed can be seen to constitute unfair discrimination.¹⁶¹ The arbitrary ground that the union relied upon also had to be identified and proven to show that it amounted to the impairment of dignity of the employees and was a hinderance to fairness.¹⁶²

The court found that the arbitrary ground relied upon by the union of discrimination on the basis of being newer employees is not an unlisted arbitrary ground of discrimination and the election of employers to pay newly hired employees at a rate lower than employees that have worked for them longer did not result in conduct that was either irrational nor unfair. The

¹⁵⁶ Ibid para 2.

¹⁵⁷ Ibid para 3.

¹⁵⁸ Ibid para 5.

¹⁵⁹ Ibid para 14.

¹⁶⁰ Ibid para 17.

¹⁶¹ Ibid para 32.

¹⁶² Ibid.

Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value¹⁶³ states that it is not unfair discrimination if the difference is fair and rational and is based on any of the following factors: “*the individuals’ respective seniority or length of service*”.¹⁶⁴

The court further held that,

‘Differentiation in respect of terms and conditions of employment on the basis of length of service with the employer concerned is, on the contrary, a classic example of a ground for differentiation which is rational and legitimate and, indeed, exceedingly common’.¹⁶⁵

The appeal was upheld.

3.3 Application of the law

The *SACWU v Sentrachelm* case for the first time saw the court provide a definition of ‘discrimination’ as well provide a visible framework for identifying prohibited grounds of discrimination.¹⁶⁶ Du Toit¹⁶⁷ maintains that the protection against discrimination continued in an ad hoc manner that meant that in the 1980s different instances of what amounted to discrimination that were based on race, sex and trade union membership were found to constitute unfair labour practices. It is further contended that that the labour court during those years was not concerned with discrimination but was rather focused on forms of employer conduct. Du Toit also points out that case, under item 2(1)(a) of schedule 7 gave rise to a body of judgements in which unfair discrimination was considered, but that no great consistency emerged from those judgements. The accuracy of the last statement cannot be proven but what is evident is that the case law then, greatly influenced the interpretation of pay discrepancy cases that followed.¹⁶⁸

The major obstacle that claimants in the above cases had concerned the onus of proof¹⁶⁹ as pointed in *Louw v Golden Arrow Bus Service*:

‘Discrimination on a particular ‘ground’ means that the ground is the reason for the disparate treatment complained of, for example, different races, is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put

¹⁶³ 1 GN 448 in Government Gazette 38837 of 1 June 2015 clause 7.3.1.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid para 57.

¹⁶⁶ Du Toit, D ‘The evolution of the concept of unfair discrimination in South African labour law’ (2006) 27 *ILJ* 1319.

¹⁶⁷ Ibid 1317.

¹⁶⁸ Ibid.

¹⁶⁹ Vettori (note 6; 479)

differently, for the applicant to prove that the difference in salaries constituted direct discrimination, she or he had to prove her, or his salary was less than Mr Beneke's because of race.¹⁷⁰

What is evident is that the claimant in this remuneration case had to establish a *prima facie* case that the reason for the difference in remuneration was discrimination on the basis of any of the listed grounds contained in item 2(1)(a) of schedule 7 or s6(1) of the EEA.¹⁷¹ To do this the claimant had to identify a comparator and establish that the work or performance done by the comparator and themselves was of the same or equal value, and that the comparator was earning more than the claimant and this reason was found on any of the listed grounds. What follows is that the claimant had to establish that a causal link existed between the difference in remuneration and the listed or arbitrary ground relied upon.¹⁷² If the claimant was successful in doing this the employer in question bore the onus to prove that the discrimination complained of was fair.¹⁷³

From *TGWU and Another v Bayete Security Holdings* the court held that to succeed with a remuneration claim based on discrimination the claimant had to further prove that the employer would have treated a similarly situated person of another race or gender differently.¹⁷⁴

Vettori¹⁷⁵ maintains that this is a rather heavy onus of proof that is shouldered by the claimant that will probably deter future claims of unequal pay based on discrimination. Landman¹⁷⁶ holds a similar view when he asserts that discrimination cases are relatively rare, not because of the decrease of discrimination but mainly because the law on the subject is not as straight forward as the statutes would tend to suggest.

