EQUALITY AT WORK WITH THE FOCUS ON UNEQUAL PAY FOR WORK OF EQUAL VALUE

By

JETHRO MOAGE

Submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM (LLM)

In

LABOUR LAW

FACULTY OF LAW

UNIVERSITY OF PRETORIA

SUPERVISOR: Prof BPS van Eck

PRETORIA

OCTOBER 2023

DECLARATION OF ORIGINALITY

I, **JETHRO MOAGE**, declare that this Dissertation, titled “Equality at Work with the Focus on Unequal Pay for Work of Equal Value” is my work and that all the sources that I have used or quoted have been indicated and acknowledged using complete references. _____*jethromoage*__(02/11/2023)_____ (Signature and date).

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude and appreciation to my supervisor, Prof. Stefan van Eck, for his valuable time, skills, assistance and patience throughout this dissertation. It was an honour and privilege to have him as my supervisor. I would also like to thank my parents, family and friends for their support and encouragement, especially my mother CECILIA MOAGE, my aunt MMATHABO MOAGE, my uncle KOOS MOREMA and my sister THABILE MOENG, with whose computer I completed this dissertation with my computer broken and ineffective. *Keya le leboga ba geshu*. I would also like to thank God for the strength and health He provided me in completing this piece of work.

SUMMARY

The South African labour force is undeniably complex and not easy to deal with. Issues such as historical injustices and inequality are still prevalent in many South African communities. The same is true in the various workplaces of the South African economy however, South African workers are fortunate because legislation has been enacted to ensure that there is equality and fairness in the workplace regarding compensation of workers.

The Constitution guards against unequal and unfair treatment of workers by their employers in the workplace. Section 23(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") states that everyone has a right to fair labour practices. These fair labour practices include fair and equal pay for work of equal value. This study will attempt to address the issue of equal pay for work of equal value done by employees who are employed by the same employer within the South African labour market.

Legislation such as the Employment Equity Act, [1](hereinafter "the EEA"), provides the grounds for unfair discrimination.[2] Section 6(4) of the EEA provides that it is unfair discrimination when workers are paid differently yet they are doing work of the same equal value.[3] Section 11 of the EEA on the other hand provides for who bears the burden of proof wherein there is a claim of unfair discrimination in the workplace by an employer. In terms of the above legislation and the Constitution, case law and journal articles, this study will expand on this discussion. The study will address the issue of whether it is justified for employers to pay employees doing the same work or work of equal value differently.

[1] Act 55 of 1998.
[2] Section 6(1) of the EEA provides grounds for unfair discrimination.
[3] Section 6(4) of the EEA.

CONTENTS

CHAPTER ONE

INTRODUCTION

1.1 Introduction

In her article titled: "Equal Pay for Work of equal value South African perspective", Talita Laubscher confirms that:

> "Remuneration, employment benefits, terms and conditions of employment as well as job classification and grading are expressly listed as employment policies or practices in respect of which unfair discrimination is prohibited and it is on this basis that litigants complaining of unequal pay practices have sought recourse in the Labour Court".[4]

South Africa is founded on the values that are enshrined in the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').[5] Amongst these values, equality and the right to equality are of importance.[6] After this, section 9(1) of the Constitution provides that "everyone is equal before the law and has the right to equal protection and benefit of the law".

Section 9(2) of the Constitution provides that "equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality,

[4] T Laubscher "Equal pay for work of equal value -A South African perspective" (2016) 37 *ILJ* at 805.
[5] Section 1 of the Constitution.
[6] Section 9 of the Constitution.

legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".[7] Darcy Du Toit,[8] argues that labour rights must be interpreted alongside the Bill of Rights, especially section 9 of the Constitution which contains the equality clause.[9] In South African labour law, the relevant piece of legislation includes The Labour Relations Act (LRA),[10] the Employment Equity Act (EEA),[11] The Basic Conditions of Employment Act (BCEA),[12] and The National Minimum Wage Act (NMWA)[13]. This study will focus broadly on the provisions of the LRA, EEA and International Labour Law (ILO), especially in a comparative context.

