

LLM MINI DISSERTATION

**EQUAL PAY FOR EQUAL WORK AND WORK OF EQUAL VALUE: BRIDGING
THE GENDER PAY GAP**

by

Devon Basson

18374426

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Supervisor: Professor Monray Marsellus Botha

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PLAGIARISM DECLARATION

I declare that *Equal Pay for Equal Work and Work of Equal Value: Bridging the Gender Wage Gap in South Africa* is my own work, that is has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

SIGNED:

DEVON BASSON _____

PROFESSOR M.M. BOTHA _____

30 OCTOBER 2019

KEYWORDS

Gender wage gap

Work of equal value

Constitution

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Women

Differentiation

Discrimination

Equal pay

ABBREVIATIONS/ACRONYMS

EA:	Equality Act 2010
ECJ:	European Court of Justice
EEA:	Employment Equity Act 55 of 1998
EPA:	Equal Pay Act of 1970
ESA:	Equity Standards Act of 2000
EU:	European Union
IC:	Industrial Court
ILO:	International Labour Organisation
LC:	Labour Court
LRA:	Labour Relations Act 66 of 1995
PEA:	Pay Equity Act of 1990
TFEU:	Treaty on the Functioning of the European Union
UK:	United Kingdom

CHAPTER ONE - INTRODUCTION

1.1 Background and introduction

Before proceeding with the gender pay gap discussion, it is necessary to understand how women have suffered unfair treatment throughout the years. The reason being that it provides us with a better understanding of what women had to endure, other than earning less than their male counterparts. The situation for women in South Africa has never been easy. Over the last few decades things have steadily changed to accommodate women more, but there are still some lingering issues, such as the wage gap, that needs urgent attention.

At the onset of the twentieth century in South Africa all previously independent African policies was conquered, and the white population took control.¹ By the white population taking control of the African community, the economic independence of the African community was subjected to African men working on mines and on white owned farms.² Once various minerals were discovered in South Africa, it changed the South African economy once again. These changes that came about were significant for the role that women played, especially black women.³

In the early twentieth century, 1912, black women started to form groups to take on social roles in the churches, but they were never recognised nor accepted as members of the African National Congress.⁴ This acceptance only came into effect in 1943.⁵ South Africa's labour force back in the apartheid years comprised of four race groups – Africans, whites, coloureds and Indians.⁶ This racial classification was done in accordance with the Population Registration Act⁷ which was a rigid system of identification according to race.⁸ Similarly, white women also were not allowed to partake in any political decision making. It was only in the 1930's where they gained

¹ Hepple *South Africa: Workers under Apartheid* (Christian Action Publications, London) 1969 3.

² *Ibid.*

³ *Ibid.*

⁴ Anonymous 'History of women's struggle in South Africa' accessed at <https://www.sahistory.org.za/article/history-womens-struggle-south-africa> on 24 October 2019.

⁵ *Ibid.*

⁶ Hepple 10.

⁷ Act 30 of 1950.

⁸ Hepple. At 3.

the right to take part in decision making processes.⁹ In the 1930 the Afrikaner women, living in the lands, similarly to their Coloured, Indian and African counterparts, began to enter the labour market, where they often found work in the industrial sector.¹⁰

The South African society was, and in some instances still is, a patriarchal system. The role fulfilled by women, both black and white, was that of a domestic one, one where they needed to attend to the house, children etc.¹¹ It was seen that women were subordinates to men and had to obey their every command. In the late 1800's and early 1900's if a woman were to work or be economically active, it was not seen as feminine.¹² During the ages women have successfully fought for the right to vote, they fought against the extension of the notorious pass laws to women under apartheid, demanded and attained legal abortions and have risen to the ranks of parliament.¹³ Women are also at risk, daily, of being attacked in some way or another.¹⁴ The one thing that has been with women during the last century is that they have never been paid equal remuneration in relation to their male counterparts for doing the same and or similar work. Women have suffered a tremendous amount of past injustices.

South Africa during apartheid did not have any laws governing discrimination, let alone pay discrimination. The laws in the apartheid era was solely written to protect and give advantage to white people. As discussed above, women and especially black women, have suffered far more than any other group in South Africa.¹⁵ Except for the fact that women were not allowed to work and when they eventually started to work, they worked under different circumstances when compared to their male counterparts.¹⁶ However in 1957 the Wage Act¹⁷ was introduced. Section 5(b) of the Act¹⁸ was the first time that the principle of equal pay for equal work or equal value in South Africa could be found in pay disparities between different races and gender. This piece of

⁹ n 4 above.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ n 1 above at 16.

¹⁶ *Ibid.*

¹⁷ Act 5 of 1957.

¹⁸ *Ibid.*

legislation may have given rise to this new principle, but it was never effectively applied.¹⁹ Section 5(b)²⁰ stated that:

‘in making its reports to the Minister, the Board must show “the class or classes of employees to whom it would be equitable . . . that remuneration should be paid at such rates as will enable them to support themselves in accordance with civilised standards of life.”’²¹

This however is contradictory to what Section 8(4) of the Wage Act,²² which provides that “the Board shall not differentiate or discriminate on the basis of race or colour”.²³ If one compares these two sections from the same piece of legislation, it becomes apparent that even though pay disparities were acknowledged or identified, they were not applied to ensure no discrimination between race and/or gender took place, as Africans were still only paid one-third of what was paid to the lowest white wage.²⁴

The first cases of where the term discrimination was used, the Industrial Court (IC) was faced with discrimination against trade unions and members of a trade union.²⁵ The next ten years after the first cases of discrimination was heard, it was left to the IC to ‘strike down cases of permissible discrimination as unfair labour practices,²⁶ for example on grounds of race,²⁷ sex²⁸ and trade unions.’²⁹ In this process the meaning of discrimination had to be considered in more detail.³⁰ There was a distinction made between differentiation and discrimination.³¹ Differentiation meant ‘treating people differently on permissible grounds’ while discrimination meant ‘treating people unequally on impermissible grounds’³². The International Labour Organisation (ILO) Convention on Discrimination in Employment and Occupation³³ was used as a point of reference in defining discrimination.³⁴ In *SACWU & Others v Sentrachim Ltd*³⁵ the Industrial Court, faced, quoted the Convention as follows:

¹⁹ n 1 above at 27.

²⁰ n 17 above.

²¹ n 19 above.

²² n 17 above.

²³ n 19 above.

²⁴ n 1 above at 28.

²⁵ See *Raad van Mynvakbonde v Minister van Mannekrag en ‘n Ander* (1983) 4 ILJ 202 (T); *UAMAWU & Others v Fodens (SA) (Pty) Lt.* (1983) 4 ILJ 212 (IC).

²⁶ Du Toit D “Protection Against Unfair Discrimination In The Workplace: Are The Courts Getting It Right?” 1 2.

²⁷ *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC).

²⁸ *J v M Ltd* (1989) 10 ILJ 755 (IC).

²⁹ *Mtshamba & others v Boland Houtnywerhede* (1986) 7 ILJ 563 (IC).

³⁰ n 26 above at 3.

³¹ *Ibid.*

³² *Ibid.*

³³ 111 of 1958.

³⁴ n 26 above.

³⁵ (1988) 9 ILJ 410 (IC) at 429; cited with approval in *Chamber of Mines v MWU* (1989) 10 ILJ 133 (IC) at 157.

'Discrimination is defined in the convention as including any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. 'There are, however, limits, [with] art 1 s 1(2) stating: Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.'

Item 2(1)(a) of Schedule 7 to the Labour Relations Act (LRA)³⁶ provided that 'an unfair labour practice meant any unfair act or omission that arises between an employer and an employee including the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.'³⁷ This item,³⁸ which was a codification of an unfair labour practice, was short-lived as it was repealed in 1991 and replaced by section 6(1) of the Employment Equity Act (hereinafter the EEA),³⁹ which expressly states that unfair discrimination is prohibited in all employment policies and practices.⁴⁰

Prior to 1993 and before the shift came in our political landscape, differentiation between employees were allowed if they were based on valid or work-related grounds.⁴¹ Unfair discrimination was defined as unequal treatment that was based on impermissible grounds⁴² and was prohibited.⁴³ Du Toit explains that "the courts, in practice, treated the word 'unfair' as an open-ended term referring to discrimination on all grounds that were found to be impermissible even though they were not mentioned in the definition of unfair labour practice."⁴⁴

³⁶ Act 66 of 1995.

³⁷ Laubscher "Equal Pay for Work of Equal Value- A South African Perspective" 2016 *ILJ* 804 805

³⁸ n 36 above

³⁹ Act 55 of 1998.

⁴⁰ A number of early equal pay cases were determined under item 2(1) of Schedule 7 of the Labour Relations Act, such as *Transport and General Workers Union v Bayete Security Holdings* [1999] 4 BLLR 401 (LC), *Ntai v South African Breweries Limited* (2001) 22 ILJ 214 (LC) and *Louw v Golden Arrow Bus Services* [2000] 3 BLLR 311 (LC).

⁴¹ n 26 above.

⁴² For example, race, gender, creed etc.

⁴³ n 26 above at 3.

⁴⁴ *Ibid* at 4. Also see for example, *Mthembu & Others v Claude Neon Lights* (1992) 13 ILJ 422 (IC) which dealt with alleged discrimination based on union membership.

In the period 1993 – 1999 (the period from the Interim Constitution⁴⁵ to the EEA⁴⁶), the Interim Constitution prohibited unfair discrimination in every aspect of life within South Africa.⁴⁷ Section 8⁴⁸ stated that “no person shall be unfairly discriminated against on any ground, including a number of listed grounds such as race, sex and religion.”⁴⁹ It also stipulated that “affirmative action measures were not prohibited.”⁵⁰ For a couple of years thereafter the Industrial Court still continued to exercise its unfair labour practice jurisdiction, which ultimately meant that if there was discrimination alleged in the workplace on any of the grounds listed in section 8,⁵¹ such allegations were treated as an unfair labour practice.⁵² The Interim Constitution went further and defined indirect⁵³ and direct discrimination⁵⁴ and subsequently prohibited discrimination even further.⁵⁵ Even though the Industrial Court adjudicated on discrimination matters, their judgments were not very clear which led to even more confusion.⁵⁶

In 1997 our current Constitution⁵⁷ took effect and contained, like our Interim Constitution, the prohibition of unfair discrimination.⁵⁸ The Constitutional Court was then tasked in the *Hoffmann v South African Airways*⁵⁹ to interpret the meaning of unfair discrimination in terms of section 9.⁶⁰ Thereafter the LRA⁶¹ came into effect and did away with the Industrial Court.⁶² The LRA⁶³ then included both listed and unlisted grounds, similar to the Constitution, on which discrimination is prohibited.⁶⁴ The LRA⁶⁵

⁴⁵ Constitution of the Republic of South Africa Act 200 of 1993.

⁴⁶ Act 55 of 1998.

⁴⁷ n 26 above at 4.

⁴⁸ n 45 above.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² n 47 above.

⁵³ Discrimination based on a seemingly neutral measure which effectively discriminates against a group and where there is no objective and fair justification, for example, giving fewer leave days to employees on fixed-term contract where females predominantly worked on fixed term contracts.

⁵⁴ Discrimination based expressly on a listed ground in section 8, for example, gender.

⁵⁵ *Ibid.*

⁵⁶ n 52 above. Also see 2 cases of note that where the Industrial Court were clear, *Collins v Volkskas Bank* (1994) 15 ILJ 1398 (IC), which relied on ILO Convention 111 of 1958, and *Association of Professional Teachers & Another v Minister of Education* [1995] 9 BLLR 29 (IC) where the court distinguished between differentiation and discrimination and what constituted fair discrimination.

⁵⁷ Section 9 of the Constitution of the Republic of South Africa, 1996.

⁵⁸ n 47 above at 5.

⁵⁹ [2000] 12 BLLR 1365 (CC).

⁶⁰ n 58 above. Also take note at the time of the dispute mentioned in the Hoffmann-case, the LRA was not yet in effect.

⁶¹ Act 66 of 1995.

⁶² n 58 above.

⁶³ Schedule 7, item 2(1)(a) of Act 66 of 1995.

⁶⁴ n 62 above.

⁶⁵ n 63 above.

went further and added the principle of inherent requirement of a job as a defence to employers to justify differentiation.⁶⁶ In 1997 Convention 111⁶⁷ was ratified and the EEA⁶⁸ was enacted which replaced item 2(1)(a) of Schedule 7 of the LRA⁶⁹ with section 6(1) of the EEA,⁷⁰ which had a similar provision of prohibition of unfair discrimination.⁷¹

The purpose of the EEA was to implement the constitutional prohibition of unfair discrimination in the workplace⁷² and the EEA also had to in compliance with international law obligations⁷³, especially ILO Convention 111 of 1958⁷⁴. This effectively meant that the EEA had to be interpreted in line with ILO Convention of 1958 to ensure that unfair discrimination in terms of section 6 of the EEA⁷⁵ has the same meaning as that of discrimination in terms of the ILO Convention⁷⁶ and that it be interpreted accordingly.⁷⁷

1.2 **Problem statement**

The World Economic Forum created a study in 2006 to investigate the gender pay gap globally to determine if the gap is closing and by how much it is closing by annually. This study can be found in the Global Gender Pay Gap Report.⁷⁸ This report provides in depth detail on the estimated time it will take to eventually close the gap between men and women in the workplace. From the report the gender pay gap during the period 2017-2018 has reduced by 0.03% and since the inception of this report in 2006, the gap has reduced by 3.6% globally.⁷⁹

If all things being equal are to be considered, with the current trends, the global gender pay gap will most likely only be closed in 108 years.⁸⁰ In this survey the World Economic Forum looked at 149 countries. South Africa was rated 19th out of the 149

⁶⁶ n 62 above.

⁶⁷ ILO Convention 111 of 1958.

⁶⁸ Act 55 of 1998.

⁶⁹ Act 66 of 1995.

⁷⁰ n 68 above.

⁷¹ n 66 above.

⁷² Section 2(a) of Act 55 of 1998.

⁷³ Section 3(d) of Act 55 of 1998.

⁷⁴ Discrimination in Respect of Employment and Occupation.

⁷⁵ N 68 above.

⁷⁶ 111 of 1958.

⁷⁷ N 71 above.

⁷⁸ [www. https://www.weforum.org/reports/the-global-gender-gap-report-2018](https://www.weforum.org/reports/the-global-gender-gap-report-2018) accessed on 21 August 2019

⁷⁹ *Ibid.*

⁸⁰ World Economic Forum – The Global Gender Gap Report 2018 p15.

countries. This means that of all the countries surveyed South Africa is 19th for having the smallest gender disparity gap. This sounds good if considering the global picture, but South Africa still has a 28.1% difference of remuneration between men and women doing the same or similar jobs.⁸¹ The global standard for pay disparities between genders are 19,4% according to the Global Gender Gap Report.⁸² This effectively means that South Africa has an increased 9.1% difference in wages that favours men if one considers the international wage gap of 19.4%. A further study done by the ILO⁸³ indicate that the wage gap between men and women in South Africa is far greater than originally thought, as the gap measures 49.2%.