3.4 Conclusion

The main objective of this chapter was to view how the courts have dealt with unequal pay disputes in South Africa. What is evident is that the burden of proof that is one that is onerous when undertaken has shown to lead to unsuccessful unequal pay claims.

¹⁷⁰ Louw (note 150 above; 2).

¹⁷¹ Vettori (note 6; 479)

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid 480.

¹⁷⁵ Ibid.

¹⁷⁶ Landman 'The Anatomy of Disputes about Equal Pay for Equal Work' (2002) 14 *SA Merc L* 355.

CHAPTER FOUR

The situation in Canada and the United Kingdom

4.1 Introduction

In the previous chapters much discussion has been centred around the problem of pay discrimination based on gender and race, with a focus on the South African labour market which suffers the problem on a greater scale due to the systematic discriminatory practices of the past. It is submitted that the limited success of unequal pay claims in the courts in the prior chapter is evidence of a legislative and judicial interpretation¹⁷⁷ of the law that falls short in addressing a problem that not only exists but shows no indication of lessening. What chapter five purports to do is to provide a brief comparative analysis using the jurisdictions of Canada and the United Kingdom in observing how these two countries that have also ratified the ILO Equal Remuneration Convention No.100¹⁷⁸ have fared in their application of the equal pay for equal work and value principal.

4.2 Reasons for UK and Canada in comparative study

The reason for choosing Canada for a comparative study is because according to Chica¹⁷⁹ Canada has applied the principal of equal pay for work of equal value consistently through the many models that the country has adopted in the pursuit thereof. The country is also considered as something of a pay equity laboratory since it encompasses different legal approaches both judicial and proactive that have been tried and tested which thus provides an ideal country for a comparative analysis in its jurisdiction.¹⁸⁰

The United Kingdom (UK) was the next choice because of it having ratified the Equal Remuneration Convention in 1971. It has almost 30 years of experience in its application of the convention when compared to South Africa where the convention was only signed in the

¹⁷⁷ E Fergus and D Collier 'Race and gender equality at work: The role of the judiciary in promoting workplace transformation' (2014) 30 *SAJHR* 506-507.

¹⁷⁸ Canada ratified the Equal Remuneration Convention, 1951 (No.100) in November 1972 whilst the United Kingdom ratified it in June 1971.

¹⁷⁹ Chicha 'A comparative analysis of promoting pay equity: models and impacts', pg. 2 accessed at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596,p6. accessed at 22 June 2017

¹⁸⁰ *Ibid* at 2.

year 2000.¹⁸¹ The UK has furthermore not attracted the same criticism from the ILO that South Africa has which begs an investigation as to what has been done differently.¹⁸²

4.3 Unequal pay in Canada

4.3.1 General framework of anti-discrimination practices

Canada's pay and employment equity laws have not only been hailed for providing access to important economic justice but for also being on the forefront in providing tools to help businesses and public sector organizations adapt to the changes that the laws may impose on them.¹⁸³ The laws that have been enacted have been aimed at being proactive and progressive; this was done to effectively redress the substantial inequalities facing women, racial minorities, disabled persons and aboriginal persons.¹⁸⁴ The laws came about as a result of years of lobbying by trade unions and community groups.¹⁸⁵

The Supreme Court of Canada first initiated employment equity laws in its interpretation of human rights legislature and held findings that had a vast impact on the future of pay equity legislation.¹⁸⁶ The first significant finding was that discrimination is primarily systemic and unintentional and includes employment practices which might at first appear neutral, but which when carefully considered negatively affect disadvantaged groups such as women. The second, asserted that human rights are special laws which are only second in importance to the constitution and be practically implemented so that discrimination can be recognized consequently eliminated. The third and final finding of the court was that special measures for employment equity plans which comprised of having ascertainable goals which were reasonable, was necessary to remedy systemic discrimination.¹⁸⁷ This careful focus on the systemic and unintentional nature of discrimination and the proactive nature and an approach that focuses on results has greatly benefitted the Canadian legislative framework.¹⁸⁸

¹⁸¹ Ebrahim, S *A critical analysis of equal remuneration claims in South African law*, (2014) LLM Thesis, University of South Africa at 46.

¹⁸² 16th CEE Report (note 99: 9).