The LRA and EEA ensure that there is no discrimination in the workplace. Van Niekerk and Smit,[14] argue that discrimination occurs when employers treat their employees differently because of generalised assumptions.[15] Such assumptions may lead to employers compensating employees differently. For example, the idea that white employees are more profitable to the company than black employees.[16] Another example would be that male employees perform better than female employees,[17] or that diabetic employees cannot do certain kinds of work that non-diabetic employees can perform.[18] All these scenarios are discriminatory; be it race, gender, or age. The EEA in section 6(1) prevents this discrimination from being practised by employers in the workplace.[19] Du Toit *et al*. advances a similar argument.[20] The author states that it is an unfair labour practice if employees of the same employer are entitled to different benefits whilst doing the same work or similar work.[2122]

[7] Section 9(2) of the Constitution.
[8] D Du Toit "The right to equality versus employer 'control' and employee 'subordination": Are some more equal than others? (2022) 37 *ILJ* 1.
[9] Du Toit at 4.
[10] Act 66 of 1995.
[11] Act 56 of 1998.
[12] Act 75 of 1997.
[13] Act 9 of 2018.
[14] A van Niekerk and N Smit and others *Law@work* (2019) 117.
[15] Van Niekerk and Smit and others at 120.
[16] *SACCAWU abo Mabaso and Others v Masstores (PTY) Ltd t/a Makro* [2023] ZALC 49.
[17] *Mangena and Others v Fila South Africa (Pty) Ltd and Others* (JS 343/05) [2009] ZALC 81.
[18] *Imatu and Another v City of Cape Town* [2005] 11 BLLR 1084 (LC).
[19] Section 6(1) of the Employment Equity Act.
[20] D du Toit and others *Labour Relations Law: A Comprehensive Guide* (2015) 537.(get 2023 book)
[21] Du Toit at 541.
[22] *Protekon (Pty) Ltd v CCMA* [2005] 7 BLLR 703 (LC), paras 31-32.

This study will focus on equality at the workplace, in particular: unequal pay for work of equal value. Being paid differently is justifiable in an event where the job requires certain standards to be met. These standards include amongst others, experience[23] and inherent requirements of the job.[24]

[23] *Sun International Limited v SACCAWU obo Ramerafe and Others* (JR1501/17) [2019] ZALCJHB 31
[24] A Rycroft, "Inherent requirements of the job" (2015) 36 *ILJ* at 900.

1.2 Problem Statement

Talita Laubscher argues that South Africa has been criticised by the ILO for lacking legislation that deals with wage discrimination, especially with regard to gender and race.[25] However, this has changed with the introduction of the Employment Equity Act of 1998 (specifically with the amendment of the Act in 2014), which inserted section 6(4) stipulating that:

> "The difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination".[26]

Section 6(4) follows on section 6(1) of the same act which provides that:

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

These two subsections seek to ensure that no employer employs people who do work of the same value but are being compensated differently. This study will focus mainly on the discrimination (directly or indirectly), on the grounds of race,[27] gender, disability and age directed at employees who perform the same work or similar work yet are compensated differently. Everyone has a right to fair labour practices in terms of the Constitution and may not be discriminated against.[28] Discrimination can be justified by the employer; however, it is of paramount importance to note that the employer bears the onus to prove beyond reasonable doubt that the discrimination is fair and justified.[29] Discrimination may be fair or unfair. According to the EEA, discrimination is considered unfair if it is based on the listed grounds in section 6(1) of the said Act. Race, gender, age and disability are some of these listed grounds. The Labour Court in the case of *Louw and Another v Golden Arrow Bus Services (Pty) Ltd*,[30] held that

[25] Laubscher at 805.
[26] Section 6(4) of the Employment Equity Act as amended in 2014.
[27] T Tabane and A Rycroft "Racism in the workplace" (2008) 29 *ILJ* 43.
[28] Section 23(1) of the Constitution.
[29] N Hlongwane "Commentary on South Africa's position regarding equal pay for work of equal value" (2007) 79 *Law Democracy and Development* at 69.
[30] (C 37/97) [1999] ZALC 166.

"fairness requires that persons doing equal work should receive equal pay".[31] Therefore, it is an unfair labour practice to pay employees different wages for work of equal value based on their race, gender, age and disability.

Discrimination can also be based on arbitrary grounds. Du Toit argues that concerning *Naidoo and Others v Parliament of the Republic of South Africa*, [32]an arbitrary ground violates the rights to human dignity.[33] It is submitted that discrimination based on gender and race violates a person's human dignity and this is against the provision of the Constitution because the Constitution guarantees that everyone has "inherent dignity and the right to have their dignity respected and protected".[34] The case of *Minister of Justice and Correctional Services v Ramaila* dealt with what constitutes "any other arbitrary ground" as mentioned by section 6(1) of the EEA. In this case, the first respondent, Ramaila, brought a case to the Labour Appeal Court (LAC) about unfair discrimination based on arbitrary grounds. The court held that discrimination on an arbitrary ground should be the one that was "not meant to be self-standing ground but rather one that referred back to the specified grounds, contained in s6(1) of the EEA".[35]