South Africa's Constitution⁸⁴ sought to address inequality through section 9 in Chapter 2 of the Bill of Rights, which provides for equality and equal protection of the law to everyone.⁸⁵ Section 23 of the Constitution⁸⁶ determines that everyone has the right to fair labour practices. The term 'everyone' is very wide and could be interpreted in various ways.⁸⁷ In South Africa there are numerous non-standard employees.⁸⁸ Normally these non-standard workers are black unskilled females, by excluding these females because they do not fall within the definition of 'employee', these groups are negatively affected.⁸⁹ With all the legislation governing employment, there are various definitions of employees in each act.⁹⁰ The EEA⁹¹ prohibits both direct⁹² and indirect⁹³ discrimination⁹⁴ When discrimination is apparent and the more substantial its inroads

⁸¹ <https://www.businessinsider.co.za/south-africa-industries-pwc-executive-directors-practices-and-remuneration-trends-report-jse-gender-pay-gap-white-ceos-2019-7> accessed on 21 August 2019.

⁸² See n 48 above.

⁸³ International Labour Organisation: Global Wage Report 2017/18.

⁸⁴ Constitution of the Republic of South Africa, 1996.

⁸⁵ See *President of Republic of South Africa v Hugo* 1997 4 SA 1 (CC) which discussed formal versus substantive equality in para 41 it was stated that: "We need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth... we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved".

⁸⁶ *Ibid.*

⁸⁷ Fourie ES "Non-standard workers: The South African Context, International Law and Regulation by the European union" PER (2008)4 110 128.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ See definitions of employee under the Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998, the Basic Conditions of Employment Act 75 of 1997, the Skills Development Act 97 of 1998.

⁹¹ Act 55 of 1998.

⁹² Direct discrimination arises when the criteria on which differentiation is based are themselves unfair- for instance when an employer treats a woman less favourably than it does or would treat a man (Van Niekerk and Smit (eds) *Law @work*).

⁹³ Indirect discrimination occurs when criteria that are unfair in form produce inequitable results- for instance, criteria that on the face of it, seems neutral such as height, educational requirements and status (Van Niekerk and Smit (eds) *Law @work* 130).

⁹⁴ see section 5 of the EEA, Act 55 of 1998, where it is stated that 'every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in employment policy or practice.'

are on fundamental rights of employees, the justifiable reasons given for the discrimination must be much more persuasive than normally.⁹⁵ The EEA, however, does not define these concepts but courts have given meaning to it.⁹⁶ Equal work for equal value is an area in our discrimination laws that are complex and the EEA has only recently recognised equal pay for equal work or work of equal value.⁹⁷

Unlike equality laws in other jurisdictions, such as Iceland and the United Kingdom (UK), the Employment Equity Act, 55 of 1998,⁹⁸ only recently recognised and regulated claims for equal pay for equal work or work of equal value.⁹⁹ Equal pay or rather 'pay equity'¹⁰⁰ is a very broad concept. When looking at 'pay equity' there are two distinctions to be made: equal pay for equal work and equal pay for work of equal value.¹⁰¹ The concept of equal pay for equal work means that employees who perform substantially similar work within the same contextual setting and workplace, should earn the same wages.¹⁰² The concept of equal pay for work of equal value means that where a woman works in a predominantly female environment and her work has the same value of the work being done by another employee, a man, working in a predominantly male environment, the wages must be similar, even if their job descriptions differ.¹⁰³

The quality of the guidelines provided for in the EEA, are simply not enough to ensure that the gender pay gap will be bridged. A lack of quality of the discrimination laws we have in place and the proper analysis thereof has made the debate on equality and non-discrimination in the law more complex, and the neglect of such analysis has caused confusion.¹⁰⁴ Even though changes in legislation has been made, the inclusion of section 6(4) and section 6(5), in my opinion does not bring about a substantive change in our laws relating to pay discrimination in South Africa.¹⁰⁵ As mentioned

⁹⁵ *S v Bhulwana, S v Gwadiso* 1995 12 BCLR 1579 (CC), 1996 (1) SA 388 (CC) par 18.

⁹⁶ See Van Niekerk and Smit (eds) *Law@work* 130. Also see also *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) paras 23-24.

⁹⁷ See section 6(4) and 6(5) of Act 55 of 1998.

⁹⁸ Employment Equity Act, 55 of 1998.

⁹⁹ Van Niekerk and Smit (eds) *Law@work* (2018) 147.

¹⁰⁰ Hlongwane "Commentary on South Africa's position regarding equal pay for work of equal value" *Law Democracy and Development* 11 2007 69

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Ackerman "Equality and non-discrimination: Some analytical thoughts" 2006 22 SAJHR 597

¹⁰⁵ Laubscher "Equal Pay for Work of Equal Value- A South African Perspective" 2016 *ILJ* 804 2.

earlier, the prohibition of unfair discrimination with regards to equal pay was acknowledged in our law even before the era of democracy.¹⁰⁶ Du Toit explains that “the principle of equal pay for equal work, and equal pay for work of equal value, has its roots in pay discrepancies between men and women.”¹⁰⁷ In South Africa women do generally earn less than men, but there is also a discrepancy in wages between the different race groups of South Africa.¹⁰⁸

If one looks both locally and internationally, there has always been a need between people that pay discrimination should be eliminated.¹⁰⁹ Equal pay for equal work or work of equal value is indirectly governed by the EEA.¹¹⁰ The aim of the EEA is to achieve and promote equality in the workplace.¹¹¹ The Act does not expressly prohibit the unequal pay for work of equal value but merely prohibits discriminatory practices.¹¹²

1.3 Research questions

This paper will pose to answer various questions on the gender wage gap and how to effectively bridge the gap. The questions are as follows:

- Does the Employment Equity Act 55 of 1998 effectively and adequately regulate the issue of equal pay for equal work or work of equal value and the gender wage gap?
- Do the measures provided for in the EEA, provide South Africa with a fair chance to bridge the gender wage gap?

¹⁰⁶ Ibid. also see *Mthembu v Claude Neon Lights* (1992) 13 ILJ 422 (IC) and *South African Chemical Workers Union v Sentrachem* (1988) 9 ILJ 410 (IC), both of which concerned alleged unfair pay discrimination determined under the Labour Relations Act No 28 of 1956.

¹⁰⁷ n 37 above at 3.

¹⁰⁸ Ibid.

¹⁰⁹ Du Toit et al *Labour Relations Law: A comprehensive guide* (2015) 703.

¹¹⁰ See section 6(4) & 6(5) of Act 55 of 1998.

¹¹¹ Ibid. section 2.

¹¹² Hlongwane “*Commentary on South Africa’s position regarding equal pay for work of equal value*” Law Democracy and Development 11 2007 69. Also see *Harksen v Lane NO & Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (07 October 1997) in which the Constitutional Court set out the test to be followed in determining whether section 9 of the Bill of Rights is violated. In the *Harksen*-case it was made clear that there are two different tests to be applied –one in relation to s 9(1) and one in relation to s 9(3). Section 9(1) of the Constitution guarantees equal protection and benefit of the law to everyone” and s 9(3) prohibits unfair discrimination. The test in *Harken*, in relation to discrimination under section 9(3) of the Constitution, posed 3 questions, the first was whether there was differentiation? if there was differentiation the second question was ‘did the differentiation amount to discrimination?’ and lastly if there was discrimination, the last question would then be ‘if such discrimination was unfair?’. All three questions needs to be answered in the positive in order to constitute an infringement on section 9(3) of the Constitution. Also see *Ntai v SA Breweries Ltd* 2001 22 ILJ 214(LC); *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC).

- What should be done to ensure that the gender wage gap declines are bridged?

1.4 Research methodology

This dissertation will be in the form of a literature study. It will provide a summary discussion on how women suffered past injustices and how they still face the injustice, that is unequal pay. It will further provide clarity on how South Africa's laws, especially the laws governing discrimination, has evolved over the years. It will provide a critical analysis of the laws governing discrimination in South Africa, with a specific focus on the Constitution of the Republic of South Africa, 1996 and the Employment Equity Act, 55 of 1998. It will comprise of a critical analysis which draws comparison between South African and foreign legislation, South African and foreign jurisdiction case law, international instruments, textbooks and academic articles. Lastly this paper will aim to provide a detailed discussion on what recommendations South Africa can take from the United Kingdom, Canada, Iceland, Ireland (Northern Ireland) and the European Unions. My concluding remarks will focus on the international measures and how it could be effectively be applied in South Africa to bridge the gender age gap.

1.5 Chapter outline

Chapter one will set out the introduction. This includes but is not limited to the background of the history of injustices suffered by women, how our legislation has evolved, the problem statement, the questions that this dissertation will pose to answer, the research methodology and the outline of the chapters of this dissertation.

Chapter two will in brief discuss the onus of proof in discrimination matters. This Chapter will deal with the position in South Africa with regards to discrimination in general, but the focus will be on gender wage discrimination and the legislation we have in place. This Chapter will also provide a discussion on the ILO and their Conventions, Standards and recommendations on how they are applicable in South Africa This Chapter will also look at some of the earliest case law with regards to discrimination as well as the most relevant case law on wage discrimination.. Lastly, a brief discussion will be given on the remedies our legislation provides to an employee who has suffered unfair discrimination.

Chapter three will solely focus on the international perspectives on bridging the gender wage gap. In this Chapter the European Union, United Kingdom, Iceland, Ireland and Canada will be the focus of discussion. A critical analysis will be provided on the measures used by these countries to bridge the gender wage gap.

Chapter four deals with the recommendations taken from the above countries and how these recommendations could effectively be applied in South Africa to assist in bridging the gender wage gap. Lastly, I will give my concluding remarks on the position in South Africa and how we should proceed if we want to bridge the gender wage gap

CHAPTER TWO - PAY DISCRIMINATION IN SOUTH AFRICA

2.1 The EEA

The general principle is that different remuneration is not unfair¹¹³ and does not automatically come down to discrimination.¹¹⁴ Before the amendments took place in the form of section 6(4) & (5) of the EEA¹¹⁵ the EEA dealt with equal pay disputes indirectly under section 6(1) of the EEA read together with the definition of an employment policy or practice in section 1. Section 6(1) of the EEA states the following:

“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.”

The EEA was amended in 2013 by introducing the Employment Equity Amendment Act.¹¹⁶ The amendments to the EEA was introduced after the ILO criticised South Africa for not having express statutory provisions that deals specifically with gender wage discrimination. South Africa only made the necessary amendments due to the ILO criticising South Africa for failing to have statutory provisions expressly dealing with gender wage and race discrimination.¹¹⁷ The purpose of the inclusion of section 6(4) was accordingly ‘to deal explicitly with unfair discrimination by an employer in respect of the terms and conditions of employment of employees doing the same or similar work or work of equal value’.¹¹⁸ The amendment included section 6(4) to the EEA. Section 6(4) of the EEA reads as follows:

‘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

¹¹³ See *Transport and General Workers Union v Bayete Security Holdings* 1999 4 BLLR 401 (LC) para 7 which stated that ‘It is so that to pay one employee more than another for doing the same work may have amounted to an unfair labour practice under the Labour Relations Act 28 of 1956 (see *SA Chemical Workers Union & others v Sentrachem Ltd* (1988) 9 ILJ 410 (IC)), and would also be so under the wAct if it is done for an arbitrary reason. However, the mere fact that an employer pays one employee more than another does not in itself amount to discrimination (see *Du Toit et al The Labour Relations Act of 1995* 2 ed at 436). Discrimination takes place when two similarly circumstanced individuals are treated differently. Pay differentials are justified by the fact that employees have different levels of responsibility, expertise, experience, skills and the like.’

¹¹⁴ See n 105 above.

¹¹⁵ 55 of 1998.

¹¹⁶ 47 of 2013.

¹¹⁷ N 92 above at 2.

¹¹⁸ Memorandum on Objects of Employment Equity Amendment Bill, 2012. See Explanatory Memorandum at par 3.3.2 and 3.3.3.

that is directly or indirectly based on any or more grounds of unfair discrimination listed in subsection (1), is unfair discrimination.’

The legislature, acknowledging the complexity of an equal pay for work of equal value claim, has introduced section 6(5) to the EEA, which allows the Minister to prescribe the criteria and methodology for assessing work of equal value.¹¹⁹ Taking this into consideration the Minister has published the Regulations.¹²⁰ Regulation 4 defines work of equal value as:

“the work performed by an employee that is the same as the work of another employee of the same employer, if their work is identical or interchangeable;¹²¹ is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not interchangeable;¹²² is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7.”¹²³

Regulation 5¹²⁴ is of importance as it gives the methodology for assessing a claim of work of equal value. Regulation 5 states it must first be established whether the work concerned is of equal value and whether there is a difference in terms and conditions of employment, where after it must be established whether the difference constitutes unfair discrimination.¹²⁵

The Minister has, moreover, issued a Code of Good Practice on Equal Pay for Work of Equal Value (the Code).¹²⁶ Item 4.3¹²⁷ states that ‘when examining whether the obligation to apply remuneration equity in the workplace is being complied with, three key issues require scrutiny :

4.3.1. Are the jobs that are being compared the same, substantially the same or of equal value in terms of an objective assessment?

4.3.2. Is there a difference in the terms and conditions of employment, including remuneration, of the employees in the jobs that are being compared?

¹¹⁹ 2016 *PER / PELJ* (19) 1.

¹²⁰ Regulation 2 states that the Regulations have been published to prescribe the criteria and methodology for assessing work of equal value as contemplated in s 6(4) of the EEA.

¹²¹ Reg 4 (1).

¹²² Reg 4 (2).

¹²³ Reg 4 (3).

¹²⁴ Employment Equity Regulations, 2014

¹²⁵ Regulation 5(1)-(2).

¹²⁶ GN 448 in GG 38837 of 1 June 2015 (*Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*).

¹²⁷ *Ibid.*

4.3.3. If there are differences in the terms and conditions of employment, can these be justified on fair and rational grounds?’

Item 4.4 of the Code¹²⁸ states that:

‘Differences in terms and conditions of employment, including remuneration, of employees of the same employer are not unfair discrimination where the complainant and the comparator do not perform the same or similar work or work of equal value. A difference in remuneration will only be unfair discrimination if the differences are directly or indirectly based on race, sex, gender, disability or any other grounds listed in section 6(1) or any other arbitrary ground established in terms of section 11 of the Act.’

Probably the most important purpose of the Code is to provide practical guidance to both employers and employees regarding the application of the principle of equal pay for work of equal value in the workplace.¹²⁹ Regulation 6¹³⁰ sets out the criteria for assessing whether work is of equal value. 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 the 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) the physical, mental and emotional effort required to perform the work;
- d) the conditions under which work is performed, including the physical environment, psychological conditions, the time when and the geographic location where work is performed; and
- e) any other relevant factor.”¹³¹

The Code states that the factors listed in (a)-(d) above are generally regarded as being sufficient for evaluating all the tasks performed in an organisation.¹³² The weight to be attached to the criteria will vary depending on the sector, the employer and the job.¹³³ The Code, importantly, recognises that the undertaking of an objective job appraisal

¹²⁸ *Ibid.*

¹²⁹ Item 1.1 of the Code.

¹³⁰ Employment Equity Regulations, 2014. Also see item 5 and 6 of the Code of Good Practice on Equal Pay for work of Equal Value.

¹³¹ Items 6(1)(a) -(d), 6(2) of the Regulations.

¹³² Item 5.5 of the Code.