¹⁸³ Cornish, M 'Employment and pay equity in Canada--Success brings both attacks and new initiatives', (1996) 22 *Can.-U.S. L.J.*265 available at: <http://scholarlycommons.law.case.edu/cuslj/vol22/iss/35> accessed on

¹⁸⁴ *Ibid* 265.

¹⁸⁵ *Ibid* 266.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid* 267.

4.3.2 Canada's legislative framework

The laws regulating equal pay in Canada can be separated into four categories:¹⁸⁹

- a) Laws that guarantee equal pay for equal work;
- b) Laws that require equal pay for work of equal value;
- c) Human rights legislation that prohibits unequal treatment in employment and
The guarantee of gender equality in section 15 of the *Canadian charter of Rights and Freedoms*

4.3.3 Equal pay for equal work

Equal pay for equal work comprises of section 7 and 10 of the Canadian Human Rights Act¹⁹⁰ and section 43 of Ontario's Employment Standard's Act.¹⁹¹ The main thrust of these pieces of legislation is that women must be paid an equal wage for equal work performed by them. These laws are complaint based and are restricted to remedy grievances within the specified occupational groups. The laws are deemed to have been successful when women and men are paid the same wage for equal or substantially similar work.¹⁹² The legislation is meant to assure female employees that the work that they engage in will not be undervalued or deemed inferior to that performed by men. Equal pay for equal work legislation therefore makes certain that no worker will be treated unequally based on gender.¹⁹³

4.3.4 Equal pay for work of equal value

Canadian equal pay for work of equal value legislation is premised on the idea that it is possible to meaningfully participate in a wage comparison of comparable jobs done by women and men. These laws are section 11 of the Canadian Human Rights Act (CHRA) and the Ontario Pay Equity Act (PEA).¹⁹⁴ The acts operate differently in that the CHRA is complaint based whilst the PEA is a compliance based piece of legislation that requires active participation on the part of the employer.¹⁹⁵ What is similar to both acts is that they require employers to be active in achieving and maintaining pay equity through the use of gender neutral comparison systems that will measure the relative value of male and female job classes.¹⁹⁶

¹⁸⁹ Kruth, K "A case for Canadian pay equity reform" (2015) 5:2 *UWO Western Journal of Legal Studies* 6, available at <<http://ir.lib.uwo.ca/uwojls/vol5/iss2/2>>. Accessed on

¹⁹⁰ RSC 1985, c H-6 [CHRA].

¹⁹¹ 2000, SO 2000, c 41.

¹⁹² Kruth (note 198: 6).

¹⁹³ *Ibid.*

¹⁹⁴ RSO 1990, c P7 s 14(1-9) [PEA].

¹⁹⁵ Kruth (note 198: 8).

¹⁹⁶ *Ibid.*

Pay Equity Act

Under the PEA male dominated job classes are defined as jobs covering 70 per cent or more male workers and female dominated job classes are said to comprise of 60 per cent or more female workers. Employers compare occupations undertaken by male and female employees. These occupations must be comparable within each ‘establishment’: this is understood to be a specific geographic area in which the workplace is situated.¹⁹⁷

There are three evaluation methods under which this is done under the PEA. The PEA places the onus on the employer to take active steps to design a gender-neutral comparison system that evaluates jobs based on general criteria. This criterion includes skills, effort, responsibility and working conditions. After designing a gender-neutral comparison system, the employer commences with one of the three types of comparison methods as mentioned before. These types of comparison are *direct*, *proportional value* and *proxy*.

- a) Under the *direct* method of comparison, a female job class is compared to a male job class that has a similar score on the gender-neutral comparison system. The employer then compares the female job class to the male job class with the least pay. If the female job class is paid less than the comparator, the employer is obligated to make up the difference and eliminate this gap.¹⁹⁸
- b) The *proportional value* method of comparison is used when a comparable male job class is not available within the establishment. This method of evaluation indirectly compares male and female job classes by considering the relationship between compensation and work performance in the male job classes. The proportional value approach once assigned to male job classes the same is done for female job classes. Pay equity is attained when the relationship between performance and compensation is the same for all job classes within the establishment.¹⁹⁹
- c) The *proxy* method of comparison is confined strictly to the public sector. This method is also used when there is no male comparator available within the establishment. The method entails the employer selecting a comparable female job class in another organization that has achieved pay equity as the suitable comparator.²⁰⁰

What is of further importance is that the PEA necessitates not only the execution of pay equity but also an effort to ensure that the legislation is complied with must be made. Once pay equity

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid 9.