There is uncertainty in our labour law about what constitutes unfair discrimination on arbitrary grounds. In the Constitutional Court decision of *Harksen v Lane*,[36] Goldstone J held that:

> "There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the dignity of persons as human beings, or to affect them adversely in a comparably serious manner".[37]

Another issue that creates uncertainty is the issue of seniority at work. The study will further examine whether seniority in the workplace is a factor in the determination of people doing equal-value work but being paid differently. It will further examine whether seniority amounts to unfair discrimination or whether this discrimination is fair

[31] *Louw* case, para 22.
[32] (CA4/2019) [2020] ZALAC 38.
[33] D Du Toit "Discrimination on an 'Arbitrary Ground' and the Right of Access to Justice" (2021) 42 *ILJ* at 1.
[34] Section 10 of the Constitution.
[35] *Ramaila* case, para 24.
[36] (1998) 1 SA 300 (CC).
[37] *Harksen v Lane*, para 46.

and justified. In this regard, the study will refer to arguments advanced by Ebrahim's[38] article on "Equal Pay in Terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression*".[39][40]

1.3 Importance of the study

The unemployment rate in South Africa is 32.7%,[41] with the youth unemployment rate above 65%, an all-time high. This forces the labour market to be congested and people are not only looking to be employed and paid equally with their colleagues. They are merely looking to be employed, and receive an income for survival purposes. This often results in employers abandoning legislation provisions (such as the Labour Relations Act, the EEA and Constitutional provisions) when it comes to equal pay for work of equal value, and fair labour practices. The value of this research will be to attempt to circumvent this "legislature neglect" by employers to ensure that employees are treated fairly and equally in the workplace as guaranteed by the LRA, EEA, the Constitution and others. The main goal of this study is to ensure that fairness and equality in the workplace do away with unfair discrimination often practised by employers to various groups of employees.

1.4 Research Questions

This study will attempt to answer the following research questions:

- What more should the LRA, the EEA and the Constitution do to help solve the problem of unequal pay for equal-value work?
- Should the legislature introduce more stringent legislation to solve the problem?
- What lessons can be gained from the ILO?
- Should further amendments be introduced to the already existing legislation dealing with equality and discrimination at work?

[38] "Equal Pay in Terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression*".
[39] S Ebrahim "Equal Pay in terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression* 2016 ZALCCT 14" (2017) 20 *Potchefsroom Electronic Law Journal* at [i]-18.
[40] 2016 ZALCCT 14.
[41] Statistics South Africa, 2023, first quarter.

- How can we learn from other countries such as Kenya and the United States (US)?

1.5 Comparative Study

According to the World Bank, South Africa is the most unequal society in the world, with 10% of the population owning 80% of the wealth and race continues to be the determining factor for this unwelcoming statistics.[42] The United Nations (UN) in the Department of Economic and Social Affairs,[43] under the Department of Economic and Social Affairs Agenda 2030 seeks to promote equality and social justice in a changing world.[44] The UN also addresses the issue of equal pay for work of equal value, especially about race, age, gender and disability.

The study will also refer to the article by Freeman,[45] wherein equal work for work of equal value is discussed, especially about gender. This study will also look into Africa regarding the issue of equal pay for work of equal value. Although in jurisdictions such as the USA, UK and South Africa unequal pay for equal-value work is mostly influenced by factors such as race and gender, in Kenya, Jamil Majuzi,[46] provides the grounds for which employees should not be discriminated against.[47] Females are still being paid far less for the same work compared to their male counterparts. More work, however, is being done to address pay inequity in African countries. In Zambia for example, Musa Ndulo and Cosmas Emeziem,[48] concerning the Gender Equity and Equality Act,[49] which calls for the same remuneration for both males and females doing the same work,[50] argue the that wage gap between men and women who do the same work and have the same qualifications and same work experience have been recently bridged.[51]

---

[42] https://www.aljazeera.com/news/2022/3/10/south-africa-most-unequal-country-in-the-world-report.
[43] Department of Economic and Social Affairs: United Nations *World social report: Inequality in a rapidly changing world* (2004).
[44] Department of Economics and Social Affairs: UN at 12.
[45] MDA Freeman 'Equal Pay for Women the British Experience' (1980) 1 *ILJ* at 95.
[46] JD Majuzi 'The Right Not to be Discriminated Against in Employment in Kenya' (2020) 41 *ILJ* 1547.
[47] Majuzi at 1550.
[48] M Ndulo and C Emeziem *The Routledge Handbook of African* Law (2021).
[49] Act 22 of 2015.
[50] S 31(1)(e) of the Act.
[51] Ndulo and Emeziem at 89.