¹³³ Item 5.6 of the Code.

by an employer (job evaluation) is a necessary element of applying the principle of equal pay for work of equal value.¹³⁴

For the moment then, equal remuneration claims essentially revolve around the broad unfair discrimination provisions of the EEA¹³⁵, the EEA Regulations, Code of Good Practice and the ILO Conventions.

2.2 Onus of proof

In South Africa the onus of proof of a case of discrimination rest on the employee.¹³⁶ The employee needs to prove that there was differentiation, what the grounds for differentiation are and what the link is¹³⁷ and that it is still accepted that ‘placement of the onus to show fairness or justify discrimination on the employer does not address the problem of crossing the ‘discrimination-hurdle’ to begin with’.¹³⁸ Fergus adds another hurdle that employees must overcome and states that ‘Applicants are further constrained by the prevailing judicial construction of unfair discrimination requiring the alleged discriminatory conduct to be overt.’¹³⁹ Fergus explains that ‘Case law clearly indicates that while employees may have legitimate claims for discrimination at some level, the alleged acts are often not considered sufficiently flagrant as to justify imposing liability on their employers.’¹⁴⁰ Section 11(1) of the EEA¹⁴¹ deals with the

¹³⁴ Item 5.2 of the Code. Also see Item 6 and 7.3 which lists various factors and or grounds that can justify differentiation in pay: (a) seniority or length of service; (b) qualifications, ability, competence, or potential above the minimum acceptable levels required for the job; (c) performance, quantity or quality of work, as consistently assessed through a performance evaluation system; (d) demotion as a result of organisational restructuring or other legitimate reasons, without a corresponding pay reduction, resulting in pay inequalities in the same job category; (e) temporary employment in a position to gain experience or training; (f) the existence of a shortage of a relevant skill in a particular job classification; any other factor that is not unfairly discriminatory in terms of s 6(1) of the EEA.

¹³⁵ McGregor “*Equal remuneration for the same work or work of equal value*” 23 (2011) SA Merc LJ 498.

¹³⁶ Fergus E, Collier D “Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation” 2014 SAJHR 484.

¹³⁷ C Garbers ‘The Prohibition of Discrimination in Employment’ in K Malherbe & J Sloth-Nielsen (eds) Labour Law into the Future (2012) 18 at 21.

¹³⁸ *Ibid* at 40.

¹³⁹ n 136 above at 7.

¹⁴⁰ *Ibid*. Also see *Mokoena & another v Garden Art (Pty) Ltd & another* [2008] 5 BLLR 428 (LC), where the employee failed to establish that sexual harassment (and so gender discrimination) had taken place. According to the Court, the employee’s testimony was poor and unreliable and so, sexual harassment had not been proven. Yet, when the Court’s report of her testimony is read in light of the employee’s qualifications and societal position (as a cleaner), the picture it paints is of a vulnerable employee, who was not well advised in drawing up her statement of claim (or referral forms), or in presenting evidence in court. She was then subjected to extensive cross-examination by an advocate but represented only by a trade union official. In strict legal terms, the Court’s conclusion that sexual harassment had not occurred might have been correct. Yet, considering her plain disadvantage in presenting and proving her case, the outcome seems unjust. It further demonstrates the difficulty of establishing discrimination, of an adequately overt nature as to ensure its acknowledgment in Court; Mokoena paras 4 onwards & 52

¹⁴¹ Act 55 of 1998. Section 11 of the EEA provides that: (1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination; (a) Did not take place as alleged; or (b) is rational and not unfair, or is otherwise justifiable. (2) If

burden of proof this part of the EEA indirectly provides the respondent employer the guidelines on what they need to prove to avoid liability.¹⁴² The Courts have not done enough to evolve the legislation in such a manner that would assist employees in proving their discrimination claims.

2.3 The International Labour Organisation

South Africa re-joined the ILO in 1999 and has ratified certain key Conventions dealing with equality.¹⁴³ South Africa ratified both ILO Conventions promoting pay equity, namely the Convention concerning Discrimination in Respect of Employment and Occupation¹⁴⁴ and the Equal Remuneration Convention.¹⁴⁵ This ratification was done due to the criticism given by the ILO. South Africa complies with the 2 mentioned conventions in that it has amended the EEA to include sections with regards to pay disparities.¹⁴⁶

ILO Convention No 111¹⁴⁷ and ILO Discrimination (Employment and Occupation) Recommendation 111¹⁴⁸ are of special importance as the ILO Conventions and Recommendations are the primary international sources regarding remuneration in the workplace.¹⁴⁹ Article 1 of Convention 111 defines discrimination as:

“(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies.”

unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that (a) the conduct complained of is not rational; (b) The conduct complained of amounts to discrimination; and (c) the discrimination is unfair.

¹⁴² n 137 above. Also see section 50(2) of the EEA, 55 of 1998.

¹⁴³ 23 (2011) SA Merc LJ 489.

¹⁴⁴ No 111 of 1958 (in 1997).

¹⁴⁵ No 100 of 1951 (in 2000).

¹⁴⁶ Section 6(4) & 6(5) of Act 55 of 1998. Also see Olivier “Interpretation of the Constitutional provisions relating to international law” 2003 *PER/PELJ* 26 29 where the matter of *S v Makwanyane* 1995 (3) SA 391 (CC) is discussed and where it is explained to what extent international laws and standards needs to be considered.

¹⁴⁷ 1958.

¹⁴⁸ 1958.

¹⁴⁹ n 29 above 139.

In terms of the Convention, discrimination only arises if the treatment is based on a prohibited ground, and once established, the inquiry ends.¹⁵⁰ South Africa, and specifically the courts, are obliged to give regard to the various ILO Conventions and Recommendations. Section 39(1) of the Constitution¹⁵¹ requires that both instruments that are binding on South Africa and those to which South Africa is not a party to, must be used as tool to interpret our legislation.¹⁵² The LRA also makes provisions for international laws to be used when interpreting it.¹⁵³

Section 3(d) of the EEA¹⁵⁴ adds that the Act, and therefore the concept of 'discrimination, must be interpreted in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No 111).¹⁵⁵ It is clear from the above analysis of international labour law that the following factors are regarded as suitable factors to assess the value of work:

- a) skill;
- b) working conditions;
- c) responsibilities; and
- d) effort.¹⁵⁶

South Africa does make use of the above-mentioned criteria to justify why certain employees are paid more than others. But the ILO experiences a challenging implementation of the concept of 'equal pay for work of equal value' even today. In the 2007 ILO Committee of Experts Report it was noted that 'difficulties in applying the

¹⁵⁰ Du Toit *Equality in the Workplace* (2010) 154. Also see section 187 of the LRA, which deals with automatic unfair dismissals. In this instance a contrast can be drawn as section 187 provides that if a dismissal as based on a prohibited ground and it has been proven as conclusive, the unfairness of the dismissal would therefore be automatic and subsequently the employer will have no defence.

¹⁵¹ 1996.

¹⁵² Van Niekerk "Law@work" 4th edition 2018 32. Also see the matter of *S v Makwanyane* 1995 (3) SA 391 (CC) which provided clarity on how international standards should be used as a guiding principle in the interpretation of our laws. Section 23 was constitutionally tested in this matter. The Court made reference to the ILO standards. Also see *NUMSA v Bader Pop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC) where international standards were used.

¹⁵³ Section 1 and 3 of the LRA, 66 of 1995.

¹⁵⁴ Act 55 of 1998.

¹⁵⁵ No 111 of 1958 (in 1997).

¹⁵⁶ 2016 *PER / PELJ* (19) 11.

Convention in law and in practice result in particular from a lack of understanding of the scope and application of the concept of 'work of equal value'.¹⁵⁷

2.3 Most relevant case law in South Africa

*Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd*¹⁵⁸ was the first case that dealt with an unfair discrimination claim in terms of the LRA.¹⁵⁹ This case in short dealt with the unequal treatment of employees being paid weekly and employees being paid monthly, for purposes of their pension fund membership in a workplace.¹⁶⁰ All employees receiving payment on a weekly basis were black employees and most employees receiving payments on a monthly basis, were white.¹⁶¹ The court found that this 'amounted to indirect discrimination based on race.'¹⁶² The court further suggested that 'discrimination may be justified if the object [is] legitimate and the means proportional and rational.'¹⁶³

Du Toit then explains that "If this was so, it would be in direct conflict with ILO Convention 111 and, therefore, with the Constitution, the LRA and the EEA (which must all be interpreted in accordance with international law)".¹⁶⁴ The court did not disagree with the ILO Convention,¹⁶⁵ it rather used the terms discrimination as not implying actual harm but rather focussed on the distinctions based on characteristic which are generalised assumptions of groups of people.¹⁶⁶ The court in other words chose to not speak of discrimination as defined in the Convention¹⁶⁷ but rather spoke of generalised assumptions which could possibly be justified as fair.¹⁶⁸ This particular judgment however has been used by subsequent courts and that effectively means that if there is a claim for discrimination on prohibited grounds, such discrimination may be justified on the grounds of fairness which in turn reduces the protection available to employees.¹⁶⁹

¹⁵⁷ Rubery "Closing the gender pay gap: a review of the issues, policy mechanisms and international evidence" International Labour Office – Geneva: ILO, 2016

¹⁵⁸ [1997] 11 BLLR 1438 (LC).

¹⁵⁹ Du Toit D "Protection Against Unfair Discrimination In The Workplace: Are The Courts Getting It Right?" 1 6.

¹⁶⁰ n 129 above at para 1-5.

¹⁶¹ *Ibid.*

¹⁶² n 129 above at 1445.

¹⁶³ *Ibid* at 1448.

¹⁶⁴ n 130 above.

¹⁶⁵ 111 of 1958.

¹⁶⁶ n 134 above.

¹⁶⁷ n 130 above.

¹⁶⁸ n 130 above.

¹⁶⁹ n 130 above.

Some of the confusion created by the Dingler-case¹⁷⁰ was somewhat rectified by later judgments.¹⁷¹ In the matter of *Mias v Minister of Justice & Others*¹⁷² the Labour Appeal Court (LAC) was faced with the issue to establish whether an employer has committed an act of unfair discrimination and the LAC summarised it as follows:

In short: Is there a differentiation? If so, is it discriminatory? If so, is it unfair either directly, on one or more of the specified grounds, or indirectly?

Du Toit submitted that the *Mias*-case¹⁷³ “was broadly the sense in which section 6 of the EEA should be understood.”¹⁷⁴ The courts have in most instances not followed the approach in the *Mias*-case¹⁷⁵ and this has led to the court’s reasoning being unclear and important concepts, such as the meaning of discrimination, were blurred, especially the meaning of discrimination.¹⁷⁶

In the matter of *HOSPERSA obo Venter v SA Nursing Council*¹⁷⁷ promised much-needed clarity was provided to the meaning of discrimination.¹⁷⁸ The Court referred to ILO Convention 111¹⁷⁹ to establish the meaning of discrimination. The court then concluded that ‘age discrimination is absolutely prohibited in terms of the Convention as well as the EEA.’¹⁸⁰

South Africa does not have many cases on disputes on equal pay for equal work or work of equal value.¹⁸¹ The Labour Courts (LC)¹⁸² have however decided on a few matters that are of interest. I will focus on 2 of the most important cases on equal pay

¹⁷⁰ n 129 above.

¹⁷¹ n 130 above.

¹⁷² [2002] 1 BLLR 1 (LAC) at par 21.

¹⁷³ *Ibid.*

¹⁷⁴ “Protection Against Unfair Discrimination In The Workplace: Are The Courts Getting It Right?” 1 6.

¹⁷⁵ n 129 above.

¹⁷⁶ n 131 above at 7.

¹⁷⁷ [2006] 6 BLLR 558 (LC).

¹⁷⁸ Du Toit D “Protection Against Unfair Discrimination In The Workplace: Are The Courts Getting It Right?” 1 2.

¹⁷⁹ Of 1958.

¹⁸⁰ n 177 above.

¹⁸¹ 2016 *PER / PELJ* (19) 5.

¹⁸² *SA Chemical Workers Union v Sentrachim Ltd* 1988 9 ILJ 410 (IC); *National Union of Mineworkers v Henry Gould (Pty) Ltd* 1988 9 ILJ 1149 (IC); *Sentrachim Ltd v John* 1989 10 ILJ 249 (WLD); *Mthembu v Claude Neon Lights* 1992 13 ILJ 422 (IC); *TGWU v Bayete Security Holdings* 1999 4 BLLR 401 (LC); *Heynsen v Armstrong Hydraulics (Pty) Ltd* 2000 12 BLLR 1444 (LC); *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC); *Co-operative Worker Association v Petroleum Oil and Gas Co-operative of SA* 2007 1 BLLR 55 (LC); *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC); *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC); *Mutale v Lorcom Twenty Two CC* 2009 3 BLLR 217 (LC).

disputes. *Louw v Golden Arrow Bus Services (Pty) Ltd*¹⁸³ (hereinafter Louw) and *Mangena v Fila South Africa (Pty) Ltd*¹⁸⁴ (hereinafter Mangena) are the cases that need specific mentioning.¹⁸⁵

In the matter of *Louw*, the LC held that the mere differential treatment of persons from different races was not *per se* discriminatory on the ground of race,¹⁸⁶ unless the difference in race was the reason for the disparate treatment. Based on the Peromnes system, which was used to determine the rate of remuneration, there was at least one Peromnes grade difference between the size of the applicant's work (buyer) and that of the comparator (warehouse supervisor).

The LC further found that the applicant had failed to prove that the two jobs, on an objective evaluation, were of equal value. The LC remarked that this does not mean that the reason for the difference in salary was not due to racial discrimination, but it meant that racial discrimination had not been proved. It would not finally dismiss the application in the interests of justice, and it handed down an order of absolution from the instance.¹⁸⁷ An objective job evaluation method lends legitimacy to the relevant value which is attributed to the various jobs.¹⁸⁸

In *Mangena* the LC remarked that the EEA does not specifically regulate equal pay claims. It further remarked that a claim of equal pay for equal work falls to be determined in terms of the EEA, as the Act is broad enough to incorporate a claim of equal pay for work of equal value, notwithstanding the fact that the principle is not mentioned in the EEA.¹⁸⁹

The LC, noting that the *Equal Remuneration Convention*¹⁹⁰ refers only to the prohibited ground of sex, held that the principle of equal pay for work of equal value should be

¹⁸³ 2000 21 ILJ 188 (LC).

¹⁸⁴ 2009 12 BLLR 1224 (LC).

¹⁸⁵ See n 40 above for further cases as well as discussion on residual unfair labour practice. Also see n 143 above.

¹⁸⁶ See n 40 above on the discussion about discrimination which was originally categorised under an unfair labour practice. Also see *SACWU & Others v Sentrachem Ltd* 1988 9 ILJ 410 (IC) paras 429-43 and *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (L).

¹⁸⁷ *Louw* paras 26, 105-106, 130, 133

¹⁸⁸ *Ibid.*

¹⁸⁹ 2011 SA Merc LJ 497. Also see *Duma v Minister of Correctional Services* 2016 37 ILJ1135 (LC); *Cekiso and Premier FMCG (Pty) Ltd* 2016 37 ILJ 2615 (LC) and *Kutumela & others; Pretoria Metal Pressings—A Division of Denel SOC Ltd* 2016 37 ILJ 2620 (LC); *National Education Health and Allied Workers Union obo Sinxo and others v Agricultural Research Council* 2017 5 BALR 542 (CCMA); *South African Commercial, Catering and Allied Workers Union and another v Woolworths (Pty) Limited* 2016 JOL 35823 (LC).