²⁰⁰ Ibid.

has been reached in the workplace under the PEA, any changes in compensation experienced by employees thereafter are still expected to adhere with guidelines under the act. It is the responsibility of employers and bargaining agents to ensure that the wage gap does not continue to grow. For any changes in circumstances that renders the act non-compliant, the legislation requires that employers publicly circulate an amended plan to all affected employees that will purport to bring the wages back into compliance.²⁰¹

4.3.5 Human rights legislation and pay equity

Canadian human rights legislation prohibits unequal treatment in employment. Section 7 and 10 of the CHRA and section 5 of Ontario's Human Right's code²⁰² disallows discrimination in employment, this prohibition is taken to also include discrimination in wages.²⁰³

4.3.6 The *Charter* and pay equity

The Ontario Superior Court of Justice's interpretation of section 15 of the Canadian Charter of Rights and Freedoms²⁰⁴ requires that the federal government comply with gender equality and to protect pay equity gains, the Charter has also on occasion been used to resolve pay equity cases.²⁰⁵

It is submitted that the issue with Canada's equity laws has not been so much that they are unsuccessful but whether the success or potential success has been the source of their demise or has been limiting in the sense that pay equity laws are effective in raising the wages of female's work in relation to comparable men's work, but also result in simultaneously increasing the labour costs for employers. This could have the effect of putting the laws in direct conflict with the deficit-cutting agendas of certain government initiatives and the cost-cutting drive of certain businesses.²⁰⁶ The challenge that would need to be overcome is the integration of women and racial minorities into the labour force in a way that benefit the government and businesses.²⁰⁷

4.4 Unequal pay in the United Kingdom

²⁰¹ Ibid.

²⁰² RSO 1990, c H-19.

²⁰³ Kruth (note 198: 10).

²⁰⁴ The Constitution Act, 1982.

²⁰⁵ Kruth (note 198: 11).

²⁰⁶ Cornish (note 192: 277)

²⁰⁷ Ibid.

The legislation for equal pay for equal work or work of equal value in the United Kingdom is found under the Equal Pay Act (EA).²⁰⁸ This piece of legislation is aided by the Equal Pay Statutory Code of practice (The code)²⁰⁹ which is not enforceable in law. The code is divided into two parts, part one aids in interpreting the law and part two provides guidance on how to eliminate pay discriminatory practices. For our purposes part one is important as it states that,

‘The purpose of Part 1 of this code is to help employers, advisers, trade union representatives, human resources departments and others who need to understand and apply the law on equal pay, and to assist courts and tribunals when interpreting the law’²¹⁰.

4.4.1 United Kingdom legislative framework for unequal pay disputes

In section 138 of the EA an employee who believes she is not receiving equal pay is empowered to approach her employer to request information that will help her to establish whether this is so, and if she finds that a pay disparity does exist she may then may ask for reasons, and if still aggrieved may take the matter to court, also known as the employment tribunal. The code asserts that a woman can claim equal pay and other contract terms with a comparator.²¹¹ The EA sets out what equal work is as it pertains to the Act. Section 65(1) indicates that A’s work is equal to that of B if it is:

- a) like B’s work. The code provides that this is work that is the same or broadly similar, provided that where there are any differences in the work, these are not of practical importance, this is also known as ‘like work’;²¹²
- b) rated as equivalent to B’s work, which is interpreted to mean work that is different, but which is rated under the same job evaluation scheme²¹³ as being work of equal value, also known as (work rated as equivalent);²¹⁴
- c) of equal value to B’s work. This means work that is different, but of equal value in terms of factors such as effort, skill and decision making, known as ‘work of equal value’.²¹⁵

When this cannot be done by the court,

²⁰⁸ Equality Act, 2010 (EA).

²⁰⁹ Equal Pay Statutory Code of Practice to the Equality Act, 2010 (Equal Pay Code).

²¹⁰ Item 12 of the code.

²¹¹ Item 34 of the code.