In Nigeria, Ronke I. Ako-Nai argues that equality between men and women in the workplace involves "equal decision-making and equal pay".[52] Therefore, African countries are slowly catching up with making the workplace equal about equal pay for equal-value work for both males and females. More work still needs to be done but the gap that was previously seen and experienced in the past is slowly closing and equality and equity are slowly emerging in various workplaces in many African jurisdictions.

1.6 Research Methodology

This study will follow a discursive, comparative and analytical approach. This will be done through a desktop-based approach. The study will use sources such as case law, peer-reviewed journal articles and academic textbooks. On limited occasions, where necessary, especially when giving statistics, the study will also make use of internet sources such as websites and online reported newspaper articles from recognised newspaper outlets across South Africa.

The comparative analysis of the study will be advanced in great detail in chapter 7 of the study. Chapter 7 of the study will make use of the work from other countries such as the UK (England in great particular),[53] and Kenya; as well as the United Nations.[54]

1.7 Description of the Chapters

This study will comprise eight (8) chapters which are outlined as follows

Chapter 1: introduces the essay and what the study will try to achieve in the essay.

Chapter 2: discusses the International Labour Organisation (ILO), standards and implications on the matter of equality and equity in the workplace with regards to equal pay for work of equal value. The study will also refer to the EU and in particular France.

Chapter 3: discusses equality at work and the Constitution.

Chapter 4: outlines the factors for unequal pay of equal work in the workplace. Factors such as race, gender, age and disability will be at the forefront.

[52] RI Ako-Nai *Gender and Power Relations in Nigeria* (2013) 195.
[53] Armstrong, Cummings, Hastings at 55.
[54] Department of Economic and Social Affairs at 23.

Chapter 5: discusses unfair labour practices and what constitutes an "Unfair Labour Practice" as regulated by the Labour Relations Act, Employment Equity Act (EEA), the Constitution and case law.

Chapter 6: discusses affirmative action. The chapter will discuss in detail whether affirmative action is good in the workplace and whether the implementation of affirmative action policies may lead to unfair discrimination in the workplace[5556] and social justice. About social justice, the study will also discuss the realm of social justice in the workplace in reference to Matlou.[57]

Chapter 7: analyses how other jurisdictions, compared to South Africa, deal with the issue of equal pay for work of equal value. The comparison will focus on gender in Africa (Zambia and Nigeria) and other factors, including gender, disability and race (England). Regard will also be held with what the United Nations says about this matter.

Chapter 8 of the study: conclusion and recommendations on what should be done to make the situation better.

[55] D Baqwa 'The Resolution of Affirmative Disputes in the Light of Minister of Finance and Another v Van Heerden (2006) 27 *ILJ* 67.
[56] *Minister of Finance and Another v Van Heerden* (2004) 25 *ILJ* 1593 (CC).
[57] D Matlou 'Understating workplace social justice within the Constitutional framework' (2016) 28 *South African Mercantile Law Journal* 544.

CHAPTER TWO
INTERNATIONAL LABOUR ORGANISATION

2.1 Introduction

In this chapter, the study will investigate the issue of equal pay for work of equal value, making reference to the standards set by the International Labour Organisation (ILO). The study will refer to the International Labour Standards Convention on Equal Remuneration,[58] Organisation for Economic Corporation and Development (OECD), whose purpose and guidelines for its multinational members are to have standards wherein the member states can have responsible business conduct in a range of issues. This includes labour-related issues such as equal remuneration for all people doing the same or similar work and although these guidelines are not binding to member states, they ensure that the labour rights of member states are protected. The study will also discuss equal pay for work of equal value focusing on the European Union (EU). This will extend to the implications and improvements that have been made by the EU in addressing pay disparities among workers doing the same value work but being paid differently and unfairly.

2.2 International Labour Organisation on Equal Pay for Equal Value Work

[58] ILO Equal Remuneration Convention 100 (1951).

ILO contains conventions and recommendations in its standards. The ILO conventions are legally binding to the states which ratified the conventions (hereinafter "ILO Fundamental Conventions"),[59] however, the ILO recommendations are not legally binding to the member states.[60] The purpose of the ILO conventions and recommendations is to try and achieve socio-economic and socio-political justice among the member states.[61]

The focus of this study will be on equal remuneration for equal-value work. Equal Remuneration Convention No. 100 of 1951 aims to eliminate discrimination in respect of employment and occupation.[62] The purpose aims at eliminating discrimination in paying employees differently on race, gender and religion among other factors which might contribute to making people receive different wages while doing the same work. Nomagugu Hlongwane holds that:

> "ILO Convention No. 100, concerning equal remuneration for men and women workers for work of equal value, commits member states to ensure that pay equity is applied to all workers using national laws, wage determination machinery, collective bargaining, or a combination of these methods".[63]

In South Africa, the legislation tasked with ensuring equality at the workplace is the EEA. Section 6 of the EEA prohibits discrimination in the workplace of any kind, including unfair discrimination on equal pay for equal-value work. Therefore, local legislation and ILO convention number 100 of 1951 should be read alongside and interpreted by commissioners or courts whenever the issue of inequality at work about equal pay for work of equal value arises.