¹⁹⁰ No. 100 of 1951 – ILO.

extended beyond the prohibited ground of sex to include the prohibited ground of race *in casu*. It held that it could therefore entertain a claim of equal pay for work of equal value under the EEA. The LC noted that it was enjoined by section 3(d) of the EEA to interpret the Act in compliance with South Africa's international law obligations which, *inter alia*, includes the Equal Remuneration Convention.¹⁹¹

The LC went further and stated that an applicant claiming equal pay for work of equal value must lay a proper factual foundation of the work performed by himself and that of his chosen comparator to enable the court to make an assessment as to what value should be attributed to the work. This factual foundation might include evidence of skill, effort, responsibility and the like in relation to the work of both the claimant and the comparator.¹⁹² It concluded that the basis for the applicant's claim of equal pay for work of equal value was non-existent. Both the claims of equal pay for equal work and of work of equal value were consequently dismissed.¹⁹³

2.4 Remedies

Section 50 of the EEA deals with the powers of the Labour Court¹⁹⁴ and provides the guidance on the sort of remedies¹⁹⁵ an employee can seek when unfairly discriminated against.¹⁹⁶ Normally the remedies are in the form of compensation and/or damages.¹⁹⁷ Fergus states that 'what is concerning is the Court's conservative attitude to remedies in workplace discrimination disputes. If substantive equality is to be facilitated through adjudication, the courts should be more mindful of their role in the transformation project.'¹⁹⁸

¹⁹¹ *Mangena* para 5.

¹⁹² *Mangena* para 15.

¹⁹³ *Mangena* paras 15, 17; also see 2011 *SA Merc LJ* 503 has stated that *Mangena* is the *locus classicus* on equal pay claims and will retain such status, notwithstanding possible changes to the EEA.

¹⁹⁴ Section 50 (1) of the EEA, 55 of 1998.

¹⁹⁵ *Ibid.* section 50(2).

¹⁹⁶ See *SA Airways (Pty) Ltd v Jansen van Vuuren* 2014 35 ILJ 2774 (LAC) para 74 – para 80 for a detailed explanation of 'compensation' and 'damages'. Also see *Association of Professional Teachers v Minister of Education* 1995 16 ILJ 1048 (IC

¹⁹⁷ *Ibid.* also see section 50 (2)(c)-(f) of the EEA.

¹⁹⁸ Fergus, Collier "Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation" 2014 *SAJHR* 484.

CHAPTER THREE: SELECTED INTERNATIONAL PERSPECTIVES ON THE GENDER WAGE GAP

3.1. European Union

Since the 1957 Treaty of Rome, the European Union (EU) has taken a stance to bridge the gender pay gap.¹⁹⁹ When one looks at the scope of EU law on gender wage equality, it becomes apparent that it has altered the landscape significantly for Europe. Europe in this context includes the EU nations as well as the European Free Trade Areas.²⁰⁰ The EU and the European Free Trade Areas makes up the European Economic Area. As with many other international jurisdictions, equality is a fundamental right in the European Economic Area. If one looks at Switzerland, who is not part of the European Economic Area, one can see the importance of equality because they have also adopted a gender wage equality policy.²⁰¹ In the EU and European Free Trade Areas all member-states must follow the precedents of the European Court of Justice (ECJ).²⁰²

In the 1970's across the EU member-states, the most obvious trend was that women came into the labour market.²⁰³ This resulted in an increase in activism by women and this effectively led to the EU-states to draft and adopt progressive laws on gender wage disparities.²⁰⁴ It became a necessity for EU officials to adopt equal pay laws, but the debate arose as to what the best process and form was for doing so. What was great importance to see during this time period was that the EU officials engaged in 'discussions with leading women's organisations.'²⁰⁵ As with many countries it took years for the EU officials and the member states to develop as there were a vast amount of 'different cultures, traditions and history.'²⁰⁶ It was only recently when these social systems removed themselves from the more traditional roles of men and

¹⁹⁹ Tudor "Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee across the Member-States" (2017) p 417. Also see Ingeborg Heide, *Sex Equality and Social Security: Selected Rulings of the European Court of Justice*, 143 INT'L LAB. REV. 299, 339 (2004).

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.* at p418. Also see TIM BALE, EUROPEAN POLITICS: A COMPARATIVE INTRODUCTION 31 (3d ed. 2013).

²⁰⁴ *Ibid.* Also see FRANCESCO DUINA, THE SOCIAL CONSTRUCTION OF FREE TRADE 110 (2006).

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.* At page 418.

women.²⁰⁷ As with many other international jurisdictions, even if there was a shift to bridge the wage gap, women still chose to engage themselves more in domestic work in comparison to the men who does not chose to do so.²⁰⁸

The Equal Pay Directive²⁰⁹ came into effect because of the changing social systems as well as the activism by women felt in the EU.²¹⁰ This Directive allows for pay for work of equal value and it also makes provisions for a comparison of wage rates across gender 'segregated' groups.²¹¹ As a result of the EU and its member-states adopting the Equal Pay Directive, the ECJ has changed and broadened the scope of the gender wage 'doctrine'.²¹²

The EU has shown throughout the years that they are committed to closing the gender wage gap, but there is still a political debate on this subject, and will in all likelihood continue for years to come.²¹³ As the EU has kept growing and new member-states became part, the commitment and desire there once was to keep evolving the law on gender wage equality, has taken a back seat and is no longer being pursued in the manner it was.²¹⁴ The EU over the years with their equal wage laws and various case law, have struggled to erase the gender wage disparities in the member-states.²¹⁵

One can say that the gender pay gap has been stable in the EU, but the constant problem is that the gap varies quite heavily, for example a country like Estonia has a wage gap of nearly 30% compared to the gap in Slovenia of only 4.4%.²¹⁶

Across the world of employment, especially women in employment, face various obstacles and disadvantages in the workplace that may affect their salaries.²¹⁷ Probably the biggest common obstacle around the world and not only in Europe, is

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ 75/117/EEC. Kindly take note that the directive was Repealed from 15 August 2009 by the *Equal Treatment Directive (Recast) (2006/54/EC)*, which came into force on 15 August 2008.

²¹⁰ See n80 above. At page 419

²¹¹ *Ibid.*

²¹² *Ibid.* also see Jacqueline O'Reilly et al., *Equal Pay as a Moving Target: International Perspectives on Forty-Years of Addressing the Gender Pay Gap*, 39 CAMBRIDGE J. ECON. 299, 300 (2015).

²¹³ *Ibid.* Also see Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 BERKELEY J. INT'L L. 27, 60 (2003).

²¹⁴ *Ibid.* at page 419.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.* also see Mark Smith, *Social Regulation of the Gender Pay Gap in the EU*, 18 EUR. J. INDUS. REL. 365, 376 (2012).

²¹⁷ *Ibid.* at page 420.

that of occupational separatism.²¹⁸ This separatism is described by *Graybaite* as “*crowding*”.²¹⁹ This means that women are limited to different types of work, or rather chose these specific types of work, which results in the demand being lower and thus the salaries are pushed down.²²⁰ These types of work that women normally find themselves in are nursing, caring and the service industry, while men find themselves in manual and technical employment.²²¹

In some instances it could even be argued that women are disadvantaged by claims such as that they are over qualified, over skilled and or even that they are assigned to a job that is less demanding or maybe the job position is unstable.²²² One can also argue to the contrary that women, more than men, would in all likelihood put a stop to their careers and the effect then is that they accumulate less experience, education and training, and by doing so they limit themselves.²²³ This could possibly then have a run on effect in the sense that employers would then be less attracted to women in employment, not on the basis of their race, but rather on the basis that they would then have to spend extra money and time of the female worker to invest in them through extra training etc. ²²⁴ Unfortunately it is a reality that there are fewer opportunities internationally for women as there are for men.²²⁵

Indirect discrimination normally does not get explained in detail in various legislation across the world, the EU however attacks indirect discrimination with its constitutional provisions.²²⁶ The EU and its treaties have always had a provision contained in them concerning gender equality.²²⁷ The principle of equal pay is enshrined in the former Article 141. Article 157 (ex 143, 119)²²⁸ has always given the necessary protection to gender discrimination. Article 157 (ex 143, 119)²²⁹ states the following:

²¹⁸ *Ibid.* also see Virginija Grybaite, *Analysis of Theoretical Approaches to Gender Pay Gap*, 7 J. Bus. ECON. MGMT. 85, 85 (2006).

²¹⁹ Grybaite, *Analysis of Theoretical Approaches to Gender Pay Gap*, (2006) at 87.

²²⁰ *Ibid.*

²²¹ *Ibid.* at 89.

²²² Figueiredo *Gender Pay Gaps and the Restructuring of Graduate Labour Markets in Southern Europe*, 565- 567 (2015).

²²³ Grybaite, *Analysis of Theoretical Approaches to Gender Pay Gap*, (2006) at 86.

²²⁴ *Ibid.*

²²⁵ Linehan *Senior Female International Managers: Empirical Evidence from Western Europe*, 813 (2002).

²²⁶ Tudor “Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee across the Member-States” (2017) p 423.

²²⁷ *Ibid.*

²²⁸ Treaty on the Functioning of the European Union (TFEU) 2007.

²²⁹ *Ibid.*

“1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

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

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”²³⁰

When considering the above and the fact that the EU has had Article 157 (ex 143, 119) in its treaties and the constitutional commitments they have made to try and bridge the gap, there are still some critique one can direct towards the EU.²³¹ Some authors say that the approach from the EU is too soft and leaves the member-states with too much flexibility, which has resulted or could result in every member-state implementing its own legislation to bridge the gender wage gap.²³² There is some argument to be made that the Directives that the EU use are not as effective, as it provides too much leniency towards member states to effectively bridge the gender wage gap.²³³

The ECJ has made various decisions on the issues related to the gender pay gap. The ECJ's decisions covers various topics, importantly it covers the scope of employment within the EU and its member states, by looking at both unintentional and intentional discrimination by the member-states and employers. with regards to the gender wage

²³⁰ *Ibid.* Also see *Mary Murphy and Others v Bord Telecom Eirann* 157/86 ECR 1989 673 and *Jamstalldhetsonbudsmannen v Orebro Lans Landsting* C- 236/98 ECR 2000 2189.

²³¹ See n108 above.

²³² *Ibid.* Also see Smith *Social Regulation of the Gender Pay Gap in the EU* 368 (2012).

²³³ See n108 above.

gap.²³⁴ The ECJ has given decisions on topics such as *'the definition of pay, pay equality, retirement benefits, maternity leave, redundancy pay, pension rights, service credits, government social policy, public servant status, and collective bargaining agreements.'*²³⁵ For the purposes of this paper we will be looking only a few topics discussed in the various cases, which include the definition of pay and pay equality. Article 157 (ex 141, 119) requires that employers operating within EU member-states pay their employees equally, based on gender, for equal work or work of equal value.²³⁶ The model case that evaluates Article 157 is *Defrenne v. SABENA*.²³⁷ The most important aspect of the *Defrenne*-case was that the ECJ found the guarantees under Article 157 to be directly effective against the member-states and employers that operate within the member-states, thus requiring the several national courts to recognise its protections even if the legislatures of the member-states and/or the legislative branches of the EU had not acted accordingly.²³⁸

The ECJ in the *Defrenne*-case²³⁹ discussed in detail the scope and merits spent most of Article 157 (ex 141, 119).²⁴⁰ It found that one of the core responsibilities if the national courts and ECJ, is to enforce Article 157 (ex 143, 119).²⁴¹ The reason being that they, the courts, must ensure that the member-states, their governments and their

²³⁴ *Ibid.* at 424.

²³⁵ *Ibid.*

²³⁶ Article 173 (ex 157 TEC) states:

1. The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist. For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at: - speeding up the adjustment of industry to structural changes, - encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings, - encouraging an environment favourable to cooperation between undertakings, - fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States. This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.

Consolidated Version of the Treaty on the Functioning of the European Union art. 173, Oct. 26, 2012, 2012 O J. (C 326) 47

²³⁷ Case 43/75, 1976 E.C.R. 0455.

²³⁸ *Ibid.*

²³⁹ See n119 above.

²⁴⁰ Treaty on the Functioning of the European Union (2007).

²⁴¹ *Ibid.*

employers who adhere to the requirements of this article does not suffer any harm in relation to employers and member-state governments that have not followed their mandates.²⁴² The court also found that the requirement of equal pay is important to the social progress and improved standard of living missions behind the EU.²⁴³ The Court then made an important finding in that it stated that the national courts in the EU must guarantee that during the process of harmonizing EU law, Article 157 (ex 141, 119) is recognised.²⁴⁴ The court went a step further and in addition to the abovementioned, added that national courts in the EU must confirm that the protections of Article 157 (ex 141, 119) are afforded even when collective bargaining agreements dictate otherwise.²⁴⁵

In the case of *Regina v. Seymour-Smith and Perez*²⁴⁶, there were four important questions raised that needed answering by the ECJ on the issue of equal pay for equal work.²⁴⁷ The ECJ in the *Perez*-case stated, while answering the first question, that to show a member-state's policy reflects indirect discrimination, and thus a violation of Article 157 (ex 141, 119)²⁴⁸, 'a national court must verify that the statistics reflect that a considerably smaller percentage of women than men are able to fulfil the requirements of that member-state's policy.'²⁴⁹ The court continued and stated that 'even if indirect discrimination is shown through a statistically considerable difference, if a member-state can show that the policy is justifiable by other objective factors, none of which are related to gender, then indirect discrimination does not exist.'²⁵⁰

The court went further in the *Perez*-case²⁵¹ and stated that 'the first step in determining whether indirect discrimination exists in violation of Article 157 (ex 141, 119), is to discover whether the policy in question creates a more unfavourable impact on women than men.'²⁵² The ECJ continued and stated that 'when using statistics, a reviewing court must determine that there are proper proportions of men and women to compare

²⁴² See n119 above.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ Case C-167/97 1999 E.C.R. I-00623.

²⁴⁷ Tudor "Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee across the Member-States" (2017) p 427.

²⁴⁸ Treaty on the Functioning of the European Union (2007).

²⁴⁹ See n128 above. At para 65 ("Grounds")

²⁵⁰ *Ibid.*

²⁵¹ See n128 above.

²⁵² *Ibid.* at para 58.

in regard to the policy in question, however, it is not sufficient to look at the number of people affected because that might depend on the number and percentage of people working in the member-state.²⁵³ The court then found that ‘the national court must establish that the statistics reveal a relatively constant disparity between men and women over a long period of time to find a case of gender based discrimination.’²⁵⁴

The second important question that needed answering in the Perez-case was ‘whether a judicial award of compensation in an unfair dismissal case was within the scope of pay pursuant to Article 157 (ex 141, 119).’²⁵⁵ The ECJ held that ‘Article 157’s definition of pay included various forms of consideration, even indirect consideration, as the result of employment.’²⁵⁶ To answer the second question, the ECJ held that ‘compensation from an administrative court, in the form of both an actual award and a compensatory award, is designed to give the employee what he or she would have received had the employer not unfairly terminated his or her employment, and was within the scope of the term "pay" for purposes of Article 157 (ex 141, 119).’²⁵⁷ The ECJ further strengthened its importance by stating that ‘compensation received through a statutory right, such as the case here in the form of a judicial award, would be treated the same as if the compensation was directly received by an employee pursuant to an employment contract.’²⁵⁸

A third question that needed answering by the ECJ in the Perez-case was, ‘what would substantiate an objective justification by a member-state for the purpose of indirect discrimination?’²⁵⁹ The ECJ stated that ‘if a member-state is able to show that its social policy, espoused in legislation, is suitable and necessary for achieving that aim, then even if the legislation far more negatively affects women than men, the legislation in question does not violate Article 157 (ex 141, 119).’²⁶⁰ Considering the fact that the ECJ explicitly specified that ‘member-states should have broad discretion when determining the best legislative methods by which to achieve its social and employment policies, this discretion cannot be exercised in a way that frustrates the

²⁵³ *Ibid.* at para 59.