²¹² Ibid.

²¹³ The code in item 39, explains that “Job evaluation is a way of systematically assessing the relative value of different jobs. Work is rated as equivalent if the jobs have been assessed as scoring the same number of points and/or as falling within the same job evaluation grade”.

²¹⁴ Item 34 of the code.

²¹⁵ Ibid.

‘The tribunal may, according to section 131 of the EA, before determining the question, require a member of the panel of independent experts to prepare a report on the question. If after that it is determined that the claim of a women’s job being of a lower value than the comparator’s, then the equal value will fail on those grounds unless the employment tribunal has reasonable grounds for suspecting that the report or evaluation was tainted by discrimination or in any other way unreliable’.²¹⁶

4.4.2 Finding the comparator

Section 79 of the EA holds that a woman can claim equal pay for equal value with a male in the same employ as her, the choice of comparator is her own and she may select whomever she wishes to be compared to. The comparator does not have to have been identified from the beginning of the proceedings. The comparator can be employed by the same or by an associated employer, or by the same or an associated employer at a different establishment. The latter can only be done if it is provided that common terms and conditions apply either generally between the employers in the workplace or as between the women and her comparator.²¹⁷

4.4.3 Defences to an equal pay claim

The code however makes it evident that there are certain defences that an employer may use in an equal pay claim against his employee. The employer may raise argument against the claim that²¹⁸

- The women (employee) and her comparator do not perform equal work as envisaged by the EA,
- The comparator chosen is not one that is allowed or recognised by the EA,
- The difference in pay is genuinely as a result of a material factor which is not in any way related to the sex of the job holders.

Section 69 of the EA recognises that there may exist a material factor that could very well be the reason for the pay disparity between the employee and the comparator. It is up to the employer to show that the difference in pay or contractual term is due to a material factor which does not in itself in any way discriminate against the employee either directly or indirectly.²¹⁹

²¹⁶ Section 131(6) of the EA.

²¹⁷ Item 57 of the code.

²¹⁸ Item 74 of the code.

²¹⁹ Item 82 of the code explains what is meant by direct discrimination:” A material factor will be directly discriminatory where it is based on treating women and men differently because of their sex. Item 182 provides an example of indirect discrimination where, if an employee is entitled to a premium for working unsocial hours and fewer women than men can do this because of their caring responsibilities, it will be indirectly discriminatory, and the employer will have to be able to prove it is justified”.

In the case of *Glasgow City Council v Marshall*²²⁰ the court held that in an equal pay claim the employer must identify the factor(s) which he seeks to rely on and prove that:²²¹

- “It is the real reason for the difference in pay and not a sham or pretence,
- It is causative of the difference in pay between the woman and her comparator,
- It is material i.e. that is to mean significant and relevant, and lastly,
- It does not involve direct or indirect discrimination.”

A claim will fail if it is found that there is a non-discriminatory factor for the unequal pay between the employee and her comparator.

4.5 Conclusion

It is evident that Canada and the United Kingdom use varying methods in their combatting of pay discrimination. Whilst Canadian legislation plays a more proactive role in requiring employers to comply with the law, the United Kingdom like South Africa, is more complaints based and does more in using legislation to regulate the unequal pay grievances that using the tribunal. It is suggested that an application of both methods would go some way in combating unequal pay in the South African labour market, whose position it has been seen is made worse by the existence of both gender and past racial discrimination. The concluding chapter will focus on establishing whether the research questions of this dissertation have been answered and on making recommendations that could vastly improve and bring the South African legislative framework into alignment with the ILO standards and principals of equal pay for equal work or work of equal value.

²²⁰ [2000] IRLR 272 HL. The case concerned the pay of instructors and teachers in special schools, where the female teachers, although lacking formal teaching qualifications, were employed in like work with male teachers in the same special schools. Conversely one male instructor claimed he was engaged in like work with female teachers. Both parties claimed they were entitled to the same pay with respective male and female teacher comparators. The case ultimately failed because the Equal Pay Act could not be used where the reason for the unequal pay is something either than sex discrimination.”

²²¹ Item 76 of the code.