2.3 Organisation for Economic Corporation and Development (OECD) and Equal Pay for Equal Value Work

The OECD has guidelines and recommendations which are not binding to the member states of the OECD. These guidelines and recommendations seek to express the shared values of the various governments which have ratified the guidelines and

[59] Article 15(1) of the the International Labour Organization's Fundamental Conventions, 2002.
[60] Article 5(1) of the ILO Fundamental Conventions, 2002.
[61] ILO's Fundamental Conventions at 73.
[62] ILO Convention number 100 of 1951.
[63] Hlongwane at 70.

recommendations for economic, social and multicultural progress worldwide.[64] In the foreword of the OECD Guidelines for Multinational Enterprises 2011 Edition (hereinafter "OECD Guidelines, 2011 edition), the guidelines stipulate that:

> "The Guidelines' recommendations express the shared values of the governments of countries from which a large share of international direct investment originates and which are home to many of the largest multinational enterprises. The Guidelines aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide".[65]

With regard to the economic and social aim of the OECD, the study will focus mainly on the remuneration of employees and the treatment of employees by various industries about the issue of equal pay for equal work value. In the section titled: "Commentary on Employment and Industrial Relations",[66] the guidelines discuss non-discrimination in the workplace. The guidelines point out that discrimination in the workplace should not be tolerated. The different types of non-discrimination are discussed and clearly outlined as job assignment, pay and benefits, and training. The guidelines emphasise that non-discrimination should be practised by multinational enterprises.[67]

Perhaps the most important question is how will the guidelines achieve their purpose in making sure that women and men in the workplace get the same recognition and get remunerated equally for doing the same work. The answer to this question lies in how EPIC aims to bring about that equality. The EPIC holds:

> "The members of EPIC will work together at the global, regional and national levels to support governments, employers and workers and their organizations, and other stakeholders, to make equal pay between women and men for work of equal value a reality, and reduce the gender pay gap".[68]

EPIC's vision calls on governments from various nations which ratified the OECD guidelines to ensure that they comply with the OECD guidelines and also work

[64] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing.
[65] OECD Guidelines, 2011 edition.
[66] OECD Guidelines, 2011 edition at 39.
[67] OECD Guidelines, 2011 edition at 39.
[68] EPIC 2017 at 10.

together to ensure that these guidelines are implemented as soon as possible. Failure to implement these guidelines will result in failing women in the workplace seeking equality and protection. This is the reason more effort will be needed to make sure that the chances of this guideline succeeding are great. The EPIC contains what is termed "The Equal Pay Platform of Champions".[69] In terms of this platform, people from different backgrounds come together in solidarity. They ensure that people of different backgrounds, races, genders, people living with disabilities and people of different age groups are recognised at work and are remunerated equally. The latter is conditional on the fact that they produce the same quality and amount of work, hold the same qualifications and have the same or similar experience. The Equal Pay Platform of Champions is likely to succeed if people from different nations, different unions, known people in society, Non-Organisation Groups (NGOs) and others come together with one voice to attempt to fight for worker's rights of equality and dignity. People's dignity is being violated when an employer pays employees differently for doing the same amount of work and the same value work. This amounts to inequality and unequal treatment of employees which usually renders the workplace intolerable to some employees, especially the ones being paid substantively less compared to their co-employees.

The work of the Equal Pay Platform of Champions will improve the lives and livelihoods of those who were previously disadvantaged. The EPIC guideline outlines what the Equal Pay Platform of Champions aims at paving the road for long-term approaches and how the governments of various countries worldwide can refer to and implement these ways in their local jurisdictions. [70] The guidelines in terms of EPIC are as follows:

- Legislation on equal remuneration for work of equal value in line with ILO Convention No. 100, and accessible dispute resolution mechanisms;

- Policies, practices and institutional mechanisms that directly address gender discrimination in pay and other related dimensions;

[69] EPIC 2017 at 11.
[70] EPIC 2017, at 11.