²⁵⁴ *Ibid.* at para 61-62.

²⁵⁵ *Ibid.* at para 20.

²⁵⁶ *Ibid.* at para 23.

²⁵⁷ *Ibid.* at para 26-28.

²⁵⁸ *Ibid.* at para 29.

²⁵⁹ *Ibid.* at para 66.

²⁶⁰ *Ibid.* at para 69.

spirit of EU law.²⁶¹ The ECJ continued as stated that ‘in such cases, the member-state has the burden of proof to show that its use of discretion when developing its social policy through legislation is not related to discrimination based on gender and must also justify the means chosen to achieve its legislative aims.’²⁶²

If one considers the position in the EU, there are a few things that can be taken and learned from them. As with many other jurisdictions the issue of equal pay will not be resolved within the next few years. The estimate is that the EU will possibly reach pay equity by 2058.²⁶³ In *Richards v. United Kingdom*,²⁶⁴ the European Court of Justice (ECJ) held that it is a fundamental human right not to be discriminated based on gender and that such a right is embedded in EU law.²⁶⁵ The ECJ has made progress with the gender wage gap doctrine by ensuring that all member-states adhere to the equal pay laws.²⁶⁶ The ECJ in some of its decisions²⁶⁷ has left a gap whereby it could possibly be argued that those decisions may threaten to disrupt or even dismantle some of the progress that has been made by the EU, for the simple reason that these decisions has potentially led to creating 28²⁶⁸ different standards to the equal pay doctrine.²⁶⁹

Although there might be some uncertainty as to the progress of the ECJ being disputed due to some decisions being made in various cases²⁷⁰, one can similarly argue that the real progress of the ECJ has been to develop the scope of the word ‘pay’ within the legal framework²⁷¹ provided for and for it to be more inclusive.²⁷² The term of ‘pay’ has been redefined to include basically all the forms of remuneration, including to “retirement contributions, in-kind benefits, redundancy pay, civil judgments, pay supplements, sick leave benefits, pay during maternity leave, pay during military leave,

²⁶¹ *Ibid.* at para 74-75.

²⁶² *Ibid.* at para 77.

²⁶³ Tudor “Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee across the Member-States” (2017) p 471.

²⁶⁴ Case C-423/04, *Richards v. Sec’y of State for Work & Pensions*, 2006 E.C.R. 1-3602, 34-35, 38.

²⁶⁵ *Ibid.* at par 22-24.

²⁶⁶ *Ibid.*

²⁶⁷ Case C-256/01, *Allonby v. Accrington.*, 2004 E.C.R. 1-00873, 5; Case C-320/00, *Lawrence v. Regent Office Care Ltd.*, 2002 E.C.R. 1-07325,5; *Cadman v. Health & Safety Exec.*, 2006 E.C.R. 1-09583, TT 39; Case C-171/88, *Rinner-Kuhn v. FWW Spezial Gebaedereinigung GmbH & Co.*, 1989 E.C.R. 2743, T 15.

²⁶⁸ Total number of the member states of the EU.

²⁶⁹ See n124 above. At 472.

²⁷⁰ See n128 above.

²⁷¹ Article 157 (ex141,119) of the Treaty on the Functioning of the European Union (TFEU) 2007.

²⁷² See n124 above. At 472.

termination payments, and service credits.”²⁷³ If one considers the position in the EU, the onus to resolve the gender wage gap doctrine not only rests with the EU and its member-states, the national courts, the ECJ who all of them are traditionally responsible for promoting and advancing the issues of the gender wage gap.²⁷⁴ Tudor explains that *“The use of trade groups and social partners may be chief allies in efforts to reduce the pay gap between men and women in the EU.”*²⁷⁵

The EU has had a lot of challenges and will continue to have challenges to bridge the gender pay gap, however they are moving in the right direction when one considers the ECJ and how it has evolved and given more effect to the legislation. Possibly the biggest challenge, which could result in the best chance of bridging the gender pay gap, is to improve the condition of the equal pay doctrine across the EU-member states, and to that the EU will need to broaden the scope of Article 157 (ex 141, 119)²⁷⁶ to require EU member-states that ‘employers must treat their workers equally based on gender.’²⁷⁷ Tudor provides us with an example as follows: “An employer operating in Sweden and Germany must compensate equally the female workers in Sweden and the male workers in Germany if those workers are engaged in work of comparable value.”²⁷⁸ If a broadening of such a nature could be materialised, it would mitigate the possibility where employers’ decide to relocate its business to another state that is more relaxed towards pay equality.

3.2 United Kingdom

The United Kingdom (UK), similarly to the position in South Africa, governs the principles of equal pay for equal work or work of equal value through legislation.²⁷⁹ The UK’s Equality Act (EA),²⁸⁰ and the Equal Pay Statutory Code of Practice to the EA,²⁸¹ hereinafter the Code of Equal Pay, governs pay equity in the UK. The Equal

²⁷³ *Ibid.*

²⁷⁴ Tudor “Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee across the Member-States” (2017) p 422.

²⁷⁵ *Ibid.*

²⁷⁶ Treaty on the Functioning of the European Union (2007).

²⁷⁷ Tudor “Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee across the Member-States” (2017) p 471.

²⁷⁸ *Ibid.*

²⁷⁹ 2016 *PER / PELJ* (19) 12

²⁸⁰ Equality Act, 2010.

²⁸¹ Equal Pay Statutory Code of Practice to the Equality Act, 2010

Pay Code does not impose legal obligations, but rather explains them and provides the necessary guidelines to the EA.²⁸² In terms of section 65(1) of the EA, equal work includes like work, work rated as equivalent, and work of equal value.²⁸³

Section 66(1) of the EA provides that if the terms of an employee's work do not include a sex equality clause then this clause is implied in the terms of work. A sex equality clause has the following effect:

- (a) "If a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable.
- (b) If A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified to include such a term."²⁸⁴

This provision provides an employee aggrieved with unequal pay for work of equal value with a cause of action based on the implied sex equality clause.²⁸⁵ The sex equality clause is the cause of action upon which the equal pay claim should be based, and this claim is then brought within the ambit of the EA.²⁸⁶ An employment tribunal faced with an equal pay claim for work of equal value may require an independent expert to prepare a report for it on the value of the work in question.²⁸⁷

From the above description and analysis of the EA, the following factors should be used in determining value of work:

- a) effort;
- b) skill;
- c) decision making; and
- d) the demands of the work.²⁸⁸

Section 131(2) of the EA provides that 'where a question arises in the proceedings as to whether one person's work is of equal value to another's, the tribunal may, before

²⁸² Item 16 of the Equal Pay Code.

²⁸³ Section 65(1)(a)-(c) of the EA.

²⁸⁴ Section 66(2)(a)-(b) of the EA.

²⁸⁵ *Ibid.*

²⁸⁶ 2016 *PER / PELJ* (19) 13

²⁸⁷ Section 131(2) of the EA.

²⁸⁸ Section 65(6)(a)-(b) of the EA.

determining the question, require a member of the panel of independent experts to prepare a report on the question.²⁸⁹

As within South Africa, the UK also has important case law that provides them with the necessary guidelines on how to resolve equal pay disputes. In the matter of *Bromley v H & J Quick Ltd*²⁹⁰ a job evaluation study must apply to all employees which it covers, and the value to be attached to an employee's work must emanate from an assessment of the employee's job in terms of the factors used in the study. It is further clear that where there is no job evaluation study or if it does not comply with the EA, then obtaining a report from an expert relating to the value to be attached to the jobs under scrutiny is recommended.

In *Leverton v Clwyd County Council*²⁹¹ the Court found that an employee who works less hours than her comparator will have a difficult time establishing that the work is of equal value to that of the comparator and will be defeated by the employer raising the genuine material factor defence. It is submitted that this comment is not restricted to hours of work and annual leave but may apply *mutatis mutandis* to other terms and conditions of employment.

In *Redcar & Cleveland Borough Council v Bainbridge (No 2)*²⁹² the England and Wales Court of Appeal found that a claimant is entitled to bring a claim under either one or all the three causes of action mentioned. The successful or unsuccessful outcome of a claim under one of the heads does not preclude a later claim under either of the remaining causes of action for the same pay period as claimed in the initial cause of action.

It is important to note from the case law in the UK, that the Tribunals and Courts make regular use of section 131(2) of the EA, which allows them to request an independent expert's report on the value of the work in question²⁹³. This is normal practice, as was stated in *Hosvell v Ashford & St Peter's Hospital NHS Trust*²⁹⁴. The mentioned case law does not specifically provide the factors that needs to be taken into consideration

²⁸⁹ Section 13 of the EA, 2010.

²⁹⁰ *Bromley v H & J Quick Ltd* 1988 IRLR 249 CA.

²⁹¹ *Leverton v Clwyd County Council* 1989 IRLR 28 HL.

²⁹² *Redcar & Cleveland Borough Council v Bainbridge (No 2)* 2008 IRLR 776 EWCA.

²⁹³ 2016 PER / PELJ (19) 19

²⁹⁴ *Hosvell v Ashford & St Peter's Hospital NHS Trust* 2009 IRLR 734 CA

to assess the value of work. The factors emerging from the EA are used as well as objective factors which are used in terms of a job evaluation study and an independent expert's report.²⁹⁵ The aspects can be summarized as follows:

- a) "a job evaluation study must assess the employees' work in terms of the factors used in the study;
- b) the principle of equal pay for work of equal value applies to a situation where a claimant is engaged in work that is of higher value than that of the chosen comparator, provided the claimant is paid less than the comparator;
- c) a court or tribunal must assess the value of the work as it existed at the time when the equal pay proceedings were initiated;
- d) a claimant is entitled to bring an equal pay claim under either or all of the following causes of action; equal pay for like work, equal pay for work rated as equivalent, and equal pay for work of equal value;
- e) where a claimant alleges material changes in her job and that of the comparator and the claim involves different periods, such changes should be dealt with separately by splitting the issues;
- f) a tribunal has the ultimate say as to whether an expert should be appointed or not and a report sought on the value of the work in question."²⁹⁶

It is of great importance to note that comparisons across separate entities in the same corporate group of companies are therefore expressly permitted in the UK²⁹⁷ and it goes even further to permit comparisons between employees employed in different entities but who are subject to common terms and conditions of employment.

3.3. Iceland

Iceland in past decade has taken big steps to bridge the gender wage gap. For the past decade they have been leading the way in eradicating gender wage inequalities.²⁹⁸ Just a minor change they made was to amend childcare policies to be more progressive so that women were no longer faced to decide between work and starting a family.²⁹⁹ Iceland's universal childcare policies and parental leave policies removes the burden from the mother to be the only one to raise the children.³⁰⁰ Both

²⁹⁵ 2016 *PER / PELJ* (19) 20

²⁹⁶ 2016 *PER / PELJ* (19) 21

²⁹⁷ Bourne & Whitmore, *Anti-discrimination Law in Britain*, Sweet & Maxwell 1996, at p213- 216

²⁹⁸ Johnny Wood *These four Nordic countries hold the secret to gender equality* published on 18 December 2018 accessed at <https://www.weforum.org/agenda/2018/12/nordic-countries-women-equality-gender-pay-gap-2018/> on 08 October 2019.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

men and women get 90 days leave when a child is born.³⁰¹ When it comes to bridging the gender pay gap, Iceland ranks No 1³⁰² for 'Wage equality for similar work'.³⁰³ Iceland's definition of wages has dramatically changed over the years to be more inclusive. Their definition of pay is as follows:

'ordinary remuneration for work and further payments of all types, direct and indirect, whether they take the form of perquisites or other forms, paid by the employer to the employee for his or her work'.³⁰⁴ Iceland has also given a broader definition of the word 'terms' to be read with wages: "wages together with pension rights, holiday rights and entitlement to wages in the event of illness and all other terms of employment or entitlements that can be evaluated in monetary terms."³⁰⁵

The legislation³⁰⁶ in Iceland explains that 'equal work' shall mean 'the performance of work activities which, according to objective criteria, are equal or similar to other work activities to the extent that both employees may be interchanged without significant costs for the employer.' 'Equivalent work' shall mean 'that, according to objective criteria, it is not lower skilled and less significant for the employer in the achievement of his operational objectives than any other comparable work.'³⁰⁷ In January 2018 Iceland became the first country in the world to make companies prove they are not paying women less than men for the same work through legislation.³⁰⁸ The Equal Pay Standard,³⁰⁹ before it became compulsory, was purely a voluntary measure used by larger companies as part of improving their marketing strategies.³¹⁰ The concept of certifying employer's pay structures has been around since 2008.³¹¹ Since the bill was passed in 2018 to make it compulsory for employers, it has resulted in employers rushing to ensure they comply and to avoid any fines.³¹² Through the Equal Pay Standard Bill they have created a statutory certification process and through this

³⁰¹ *Ibid.*

³⁰² World Economic Forum – The Global Gender Gap Report 2018

³⁰³ See n 81 above.

³⁰⁴ Foubert 'The enforcement of the principle of equal pay for equal work or work of equal value A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway' July 2017

³⁰⁵ *Ibid.* at 44.

³⁰⁶ Act on Equal Status and Equal Rights of Women and Men No. 10/2008. as amended by Act No. 162/2010, No. 126/2011, No. 62/2014, No. 79/2015, No. 117/2016 and No. 56/2017.

³⁰⁷ See n 85 above. At 44

³⁰⁸ The Equal Pay Standard, 2018. The bill of law passed in 2017 by the Icelandic Parliament (Alþingi) (amending the previous Gender Equality Act No. 10/2008) and implemented only at the beginning of 2018

³⁰⁹ *Ibid.*

³¹⁰ Ines Wagner 'Certified Equality – The Icelandic Equal pay Standard' Report 2018/11 – Institute for social research.