CHAPTER FIVE

5.1 Conclusion

During the equal pay discussion in this paper it was found to be evident that the current legislative framework provides little if any chance of success in the case of equal pay claims, this evidenced by the cases discussed above of which only one was successful²²² and even so, had been heard under old Labour Relations Act which is no longer in force. The new Employment Equity Amendment Act²²³ along with its regulations sought to bring the existing legislature into compliance with ILO standards but the effectiveness thereof is dubious. The introduction of the amendments did nothing more but restate the law as it currently stood, as previously mentioned in chapter two, the introduction of section 6 (4)²²⁴ and section 6(5)²²⁵ provided no change in the law in the face of pay discrimination in South African Law, unfair discrimination had long since been recognized, the previous section 6(1) of the EEA prohibited unfair discrimination in employment policies or practices, this was the original section under which unequal pay claims were brought. Even though the Amendments were made in response to the ILO's criticism for a lack of express statutory provision when it comes to age discrimination, what was done is merely duplicate a law that already existed²²⁶ of which does little to address the wage gap which continues to grow, and begs the question if the ILO criticism was addressed at all.

The fact that no substantive change occurred means the state of the legislative framework remains inadequate and insufficient in its service to employees seeking to challenge their employers on pay differentials. The negligible number of income disputes are misleading as unfair wage discrepancies remain a reality.²²⁷ The biggest challenge in making legislature work for individuals in a fair manner can be attributed largely to the heavy burden of proof placed²²⁸ upon complainants, which serves to put them at a loss before litigation has even begun, it is no secret that black and female employees rarely if ever have

²²² *Leonard Dingler Employee Representative Council and others v Leonard Dingler* (note 125 above).

²²³ Act 47 of 2013.

²²⁴ Section 6(4)

“provides that a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in s 6(1)”.

²²⁵ Section 6(5) empowers the Minister of Labour, after consultation with the Commission for Employment Equity, to prescribe the criteria and the methodology for assessing work of equal value.

²²⁶ D Du Toit, ‘Protection against Unfair Discrimination: Cleaning up the Act’ (2014) 35 *ILJ* 2629.

²²⁷ *Ibid* 2624.

²²⁸ Vettori (note 6 above ;479).

been able to satisfy this onerous burden of proof, in which the court must be satisfied that their work was indeed of equal value or similar to that performed by their white comparator.

The role of the courts as evidenced by case discussion has so far been limited for the employer to state whether the reasons of which unequal pay is based are justifiable or not.²²⁹ The courts neglect or avoid the important role that they have in redressing past inequalities and enforcing transformation through their interpretation of statute.²³⁰ A more proactive stance is needed in highlighting to employers the need for policies that ensure equal wages are earned by employees performing the same or like work regardless of race or gender. Furthermore, Judges should be mindful of the onerous burden the claimant must prove in equal pay cases especially where such discrimination may not as obvious but is still nonetheless equally harmful.²³¹

South Africa could benefit immensely from adopting methods that jurisdictions with more knowledge and experience have used in their combat for unequal pay. Unequal methods adopted in Canada and the United Kingdom as discussed above are examples of such jurisdictions. The application if adopted would necessitate the inclusion of racial discrimination in the policies as opposed to only gender discrimination. Canada unlike South Africa has explicit laws that regulate pay equity perhaps these are the type of laws envisioned by the ILO when the criticism of express laws was aimed at South Africa. The existence of both complaints based laws and proactive that require the involvement of employers, bargaining agents and the government reduce the wage gap²³² would be an unimaginable advantage.

The United Kingdom on the other hand has given effect of the equal pay equal value principle in a way that the EEA²³³ falls short, although like South African law the EA²³⁴ is complaints based it differs in the sense that the EA allows for an independent expert upon the request of the court to evaluate whether the jobs performed by the claimant or comparator are of equal value. The independence of the expert lessens the burden of proof on the claimant.

²²⁹ Du Toit (note 234 above;2628).

²³⁰ Collier and Fergus (note 185 above;485).

²³¹ Ibid.

²³² Kruth (note 197 above ;8).

²³³ Employment Equity Act 55 of 1998 (EEA).

²³⁴ Equality Act, 2010 (EA).

It is clear from this dissertation that the law as it relates to equal pay for equal work or work of equal value principle in South Africa falls short of the objectives the ILO and there remains much room for improvement.

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