- Adequate measures to address the gender bias in wage structures and wage-fixing mechanisms, including through objective job evaluation methods;
- Data, including wages and other benefits, disaggregated by gender, and possibly by ethnicity,
- Strong maternity, paternity and parental leave and childcare policies;
- Robust transparent policies at various stages of career progression.

If these guidelines are adopted by the member states of the OECD, they are more likely to improve the working conditions of employees at various workplaces. Most importantly, the issue of equality and recognition in remunerating employees at various workplaces. EPIC plans on achieving equal pay for equal value work Member states of OECD have a duty in their local jurisdictions to also raise awareness of ensuring that the industries operating in their states are aware of the efforts to ensure that their employees are not being discriminated against, they are not being treated unfairly and unjustly at the workplace and most importantly to ensure that their employees are being paid the same amount of money especially when performing work of equal value.

2.4 The European Union (EU) and Equal Pay for Work of Equal Value

The European Union (EU) has laws, policies and recommendations for the support of equal pay for equal work value. In the article titled "Marginalising Equal Pay Laws" by Sandra Fredman,[71] about the case of *Allonby v Accrington & Rosendale College,*[72] she holds that:

> "A woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same service in the same establishment is not entitled to claim equal pay with a man doing the same work at the same establishment".[73]

[71] S Fredman "Marginalising Equal Pay Laws" (2004) 33 *Industrial Law Journal* 281-285.
[72] Case C-256/01 [2004] IRLR 224 (ECJ).
[73] *Allonby* case, para 50.

The argument by Fredman is that women in the employment service do not have favourable contractual terms and even if the value of work is similar to that of men their contractual terms are often still not improved and are ignored which leads to them not having better contractual terms even in their next job. This argument needs more research and more statistics to be justified. Fredman regards the difference in contractual terms of men and women as inequality of treatment in the workplace between workers doing the same value work. She regards this as the institutional arrangement of inequality and discrimination and holds that it does not require one actor to ensure that men and women are treated equally and get paid the same but rather many actors. She believes that the EU and the European Courts must intervene to ensure that more is done to women's work contracts, for them to have favourable terms like their male counterparts doing equal-value work.[74] Fredman argues that female workers doing the same work or work of equal value need more protection from the EU. This study concurs with Fredman's argument on the latter point that female workers doing the same equal-value work need and should be accorded more attention and protection and that their employment contracts should be improved to consist of favourable terms and benefits that male workers usually or historically get in an environment where the males and females are doing equal value work.

Alina Nicu in her article titled: "Considerations on the Contribution of the EU Court of Justice related to the Uniform Application of the Community Regulations on the Principle of Equal Remuneration for Equal Work Irrespective of Sex" argues that the EU aims to grant equal opportunities to its member states and this includes making sure that the member of the EU and the country's population benefits from the EU labour policies.[75] Nicu references the Lisbon Treaty and the amendments brought by the treaty and holds that one of the most important amendments brought by the treaty is non-discrimination. This non-discrimination is based on ensuring that there is no discrimination at the workplace and this includes non-discrimination about remuneration. The argument made by Nicu is that workers doing the same work

[74] Fredman at 282-283.
[75] AN Nicu "Considerations on the Contribution of the EU Court of Justice Related to the Uniform Application of the Community Regulations on the Principle of Equal Remuneration for Equal Work Irrespective of Sex" (2013) 1 *Acta Universitatis Danubius Juridica* 5-11.

should be entitled to get the same remuneration, irrespective of race, gender and other factors which usually lead to discrimination at the workplace.

The Treaty on the European Union, “seeks to eliminate inequalities and promote equality between men and women" and "In the definition and application of its policies and actions, the Union seeks to fight any discrimination based on sex, race or ethnicity, religion or beliefs, handicap, age or sexual orientation".[76] This then becomes clear that the EU is taking measures to ensure that discrimination and inequalities are being rooted out from the Union member states and this also applies to the workplace of the EU member states.

In the “Principles Formulated by the Court of Justice of the European Union on the Equal Remuneration Between Female and Male Workers”,[77] Nicu argues that one of the fundamental elements the EU is based on is the principle of equal remuneration between men and women doing the same work or equal value work.[78] She argues that it is important for the EU to put more emphasis on this principle as that would push member states of the EU to introduce new legislation in their respective jurisdictions. The new legislation ought to make sure that companies comply with the principle as initiated by the Union. This principle Nicu argues, will also help in the fight for discrimination at the workplace that is often prevalent.