³¹¹ *Ibid.*

³¹² Egill Bjarnason and Christine Hauser "Iceland Makes Companies Prove They're Not Paying Women Less" on 03 January 2018 accessed at https://www.nytimes.com/2018/01/03/world/europe/iceland-equal-pay.html?_r=0 on 10 October 2019.

process, employer's must prove that they pay men and women the same for the same job.³¹³

Companies and government agencies with more than 25 employees, must obtain government certification of their equal pay policies.³¹⁴ This mechanism moves the burden of proof from employee to employer and forces companies to develop a more transparent system for the way they value different jobs.³¹⁵ The purpose of this certification process is to ensure that the wage gap that is still there must be closed within a few years.³¹⁶ The Equal pay Standard makes provision that employers, organisations and institutions must have their equal pay certification renewed every three years.³¹⁷ It is the aim of the legislature and the Icelandic government, with this new law now being in force and effect, that the gender wage gap will be closed by 2022.³¹⁸

This process of certification of an employer and/or organisation's pay systems needs the compliance and assistance of the employer.³¹⁹ The employer needs to look at each individual job they have and according to that job's description, create various criteria to show how they came to pay that employee a certain salary.³²⁰

Former Minister of Welfare and Equality Viglundsson said that an important reason why it was so difficult to close the wage gap was the lack of guidelines within the companies to provide sufficient time to assess and review how wages are determined.³²¹ He explained that:

"the standard forces you to show more responsibility. There's still complete flexibility in what kind of a pay system you want to use. This isn't a uniform pay system. It's not in any way a one-size-fits-all solution but is simply the demand that everyone should be paid equally. You can, in that sense, discriminate in pay. You just have to have some reasons. You need to be able to prove that you are paying in accordance with your pay system, at this point, in the end this is what the standard is really requiring."³²²

From the above statement one can correctly state that there can be differentiation, but it must be justified.

³¹³ See n 91 above.

³¹⁴ See n 87 above.

³¹⁵ *Ibid.* at 9.

³¹⁶ *Ibid.*

³¹⁷ See n 91 above. At 26.

³¹⁸ *Ibid.* at 10.

³¹⁹ *Ibid.* at 28.

³²⁰ *Ibid.*

³²¹ See n 91 above. At 22.

³²² Interview, Viglundsson, 2018.

Iceland also has a specialist tribunal in which they specifically hear gender discrimination cases. The Gender Equality Complaints Committee is tasked with the examining of cases relating to gender discrimination and then to deliver a written ruling of whether the provisions of the Act on Equal Status and Equal Rights of Women and Men³²³ has been violated.³²⁴ The ruling may the Committee may not be referred to another higher authority, except in cases where such a ruling may be influence or change the labour market and or policy on discrimination.³²⁵ Before finalising its ruling the Committee will first ask for inputs from the federation of workers. The Committee's rulings may not be referred to a higher authority. In cases that may be expected to influence policy in the labour market, the Committee shall seek comments from the national federations of workers and employers before delivering its ruling.³²⁶ The rulings of the Complaints Committee shall be binding for the parties in question. The parties may refer the Committee's rulings to the courts.³²⁷

Since its establishment in 2008 the Committee has issued a ruling in nine cases concerning wage discrimination. In five of these cases the Complaints Committee ruled against the employer and decided that the respondent must pay the claimant's cost of bringing the complaint before the Committee.³²⁸ In a more recent case³²⁹ the defendant argued that the jobs were not the same or of equal value as they related to two separate divisions. The Complaints Committee held that *"the defendant had shown that objective reasons were behind paying the woman less on the contractual basis at the time."*³³⁰ The Committee however still ruled that *"the defendant had still discriminated against the woman as he could not explain the difference in extra hours afforded to the job the man was holding as opposed to the woman during the period under scrutiny."*³³¹

Iceland has taken the first step to eradicate the gender wage gap by introducing a law that makes it compulsory for employers to comply with. It shows that with the correct leaders and institutions in place, something such as bridging the gender wage gap,

³²³ *Ibid.* at 9.

³²⁴ *Ibid.*

³²⁵ *Ibid.* at 11

³²⁶ *Ibid.* at 9.

³²⁷ *Ibid.*

³²⁸ Gender Equality Complaints Committee (Iceland), cases 1/2014, 5/2015 and 4/2015.

³²⁹ Gender Equality Complaints Committee (Iceland), case 3/2016.

³³⁰ *Ibid.*

³³¹ *Ibid.*

which is an international problem, is possible and that it does not have to take 50 plus years before the gap is bridged.

3.4. Ireland

Ireland's legislation³³² on equal pay provides employees with the necessary tools to fight pay discrimination. The Equality Employment Act³³³ provides employees with nine possible grounds for discrimination. Equal pay is one of the nine grounds listed by the Act.³³⁴ This Act³³⁵ gives the necessary protection to employees in the private sector as well as in the public sector. This includes applicants for employment and training. The Act allows employers, from the outset, to implement positive action measures to promote equal opportunities on gender grounds.³³⁶ In Northern Ireland the principle that women and men are entitled to equal pay for doing equal work, is governed by the Equal Pay Act.³³⁷ The equal pay provisions in the Equal Pay Act governs all contractual terms. Similarly, to the position in the UK, Northern Ireland's Equal Pay Act implies that where there is equal work and it has been confirmed, a sex equality clause will automatically include in the contract of employment of the woman. This sex equality clause will then ensure that all contractual terms are no less favourable than that of her male counterpart.³³⁸ The Equal Pay Act (EPA)³³⁹ (as amended,) gives women the right to equal pay for equal work. It makes gender discrimination unlawful in relation to contractual pay and benefits.

The Equality Commission for Northern Ireland has issued a Code of Practice on Equal Pay³⁴⁰ in order to provide practical guidance on how to avoid gender discrimination in pay structures. The Equality Commission for Northern Ireland³⁴¹ is responsible for implementing the legislation on sex discrimination and equal pay, race relations, sexual orientation, age, religious or similar philosophical belief, political opinion and

³³² Constitution Act, 1939. See articles 40.1, 40.3.1, 40.3.2 and 44.3.3.

³³³ Number 21 of 1998.

³³⁴ *Ibid.* see section 6 of the Act.

³³⁵ *Ibid.* see sections 1-3 of the Act.

³³⁶ *Ibid.*

³³⁷ Act of 1970. Also see The Sex Discrimination (NI) Order 1976 prohibits sex discrimination in relation to non-contractual entitlements to benefits.

³³⁸ Equal pay – the law and best practice - <https://www.nibusinessinfo.co.uk/content/equal-pay-law-overview>

³³⁹ Act of 1970.

³⁴⁰ The Code of Practice came into effect by order of appointment by the Office of the First Minister and deputy First Minister on July 22, 2013.

³⁴¹ Non-departmental public body in Northern Ireland established under the Northern Ireland Act 1998.

disability.³⁴² The Code of Good Practice on Equal Pay is admissible in evidence in any proceedings under the EPA, before the Industrial Tribunal. Although the Code of Good Practice is not binding, the Industrial tribunal may consider the employer's failure to adhere to the provisions set out in the Code of Good Practice and make its finding accordingly.³⁴³

As with many disputes employees and employers are faced with, it normally is in the interest of all parties involved to try and avoid litigation. The one way the Code of Good Practice tries to avoid litigation, is by recommending that there are pay reviews as this would be the best way to ensure equal pay is delivered.³⁴⁴ By having such recommendation, employers could avoid gender wage disputes by simply reviewing their wage scales and practices in the workplace. Such recommendation also opens up the door for consultations and once engaged in meaningful consultations, the employees will most likely better understand and accept changes, if it becomes necessary. The Code of Good Practice also endorses the fact that trade unions or any other employee representatives should become involved to help ensure that these pay scales and practices are transparent.³⁴⁵

The Code of Good Practice also includes and refers to the Equality Commission's Review Kit,³⁴⁶ as good equal pay practice, which provides guidelines on how to effectively carry out an equal pay review. The Code of Good Practice has made a big effort to try and ensure that explanations and guidelines given, are accurate. The Code of Good Practice also recognises the fact that the Courts and/or Industrial tribunal are the only ones that can give interpretations of the law and those interpretations are the only ones with authority.³⁴⁷

The principle that a woman is entitled to equal pay for equal work is set out in European Union and domestic legislation.³⁴⁸ In Ireland, when an equal wage for equal work dispute arises, the domestic courts interpret the EPA to be in line with the European

³⁴² s 75 of the Northern Ireland Act, 1998.

³⁴³ On Equal Pay, 2013.

³⁴⁴ See page 5 of the Code of Good Practice on Equal Pay, 2013.

³⁴⁵ *Ibid.*

³⁴⁶ Equal Pay Review Kit, Step by Step Guidance, Equality Commission for NI, 2003

³⁴⁷ See n93 above.

³⁴⁸ *Ibid.* at page 6.

laws and the decisions delivered by the ECJ. A woman in Ireland can lodge her equal wage dispute with under Ireland's legislation, but in certain circumstances she will be able to lodge a dispute under European law.³⁴⁹ The EPA³⁵⁰ entitles a woman doing equal work with a man in the same employment to equality in pay and terms and conditions.³⁵¹ The EPA gives a woman in Ireland the right to equality in the terms of her conditions of employment.³⁵²

Claims for equal pay are usually taken to the Industrial Tribunal³⁵³. If a woman succeeds in a claim, her salary must be corrected to reflect what the male was earning, if there was any other term in the employment agreement of the man that was not included in hers, and that is beneficial, this must also be inserted into the woman's contract of employment, if there were any unfavourable terms in her contract in relation to that of the man, then such less favourable terms should be amended to be as favourable as that of the man and lastly a woman can ask for compensation.³⁵⁴ The Code of Practice goes further and states that a woman can compare any term in her employment contract with that of the man and that it is necessary to look at every element which constitutes pay and not only at the total salary.³⁵⁵ It goes even further and allows the woman to earn the same higher rate as the man, even if other terms in her contract of employment, with specific reference to pay, are more favourable than that of the man.³⁵⁶

Another piece of legislation in Northern Ireland that compliments the EPA, is the Sex Discrimination Order.³⁵⁷ Whereas the Equal Pay Act provides protection for any and all contractual disputes, the Sex Discrimination Order provides protection for all non-contractual disputes.³⁵⁸ This order³⁵⁹ covers issues such as recruitment, training, promotion, dismissal and the allocation of benefits, etc. all employer in Northern

³⁴⁹ *Ibid.*

³⁵⁰ Act of 1970. The full text of the Act can be found at the UK Government legislation website at www.legislation.gov.uk

³⁵¹ *Ibid.* see paragraphs 25 and 26.

³⁵² *Ibid.* see article 1.

³⁵³ *Ibid.* See paragraph 72 in relation to the potential to take equal pay cases in the civil courts.

³⁵⁴ Code of Good Practice on Equal Pay, 2013 at 6.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.* at 7.

³⁵⁷ Order of 1976. The full text of the Act can be found at the UK Government legislation website at www.legislation.gov.uk

³⁵⁸ See n 105 above.

³⁵⁹ The Sex Discrimination Order, 1976.

Ireland and all of its employers in the public, private or third sector falls under the EPA and the size of the employer does not matter.³⁶⁰ The Code of Good Practice however acknowledges the fact that the manner in which employers meet their obligations, may vary in practice.³⁶¹ One can for example argue that small employers may not have a human resources department or they might not have that many written policies in place and therefor do things more informal.³⁶² One can also argue that the smaller an employer is, the less complex their salary systems would be and it could be that their gender wage gaps are narrower than bigger companies.³⁶³ One difference from the private and third sectors to the public sectors is section 75 of the Northern Ireland Act³⁶⁴ in relation to pay. This section deals with the review of the wages in the company. If an employer undertakes an equal pay review it is an excellent way of complying with section 75 of the Northern Ireland Act as it gives due regard to the need to promote equality between men and women.³⁶⁵

The EPA³⁶⁶ applies to every employee, other workers whose contracts require personal performance of the work, employment carried out mainly in Northern Ireland, employment of employees on ships and aircrafts register in Northern Ireland.³⁶⁷ There are three instances whereby a woman can claim equal pay with a man and it is only when a woman works for the same employer and at the same workplace as the man, or where a woman works for the same employer but at a different workplace, for example at another branch of a store, or where the employer is an associated employer and the woman works at the employer's parent company.³⁶⁸

In the *Lawrence*-case³⁶⁹ the ECJ found that

“it is allowed for a comparison to be made between employees who do not work for the same employer. The Court determined that if these employees are in the same establishment or service such comparator will be allowed. Such comparison will only be allowed where the differences in pay are attributable to a common source and that there is a single body responsible for, and capable of, remedying the wage discrepancy.”

³⁶⁰ See n105 above.

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ Act of 1998.

³⁶⁵ *Ibid.* section 75.

³⁶⁶ Act of 1970.

³⁶⁷ Code of Good Practice on Equal Pay, 2013. At 8.

³⁶⁸ *Ibid.* at 9.

³⁶⁹ *Lawrence and others v Regent Office Care Ltd and others* [2003] ICR 1092, ECJ.

The EPA³⁷⁰ has a wide definition of pay as it includes all aspects of pay as well as benefits. This definition includes basic pay, non-discretionary bonuses, overtime rates and allowances, performance related benefits, severance and redundancy pay, benefits under pension schemes, hours of work, company cars, sick pay, fringe benefits such as travel allowances.³⁷¹ The Code on Good Practice³⁷² and the EPA³⁷³ even allows for a woman to use her predecessor as a comparator in an equal wage dispute. There are several ways in which a woman may obtain the information used to select a comparator. These ways include a woman's personal knowledge and experience, she can follow an internal grievance procedure³⁷⁴, by filling out and/or requesting the equal pay questionnaire³⁷⁵ and by discovery or disclosure once the matter has been to the Industrial Tribunal and she has proven that her terms of employment in her contract are less favourable than the men in her workplace.³⁷⁶

The Code of Good Practice³⁷⁷ grants trade unions the opportunity to request disclosure of certain documents and information. The employer is under a duty to provide such documents to the trade union, if those documents and information would enable constructive collective bargaining.³⁷⁸ Documents and information relating to conditions of employment and specifically wages, normally comes within the duty to disclose. It is however important to note that this duty will only apply to information for collective bargaining.³⁷⁹ Northern Ireland provides a lot of information on how the issue on gender wage equality should be handled and they also provide various measures on how the wage gap can be bridged.

3.5. Canada

The legislation in Canada is very unique as they have various pieces of legislation governing certain regions and or states in Canada. Specific reference will be given to

³⁷⁰ See n115 above.

³⁷¹ See n 117 above.

³⁷² *Ibid.*

³⁷³ See n 115 above.

³⁷⁴ Equal Pay Act, 1970. See paragraphs 57-58

³⁷⁵ *Ibid.* see paragraphs 59-61.

³⁷⁶ See n116 above. At 10.

³⁷⁷ Code of Good Practice on Equal Pay, 2013. At 15.

³⁷⁸ Article 39 of the Industrial Relations (NI) Order 1992.

³⁷⁹ See n 126 above.

the states of Ontario and Quebec and their respective legislation with regards to equal pay.

Ontario and Quebec's legislation, the *Pay Equity Act*³⁸⁰(PEA), ensure that women and men receive equal pay for performing jobs that may be very different but are of equal value.³⁸¹ They also have the Employment Standards Act³⁸²(ESA), that has provisions to ensure that women and men receive equal pay for performing substantially the same job. That is, they are entitled to receive equal pay for equal work, meaning work that is substantially the same, requiring the same skill, effort and responsibility and performed under similar working conditions in the same establishment.³⁸³

A woman in Canada cannot be paid less than a man if she is doing equal work. This also applies in reverse³⁸⁴. The PEA³⁸⁵ states that this legislation applies to all employers in the private and public sector in Ontario and Quebec, who employ ten or more employees, all employers in the public sector, the employees of employers to whom this Act applies and to their bargaining agents, if any.

The purpose of the PEA³⁸⁶ is to redress systemic gender discrimination in compensation for work performed by employees in female job classes by undertaking comparisons between each female job class in an establishment and the male job classes in the establishment in terms of compensation and in terms of the value of the work performed.³⁸⁷

According to the section 6 of the PEA,³⁸⁸ pay equity is achieved under the job-to-job method of comparison when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same

³⁸⁰ Pay Equity Act, R.S.O. 1990, c. P.7

³⁸¹ *Ibid.*

³⁸² Employment Standards Act, 2000, S.O. 2000, c. 41

³⁸³ See n 71 above.

³⁸⁴ www.ontario.ca - Ontario - Equal pay for equal work – accessed on 11 May 2018

³⁸⁵ Section 3(1)

³⁸⁶ Section 4(1)

³⁸⁷ Section 4(2)

³⁸⁸ Pay Equity Act, R.S.O. 1990, c. P.7

establishment where the work performed in the two job classes is of equal or comparable value.³⁸⁹

On 01 April 2018 the CBC³⁹⁰ in Canada, a news company, wrote an article on the equal pay for equal work dilemma. What was of importance is that on this day, in Ontario, it was confirmed that employers must pay part-time and or casual workers at the same rate as full-time employees for the same work being done.³⁹¹ Once again Canada is taking a step in the right direction to eradicate gender pay discrimination.

From the above it is apparent that Canada has various measures in place to eradicate gender pay discrimination. In most of their states or counties, they have separate guidelines and or legislation governing equal pay within their border lines. It is for this reason that focus was placed on Ontario and Quebec as they, according to me, provide the necessary guidelines to us in South Africa on how to improve and close the gap on gender pay discrimination.

³⁸⁹ *Ibid.*

³⁹⁰ www.cbc.ca - Equal pay for equal work: New rules arrive today in Ontario by Kimberley Molina – accessed on 11 May 2018

³⁹¹ *Ibid.*

CHAPTER FOUR – CONCLUSIONS AND RECOMMENDATIONS ON BRIDGING THE GENDER WAGE GAP IN SOUTH AFRICA

4.1 Introduction

From the outset international labour law plays a very important role in the interpretation of the EEA, as it is required by the EEA that it be interpreted in accordance with international laws³⁹². The international laws provide us with clarity on how the value of equal pay for equal work or work of equal value should be determined by looking at various criteria.³⁹³ When looking at what the international laws have to say, it becomes apparent that courts play a vital role in shaping the jurisprudence of equal pay claims.³⁹⁴ As with any other legislation, the court's decisions can lead to a better understanding of the principles of equal pay.³⁹⁵

South African employees still endure wage discrimination in respect of work of equal value in the workplace. The issue needs to be addressed urgently in order for South Africa to have a stable workforce that can compete locally and internationally.³⁹⁶ The gender wage gap in South Africa is about 27%, meaning that female employees get paid 27% less than their male counterparts as stated in an article³⁹⁷ by Gopolang Makou. This gives us a clear indication that South Africa is still lacking proper measures to eradicate gender pay discrimination. Although section 6(4)³⁹⁸ did not 'introduce a material change in the substance of the law on unfair pay discrimination in South Africa, the fact that equal treatment is now expressly provided for will likely result in an increase in litigation.'³⁹⁹ In the Mangena-case The guiding principles provided for in our discrimination legislation is not enough to resolve the problem. The onus of proof rests on the employee to show that she has been discriminated against, getting paid less, due to her gender. The problem is that in South Africa there is no case law on gender pay disparities, thus there is nothing employees, women, can rely on. It is too difficult to prove a case of pay disparity between a man and a woman in

³⁹² See para 2.1.

³⁹³ 2016 PER / PELJ (19) 21

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ Hlongwane "Commentary on South Africa's position regarding equal pay for work of equal value" 2007 83

³⁹⁷ <https://www.africacheck.org> - Do SA women earn 27% less than men? By Gopolang Makou accessed on 11 May 2018

³⁹⁸ Employment Equity Act 55 of 1998

³⁹⁹ <https://saslaw.org.za> - Equal pay for work of equal value: A South African perspective by Talita Laubscher accessed on 11 May 2018

South Africa. The legislation that we have does not assist and provide enough guidelines and principles to successfully pursue such a case.

4.2 Recommendations

There is a need for us to look outside our jurisdiction to determine what is working internationally and how we can apply that to our current legislation governing pay disparities. The United Kingdom has a very adequate legal framework in the form of the EA.⁴⁰⁰ The EA provides various guidelines and ways to ensure that the gap of equal pay between genders are equal⁴⁰¹. The case law⁴⁰² in UK also provide clear guidelines on the principles that should be applied. When comparing South Africa's legislation to that of the UK, we are lacking proper guidelines and structures. What can be taken from the UK's model and/or legislation is that there is a need for separate legislation to deal with equal pay matters. There needs to be proper guidelines and structures in place for such legislation to be effective. I am of the opinion when our legislation, section 6(4) of the EEA, is compared to the international jurisdictions discussed above, we have a lot to learn from them. The reason being that every country that was discussed in Chapter 3, it is apparent that separate legislation needs to be drafted to combat gender wage discrimination. By having a sub-section in the EEA and the Code of Good Practice on Equal Pay, simply does not suffice. This is apparent from the massive gender wage gap we still have in South Africa.

For us to have sufficient equal pay legislation, we will have to amend it or even draft a separate piece of legislation. The tools are out there for us to make use of and resolve the age-old dispute of gender pay discrimination. When one considers the mechanisms used in the UK to bridge the gender wage gap, these measures, in my opinion, would improve our equal pay legislation and result in us also closing the gender wage gap. The measures that needs considering, are:

- 1) To insert sex-clauses into employment contracts⁴⁰³;

⁴⁰⁰ Equality Act, 2010.

⁴⁰¹ See para 3.1 p 9-13.

⁴⁰² See para 3.1 p10-11.

⁴⁰³ See para 3.1 p9-10.

- 2) To create job evaluation schemes where an independent expert can report on value of work when a dispute arises in the CCMA, as with the tribunals in UK⁴⁰⁴;
- 3) Broadening comparators⁴⁰⁵.

Another international comparator that can be looked at to try and bridge the gap, is that of Canada. What we can take from Canada to help bridge the gender pay gaps are:

- 1) To include into our legislation that annual reporting should be done on the progress being made etc. This specifically is the case in Quebec, Canada;⁴⁰⁶
- 2) Drafting separate by-laws for each province in accordance with the province's needs, demographics, etc.⁴⁰⁷
- 3) Putting up notices for employees to easily access them to see the equity practices currently in place and what can be expected as well as putting up notices of what employees can do if there is a dispute;⁴⁰⁸
- 4) Implementing Pay Equity Plans,⁴⁰⁹ similar to Employment Equity Plans, for bigger companies to monitor progress and to report on it to employees or a committee;
- 5) Setting up of Pay Equity Committees,⁴¹⁰ as with our employment equity committees, to represent employees in setting up a Pay Equity Plan. We already have the framework for such committees and how they function in the EEA that could simply be amended to suit pay equity.

The ECJ plays a centre role in trying to bridge the gender pay gap in the EU. If one considers the various case law that has been discussed above, it becomes very clear the role that courts play in the doctrine of pay equity. South Africa needs to take from the EU the importance for our judiciary to keep developing our discrimination laws which relates to pay equity. Without guidance from the courts and the continuous development of our jurisprudence, we will struggle to bridge the gap when one

⁴⁰⁴ See para 3.1 p10-11.

⁴⁰⁵ See para 3.1 p11. Emphasis on *Redcar & Cleveland Borough Council v Bainbridge* (No 2).

⁴⁰⁶ Section 76 of Quebec's Pay Equity Act.

⁴⁰⁷ See Quebec's Pay equity Act and Ontario's Pay Equity Act as examples.

⁴⁰⁸ Section 7 of the Pay Equity Act, R.S.O. 1990, c. P.7

⁴⁰⁹ Section 13 of Quebec's Pay Equity Act.

⁴¹⁰ Section 16 of of Quebec's Pay Equity Act.

considers that South Africa's courts have done little to noting to assist closing the gap. South Africa should adopt a similar approach by broadening the definition of pay and equal pay and it needs to be far more inclusive, as it was done in the EU.⁴¹¹

In the EU, and the United Kingdom, the gender wage gap has been narrowed due to collective bargaining agreements being concluded between the trade unions and the employers.⁴¹² This in my opinion should be a serious recommendation that should be considered. We are already very actively involved in collective bargaining. Unions in most instances are the protectors of employees' rights in the workplace, by them being on board and assisting employers as well as employees to resolve the pay gap, we will be one step closer to the ultimate goal of equality.⁴¹³ We should consider that trade unions are far more involved with employers as opposed to an individual employee. Trade unions have access to resources, and they have knowledge and information about companies that the individual most likely does not have.⁴¹⁴ This means that trade unions will be in the best position to assist employees to bridge the gender pay gap.

It is just too difficult for an individual employee to pursue an equal pay claim on his own without having any resources available to them. If one really wants to combat the gender wage gap there needs to be pro-active measures set in place and that should preferably be established through social dialogue, because such measures require the full commitment of trade unions, employers, employer organisations and the government.⁴¹⁵ The need for social dialogue is now more important than ever as it will establish realistic goals on how to bridge the gender wage gap.

An interesting measure to be considered, can be found in how the Netherlands handle equal pay disputes. The Dutch Equal Treatment Commission is an independent organisation which was established to promote and monitor compliance with its legislation.⁴¹⁶ The Equal Treatment Act⁴¹⁷ makes provision for the Equal Treatment

⁴¹¹ Article 157 (ex141,119) of the Treaty on the Functioning of the European Union 2007.

⁴¹² Smith *Social Regulation of the Gender Pay Gap in the EU* 376 (2012).

⁴¹³ *Ibid.*

⁴¹⁴ Veldman "Strengthening the effects of community equal pay legislation, or why established equal pay standards have little impact on the pay gap in the EU labour market" 2003 Utrecht University Repository.

⁴¹⁵ *Ibid.*

⁴¹⁶ Equal Treatment Act, 2005.

⁴¹⁷ *Ibid.*

Commission, which was established in 1994, in section one of the Act.⁴¹⁸ This Commission provides assistance to any victim of discrimination, and in this instance pay discrimination, and they have the powers to conduct independent surveys.⁴¹⁹ The majority of cases that are successful within the Netherlands is because of the Commission conducting its own equal pay research within the employer's company after an employee has lodged a complaint. After completing such an investigation, the Commission then makes its findings and the employer is then obliged by legislation to give effect to the findings.⁴²⁰ South Africa, once again, already has a similar commission in place, the Human Rights Commission, thus it would be the appropriate forum for an individual to lodge such a dispute and to ask for assistance. This however would come with a lot of problems. The first change that will need to happen is an amendment of our current discrimination legislation to make such assistance possible.

In Northern Ireland they have given a wider definition of pay. By doing so they included various other terms that relates to pay. This means that even if the salaries are the same, one can still lodge a dispute for inequality with regards to pay which relates to any other terms in the contract of employment that has to do with pay. This would then give the women in the workplace a better chance of lodging a dispute and thus it would result in the employer rather paying employees fairly than to face adjudication by a court. The Code of Good Practice of Northern Ireland⁴²¹ makes provisions for there to be reviews of the pay doctrine in the workplace.⁴²² This principle of review of the pay doctrine goes hand in hand with pay reporting in Canada. The Equality Commission of Ireland has already drafted comprehensive guidelines on how to proceed with a review of wages in the workplace.⁴²³ Once again there would be no need for South Africa to reinvent the wheel, we should simply look at what is already out there and apply it to our current system.

A further consideration from Northern Ireland comes from the Code of Good Practice⁴²⁴ whereby it introduces the avenue of equal pay questionnaire. This allows

⁴¹⁸ *Ibid.*

⁴¹⁹ See n184 above.

⁴²⁰ *Ibid.*

⁴²¹ Code of Good Practice on Equal Pay (NI), 2013.

⁴²² *Ibid.* also see Equal Pay Review Kit, Step by Step Guidance, Equality Commission for NI, 2003 for a full explanation on how such a review process should work.

⁴²³ Equal Pay Review Kit, Step by Step Guidance, Equality Commission for NI, 2003.

⁴²⁴ *Ibid.*

employees to fill in a pro-forma form and ask the necessary questions relating to how other individuals pay has been constructed. This gives the employee, woman, the chance to see what the reasons are for the employer paying a man more. This also would give an indication to whether the employer is acting fairly and truthfully. For example, if the employer answers the questionnaire very vaguely, one can argue they are trying to hide something. From the Code of Good Practice it is also indicated that even the Industrial Court may draw a negative inference from the employers refusal to answer the questionnaire and the court can even go so far as to say that no good reason in fact exists for the differentiation, as the employer had the chance to answer but decided not to.

For most of these measures to be introduced there will be a need for laws to be amended. However, if one can imagine the employer, employees and trade unions sitting down together and working on the wage inequalities, we would achieve wage equality much faster in contrast to us waiting for the legislation to change to assist us in bridging the gender wage gap. One example whereby there is no need for new legislation is by introducing equal pay policies in the workplace. This is also a recommendation made by the Equality Commission of Northern Ireland in their Code of Good Practice on Equal Pay.⁴²⁵ As mentioned above the whole equal pay policy hinges on all parties being involved and to join the consultation table in discussing the issue at hand. Without proper cooperation by all three parties, embarking on such process would be futile. The onus should shift to us as employers, employees and trade unions to take matters into our own hands. Any employer can draft his own policies if it does not contravene any of the laws in our land.⁴²⁶ By acting pro-actively and being transparent about the wages in the workplace, such a policy will go a long way in bridging the gender pay gap. In my opinion it would only take a few big companies to introduce such equal pay polices in the workplace and set a new precedent for other companies.

The disclosure of information and documents to trade unions for collective bargaining purposes is another avenue that is worthy of mentioning to try and bridge the gender

⁴²⁵ See page 28 of the Code.

⁴²⁶ Code of Good Practice on Equal Pay (NI),2013. See pages 30-32.

pay gap.⁴²⁷ As long as the documentation and/or information sought from the employer are for the purposes of collective bargaining, the employer must provide the information asked for. The roles of trade unions in equal pay disputes should be more pro-active. If one can resolve issues through collective bargaining, there would be no need for costly litigation. Seeing that South Africa has a strong union presence, this option should be explored. Other jurisdictions such as the EU and UK also recommends unions being involved to bridge the gender pay gap.

Lastly, if we consider the position in Iceland, who can be said to be the front runners in bridging the pay gap, one should give serious consideration to their measures on bridging the gap. The fact that they have a specialised institution⁴²⁸ dealing with discrimination matters only, provides all parties the assurance that the matter will be dealt with by a person with excessive knowledge on discrimination matters. This in return would result in cases being handled more effectively and would also result in matters not being referred to the Courts for review. South Africa already has a similar institution in the form of the Human Rights Commission who deals with all disputes surrounding human rights. South Africa could train people effectively in the field of discrimination and make use of the Human Rights Commission to resolve issues such as gender wage disparities.

The problem in South Africa is that not many individuals are well versed in discrimination disputes and thus it leads to findings against employees.⁴²⁹ Findings against employees lodging a dispute can also be attributed to the lack of guidelines in our discrimination laws and the massive onus of proof that rests on the employee. Most cases on discrimination gets dismissed due to technicalities and thus there is a need for proper guidelines and assistance from the relevant authorities. In Iceland once a ruling has been made on a dispute relating to gender wage discrimination, they are entitled to publish such findings, which will become available to anyone.⁴³⁰ This would mean that every company will be in the public's eye and this in turn could result

⁴²⁷ Article 39 of the Industrial Relations (NI) Order 1992.