The issue of gender pay in the European Union is quite a big one. Jarrod Tudor[79] holds that the EU has been constitutionally committed to ensuring that equal pay is implemented by EU member states in their local jurisdictions and that companies operating in those EU member states comply with the requirements of equal pay in the workplace for workers doing the same value work.[80] Equality is what the EU has been working on achieving for the longest time. Tudor holds that the EU has been committed to achieving equality since the 1957 Treaty of Rome.[81] This equality is also focused and directed in the workplace and men and women who do the same work, work of equal value and work of substantially the same value are remunerated equally. This concept of equality at the workplace is also in line with the EU’s policy relating to

[76] Nicu at 6.
[77] Nicu at 9.
[78] *Ibid.*
[79] J Tudor “Closing the gender pay gap in the European Union: The Equal Pay Guarantee Across the Member-States” (2017) 92 *North Dakoda Law Review* 415-472.
[80] Tudor at 415.
[81] Tudor at 417.

human rights, the attainment of human rights and the protection of these rights at the workplace.[82] The EU policies in the workplace according to Tudor have been a catalyst in achieving equality and in making sure that people of the member states of the EU have equal rights and equal opportunities in the workplace, especially between men and women. In promoting equal pay for equal work value, trade groups and social partners also have a role to play in making sure that workers receive the same remuneration for their equal work at the workplace. Tudor argues that many stakeholders have to lead the way in ensuring that this implementation is a success and is effective and efficient as it is an initiative that is good for community building.[83] Affirmative action and affirmative approach will have to be adopted and taken to ensure that the implementation of equal pay across the board is a success and no one should be left behind.

Tudor holds that "the requirement of equal pay is important to the social progress and improved standard of living missions behind the EU".[84] This argument is valid as making men and women get paid the same when they do the same value work is critical for nation-building and ensuring equality. One thing that should be avoided in society is the notion that women should begin thinking that their worth is not being recognised at the workplace as that would portray a negative narrative and would produce workers who are not motivated and likely not to give their best when executing duties at work. A society built on equality, fairness and recognition is a progressive society

On implementing the equal pay for equal work doctrine, Tudor argues that:

> "Perhaps the most challenging effort the EU as a whole can take to improving the condition of the equal pay doctrine across the continent is to broaden the scope of Article 157 (ex 141, 119) to require an inter-member-state requirement that employers must treat their workers equally based on gender. In other words, an employer operating in two or more EU member-states must adhere to the equal pay doctrine in each of those member-states".[85]

This notion will improve the workplace of the member states of the EU and will result in the EU member states adopting policies which will make sure that women and men

[82] Tudor at 418.
[83] Tudor at 422.
[84] Tudor at 426.
[85] Tudor at 471.

are rated and rewarded equally in the workplace for the same work that they are doing. The study concurs with this argument by Tudor to achieve equality in the workplace and avoid discrimination. In an attempt to ensure that different genders in the workplace are not faced with inequalities (this includes remuneration, tolerance and recognition) strategies by the EU will have to be implemented over some time.

Some authors argue that the equal pay apparatus needs radical reform.[86] Sandra Fredman is one such author. She argues that this radical reform however should also come up with realistic ways on how this will be done. This study does not support this notion by Fredman. The reason for this is two-fold. Firstly radical ways of implementing new policies are done quickly without proper consultations with different stakeholders such as investors and experts in the field of labour law. Secondly, radical ways of doing things will deter investors from investing in a market of member states of the EU and this might have negative consequences and outcomes as more businesses might collapse and retrenchments may follow. While this study supports these changes to labour laws, the changes should be done and implemented by first consulting with the investors, employers and labour experts of each member state of the EU.

This study believes that unfair discrimination in the workplace exists. Fredman argues that the first initiative to do away with unfair discrimination should be from the employer and "the employer must take the initiative to identify equal pay gaps, and to eliminate those that cannot satisfactorily be explained on grounds other than sex".[87] Therefore, this will ensure that sex bias in the workplace is eliminated between employees doing the same value work. Methods such as an equal pay plan would also work and the employer should come up with an equal pay plan, introduce it to the employees affected and gather from them whether they are satisfied or not and conduct consultations in this regard. This will also make the employees believe that they have a say in matters that affect them at the workplace, however, this plan must be consistent with EU law and not contravene it or undermine it.

[86] S Fredman "Reforming equal pay laws" (2008) 37 *Industrial Law Journal* 193-218.
[87] Fredman (2008), at 215.

The issue of what constitutes "equal value work" and allows the parties to be entitled to the same or equal pay arises. In the article titled: "Beyond Equal Pay", Steele[88] argues that:

> "Problems arise where the selected route reveals that claimant and comparator do unlike work or work of unequal value, but the claimant remains of the view that she is being underpaid on grounds of sex. This can occur both where the claimant's work is less valuable and more valuable than her comparator's".[89]

Steele then suggests that in such a case, the worker complaining of being treated unequally ought to be made to understand how her work differs from that of the comparator. The duty in this case lies with the employer in ensuring that both the complainant and the comparator understand the value of the work they are doing for the employer and how they will be consequently compensated as a result.