⁴²⁸ Gender Equality Complaints Commission.

⁴²⁹ See Article 157 of the TFEU [ex-Article 141 (TEC)] which states that all member states must make provisions for men and women to be paid equally for the same and/or similar work.

⁴³⁰ Foubert 'The enforcement of the principle of equal pay for equal work or work of equal value A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway' July 2017 at 11.

in companies being humiliated if they do not comply or if there is a scathing finding made against them.

A common theme throughout all the international jurisdictions discussed in this paper, is that there needs to be legislation that provides proper guidelines on gender wage discrimination. Although South Africa has discrimination laws⁴³¹ they are not effective in dealing with the equal pay disputes where gender discrimination is the sole cause for the differentiation. Iceland is the first country that has taken the step to introduce a law⁴³² that forces employers to get certification on their pay structures in order to ensure they comply with the standards set out in the law. South Africa needs a similar approach if there is any reasonable chance of bridging the gender pay gap, which currently stands at men being paid 28% more than women.⁴³³ Legislation needs to be introduced that makes it compulsory for employers to pay men and women equal for equal work or work of equal value.

4.3 Conclusion

Section 6(4) of the EEA⁴³⁴, in my opinion, makes no new change to the existing law we already have, in the form of section 6(1) of the EEA. The reason being that if a male employee is being paid more than his female counterpart because of his race, gender, beliefs or other personal attributes that are unrelated to the objective, job criteria or now even on an arbitrary ground, would still be a classic case of unfair discrimination as it currently stands in terms of section 6(1) of the EEA. Thus, section 6(4)⁴³⁵ does not really bring about any substantive changes. The amendments brought about in the LRA⁴³⁶ and EEA with regards to unfair discrimination, in my opinion, was a mere codification of the principles that was articulated in the *Mangena*-case.⁴³⁷ The introduction of section 6(4) did not bring about a substantial change in equal wage discrimination, even less so on gender wage discrimination. Section 6(4) as it currently

⁴³¹ Employment Equity Act, 50 of 1998. See Section 6 of the Act.

⁴³² The Equal pay Standard, 2018. This Bill of law was passed in 2017 by the Icelandic parliament (Alþingi) (amending the previous Gender Equality Act No. 10/2008) and it was implemented in January 2018.

⁴³³ See n 8 above.

⁴³⁴ Act 55 of 1998.

⁴³⁵ *Ibid.*

⁴³⁶ Act 66 of 1995.

⁴³⁷ 2009 12 BLLR 1224 (LC).

stands, read together with the Code of Good Practice on equal pay, is not an effective measure to bridge the gender wage gap.

Once the gender pay gap is reduced and effectively bridged, litigation will be reduced dramatically on these disputes. One can go so far and say that if there is gender equality with regards to wages, the best employees will stay in employment, staff turnover will reduce, commitment from employees will increase and employees will no longer think of excuses to stay away from work. It is a fact that an employee's salary is the key factor that affects his/her relationships at work as well as motivation. By providing equal wages to all who does the same work or work of equal value, one shows true appreciation to employees and it is rewarding employees fairly for the work they do.

Organisations and/or employers in South Africa should make the necessary changes in the workplace even it is not legally mandatory, for the time being, to ensure that more women are appointed to senior positions and that more women sit on the boards of companies.⁴³⁸ Gender pay reporting, in my opinion, is the biggest change we can adopt from international jurisdictions, such as Canada and Iceland, to ensure that employers assist in bridging the gap.⁴³⁹ Employers need to make it a priority to bridge the gender pay gap and if they fail to do so they must be held accountable with much more severity where the differences in salaries are unjustifiable.⁴⁴⁰

Taking the measures of the UK, Canada, Iceland, Ireland and the EU into account, there are various mechanisms we can look at and consider. The recommendations mentioned above are viable options, as there would be no need to start from scratch and neither should legislation be drafted from the ground up. South Africa's current legislation⁴⁴¹ does have the scope to entertain and resolve pay discrimination disputes, as can be seen in *Mangena*.⁴⁴² The question however that arises is the one of how effective it is and if the legislation is likely to resolve the gender pay gap in South Africa? The short answer is no, we will not resolve this issue with the current legislation and guidelines in place.

⁴³⁸ <https://www.pwc.co.za/en/press-room/gender-pay-gap.html> accessed on 30 September 2019.

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

⁴⁴¹ Section 6(4) of the EEA

⁴⁴² 2009 12 BLLR 1224 (LC).

A fundamental part of bridging the gender wage gap is to ensure that all parties involved have the necessary guidelines available to them that would assist them in effectively narrowing the gap and eventually to close the wage gap completely. In order for South Africa to be able to bridge the wage gap, we need to make use of international labour laws, guidelines and measures to ensure that we have an effective way in dealing, and most importantly, bridging the gender pay gap, with either drafting legislation for equal pay or amending the EEA to provide detailed measures to both employers and employees that they need to comply with. If South Africa could effectively implement the recommendations and measures from our international counterparts, we will most surely become a front runner, as with the UK, Canada, Iceland, Ireland and the EU, in bridging the gender wage gap.

BIBLIOGRAPHY

<u>BOOKS/ CHAPTERS IN BOOKS</u>
Bourne C & Whitmore J, <i>Anti-discrimination Law in Britain</i> , 3rd Ed, Sweet & Maxwell 1996
Dupper OJ <i>Essential Employment Discrimination Law</i> (Juta, Cape Town) 2004
Du Toit et al <i>Labour Relations Law: A Comprehensive Guide</i> 6 th edition (Lexis)(Nexis) (2015)
Du Toit D "Protection Against Unfair Discrimination In The Workplace: Are The Courts Getting It Right?" <i>Law, Democracy & Development</i> 11, pp 1 - 15 (2007)
Figueiredo H et al., <i>Gender Pay Gaps and the Restructuring of Graduate Labour Markets in Southern Europe</i> , 39 <i>CAMBRIDGE J. ECON.</i> (2015).
C Garbers 'The Prohibition of Discrimination in Employment' in K Malherbe & J Sloth-Nielsen (eds) <i>Labour Law into the Future</i> (2012) 18.
Hepple A <i>South Africa: Workers under Apartheid</i> (Christian Action Publications, London) 1969
Tudor J, Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee across the Member-States, <i>Bluebook</i> 20th ed. 92 <i>N.D. L. Rev.</i> 415 (2017).
Van Niekerk and Smit (eds) <i>et al Law@work</i> 4 th ed (LexisNexis) (2018)

Journals
Ackerman LWH " <i>Equality and non-discrimination: Some analytical thoughts</i> " 2006 22 <i>SAJHR</i> 597
Ebrahim S " <i>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</i> " <i>PER / PELJ</i> 2016(19)
Fergus E, Collier D "Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation" 2014 <i>SAJHR</i> 484.
Laubscher T "Equal Pay for Work of Equal Value- A South African Perspective" 2016 <i>ILJ</i> 804

Linehan M, *Senior Female International Managers: Empirical Evidence from Western Europe*, 13 INT'L J. HUM. RES. MGMT 802 (2002).

Mcgregor M “*Equal remuneration for the same work or work of equal value*” (2011) 23 SA Merc LJ 498.

Smith M, *Social Regulation of the Gender Pay Gap in the EU*, 18 EUR. J. INDUS. REL. 365 (2012).

Articles

Nomagugu Hlongwane, Commentary on South Africa's Position regarding Equal Pay for Work of Equal Value, 11 Law Democracy & Dev. 69 (2007)

Rubery, Jill; Koukiadaki, Aristeia. “Closing the gender pay gap: a review of the issues, policy mechanisms and international evidence” International Labour Office – Geneva: ILO, 2016 accessed at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_540889.pdf on 30 September 2019.

Virginija Grybaite, *Analysis of Theoretical Approaches to Gender Pay Gap*, 7 J. Bus. ECON. MGMT. 85, 87 (2006).

Dr. Albertine G. Veldman “Strengthening the effects of community equal pay legislation, or why established equal pay standards have little impact on the pay gap in the EU labour market” 2003 Utrecht University Repository accessed at https://dspace.library.uu.nl/bitstream/Veldman_04EqualPay on 04 October 2019.

Case Law

South Africa

Chamber of Mines v MWU (1989) 10 ILJ 133 (IC).

Co-operative Worker Association v Petroleum Oil and Gas Co-operative of SA 2007 1 BLLR 55 (LC)

Heynsen v Armstrong Hydraulics (Pty) Ltd 2000 12 BLLR 1444 (LC)

Hofmann v South African Airways [2000] 12 BLLR 1365 (CC).

HOSPERSA obo Venter v SA Nursing Council [2006] 6 BLLR 558 (LC).

J v M Ltd (1989) 10 ILJ 755 (IC).

Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd [1997] 11 BLLR 1438 (LC).
Louw v Golden Arrow Bus Services (Pty) Ltd 2000 21 ILJ 188 (LC)
Mangena v Fila South Africa (Pty) Ltd 2009 12 BLLR 1224 (LC)
Mias v Minister of Justice & Others [2002] 1 BLLR 1 (LAC)
Mthembu v Claude Neon Lights 1992 13 ILJ 422 (IC)
Mtshamba & others v Boland Houtnywerhede (1986) 7 ILJ 563 (IC).
Mutale v Lorcom Twenty-Two CC 2009 3 BLLR 217 (LC)
National Union of Mineworkers v Henry Gould (Pty) Ltd 1988 9 ILJ 1149 (IC)
Ntai v SA Breweries Ltd 2001 22 ILJ 214 (LC)
Raad van Mynvakbonde v Minister van Mannekrag en 'n Ander (1983) 4 ILJ 202 (T)
SA Chemical Workers Union v Sentrachem Ltd 1988 9 ILJ 410 (IC)
<i>Sentrachem Ltd v John</i> 1989 10 ILJ 249 (WLD)
<i>TGWU v Bayete Security Holdings</i> 1999 4 BLLR 401 (LC)
<i>UAMAWU & Others v Fodens (SA) (Pty) Lt.</i> (1983) 4 ILJ 212 (IC).
<u>United Kingdom</u>
<i>Bromley v H & J Quick Ltd</i> 1988 IRLR 249 CA
<i>Hosvell v Ashford & St Peter's Hospital NHS Trust</i> 2009 IRLR 734 CA
<i>Leverton v Clwyd County Council</i> 1989 IRLR 28 HL.
<u>European Union</u>
<i>Redcar & Cleveland Borough Council v Bainbridge (No 2)</i> 2008 IRLR 776 EWCA
Case C-423/04, <i>Richards v. Sec'y of State for Work & Pensions</i> , 2006 E.C.R. 1-3602
Case C-256/01, <i>Allonby v. Accrington.</i> , 2004 E.C.R. 1-00873, 5;
Case C-320/00, <i>Lawrence v. Regent Office Care Ltd.</i> , 2002 E.C.R. 1-07325,5;
<i>Cadman v. Health & Safety Exec.</i> , 2006 E.C.R. 1-09583, TT 39;
Case C-171/88, <i>Rinner-Kuhn v. FWW Spezial Gebaeudereinigung GmbH & Co.</i> , 1989 E.C.R. 2743, T 15.
Case 43/75, <i>Defrenne v. SABENA</i> , 1976 E.C.R. 0455.
Case C-167/97, <i>Regina v. Seymour-Smith & Perez</i> , 1999 E.C.R 1-00623.

Gender Equality Complaints Committee (Iceland), cases 1/2014, 5/2015, 4/2015 and 3/2016.

Legislation

South Africa

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of South Africa Act 200 of 1993

Employment Equity Act, 55 of 1998

Employment Equity Amendment Act, 47 of 2013

Employment Equity Regulations, 2014

Labour Relations Act 66 of 1995.

United Kingdom

Equality Act, 2010.

Equal Pay Statutory Code of Practice to the Equality Act, 2010

Canada

Pay Equity Act, R.S.O. 1990, c. P.7

Employment Standards Act, 2000, S.O. 2000, c. 41

Quebec's Pay Equity Act Chapter E-12.001

Netherlands

Equal Treatment Act, 2005.

Ireland

Northern Ireland Act 1998.

Constitution Act, 1939.

Equality Employment Act. Number 21 of 1998.

Equal Pay Act, 1970.

Northern Ireland's Code of Good Practice on Equal Pay, 2013.

Industrial Relations (NI) Order 1992.

Equal Pay Review Kit, Step by Step Guidance, Equality Commission for NI, 2003

European Union

Equal Pay Directive 75/117/EEC.

Equal Treatment Directive (Recast) (2006/54/EC).

Treaty on the Functioning of the European Union (TFEU) 2007.

Iceland

The Equal Pay Standard, 2018.

Act on Equal Status and Equal Rights of Women and Men No. 10/2008. as amended by Act No. 162/2010, No. 126/2011, No. 62/2014, No. 79/2015, No. 117/2016 and No. 56/2017.

Government publications

GN 448 in GG 38837 of 1 June 2015 (*Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*)

International Instruments

ILO Discrimination (Employment and Occupation) Convention 111 of 1958

ILO Equal Remuneration Convention 100 of 1951

Treaty on the Functioning of the European Union (TFEU) 2007.

European Commission: Author Petra Foubert Coordinator Alexandra Timmer 'The enforcement of the principle of equal pay for equal work or work of equal value A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway' July 2017

Other

<https://www.ontario.ca/document/your-guide-employment-standards-act/equal-pay-equal-work> - Ontario - Equal pay for equal work 07 December 2017

<http://www.cbc.ca/news/canada/ottawa/equal-pay-equal-work-ontario-labour-changes-1.4601257> - Equal pay for equal work: New rules arrive today in Ontario by Kimberley Molina, 01 April 2018

<p>https://africacheck.org/reports/south-african-women-earn-27-less-men/ - Do SA women earn 27% less than men? 27 September 2017 by Gopolang Makou</p>
<p>https://saslaw.org.za/index.php/downloads/category/55-2015-conference-resources?download=331:laubscher-talita – Equal pay for work of equal value -A South African perspective 2015 by Talita Laubscher – SASLAW Conference 2015</p>
<p>https://www.businessinsider.co.za/south-africa-industries-pwc-executive-directors-practices-and-remuneration-trends-report-jse-gender-pay-gap-white-ceos-2019-7</p>
<p>https://www.weforum.org/reports/the-global-gender-gap-report-2018 - World Economic Forum – The Global Gender Gap Report 2018</p>
<p>https://www.sahistory.org.za/article/history-womens-struggle-south-africa - Women's struggle in South Africa</p>
<p>https://www.pwc.co.za/en/press-room/gender-pay-gap.html - accessed on 30 September – “Companies need to focus more on addressing gender pay inequalities” written by Rene Richter, Director of PWC</p>
<p>Equal pay – the law and best practice - https://www.nibusinessinfo.co.uk/content/equal-pay-law-overview accessed on 07 October 2019.</p>
<p>Egill Bjarnason and Christine Hauser “Iceland Makes Companies Prove They’re Not Paying Women Less” on 03 January 2018 accessed at https://www.nytimes.com/2018/01/03/world/europe/iceland-equal-pay.html?_r=0 on 10 October 2019.</p>
<p>Ines Wagner ‘Certified Equality – The Icelandic Equal pay Standard’ Report 2018/11 – Institute for social research.</p>