Steele comes up with the solution for these problems or the likelihood of such problems existing in future. According to Steele, this approach will ensure that women doing work of more value to that of men are treated equally and justifiably by the employer

2.5 Conclusion

Chapter 2 of this study has discussed the International Labour Organisation on Equal Pay for equal-value work. The focus was on the conventions and recommendations contained in ILO. Of importance was the discussion of Convention number 100 of 1951, which aims to eliminate discrimination in respect of employment and occupation. The study also discussed the Organisation for Economic Cooperation and Development (OECD) regarding equal pay for equal work value. The guidelines and recommendations provided by the OECD to achieve social and economic goals for the member-states of the OECD were also discussed. Non-discrimination in the workplace is one of the most important OECD guidelines and it seeks to ensure that employees of the member-states of the OECD are protected and equality is achieved in the workplace, especially on the issue of remuneration for equal work value. The study finally discussed the issue of equal pay for equal work value in the European Union.

---

[88] I Steele "Beyond Equal Pay" (2008) 37 *Industrial Law Journal* 119-124.
[89] Steele at 119.

Policies and recommendations have already been outlined to protect workers who perform the same work in the workplace. More emphasis on the study looked at the issue of gender inequality and the subsequent unequal remuneration of males and females in the workplace. The EU and its member-states are putting measures in place to ensure both males and females are treated equally and measures such as making contractual terms the same for both men and women doing the same work value. The European Courts should put more emphasis on equality in the workplace for both males and females doing equal-value work and finally, the EU Court of Justice should put labour policies, rules and recommendations which the member-states of the EU should implement and make sure they apply in their local jurisdictions and the local companies operating in those jurisdictions should then comply with those labour policies, rules and recommendations.

CHAPTER THREE

EQUALITY AT WORK, CONSTITUTIONAL PROVISIONS AND THE EMPLOYMENT EQUITY ACT

3.1 Introduction

In this chapter, the study will discuss equality in the workplace about equal pay or remuneration for work equal value. In this regard, section 9 and section 23 of the Constitution will be looked at. Section 9 contains the equality clause; the study will however focus on section 9(1), section 9(2) and section 23(1) which affords the protection of an employee in the workplace. The Employment Equity Act plays a huge role in regulating the issue of equal pay for equal-value work in South Africa. The study will discuss section 6 of the EEA which deals specifically with unfair discrimination in the workplace and the issue of equal pay for equal value work. Section 6(4) of the EEA will be critical in this chapter as it will show the contents of equal pay for equal-value work. The article by Shamier Ebrahim discusses grounds of justifications for pay discrimination. The study will focus on case law and the cases that have been brought in our courts with the issue of pay discrimination, violation of the employee's right to equality in the workplace, violation of the employee's right to fair labour practices and case law in terms of section 6(4) of the EEA.

3.2 Equality at Work and the Constitutional Provisions

In the founding provisions of the Constitution, section 1(a) states that: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms". In this study, the focus will be on the achievement of equality, more

especially equality in the workplace. Still, on the issue of equality, section 9 of the Constitution plays a huge role. Section 9(2) states that:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed Chapter 2: Bill of Rights 6 to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".[90]

This section provides that unfair discrimination should not be tolerated and the advancement of equality should be prioritized, especially in a country like South Africa where inequality was prevalent in the past. In the 2004 Constitutional Court case of *Minister of Finance v Van Heerden,*[91] a case dealing with the issues of equality and unfair discrimination. Moseneke J held about equality that:

> "When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is
> contemplated by s 9(2) in that it promotes the achievement of equality and is designe d to protect and advance persons disadvantaged by
> unfair discrimination. It seems to me that to determine whether a measure falls within s 9(2), the enquiry is threefold. The first yardstick relates
> to whether the measure targets persons or categories of persons who have been disa dvantaged by unfair discrimination; the second is
> whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the
> measure promotes the achievement of equality".[92]

It is clear that history still plays a huge role when it comes to the issue of equality and the attainment of equality in South Africa. Ebrahim draws reference to the *van Heerden* case and argues that: "It is self-evident that if a measure does not pass the above enquiry then the measure is not one contemplated in section 9(2) and is not a remedial measure including an affirmative action measure".[93] This study is in agreement with Ebrahims' argument. Although the study will not focus on affirmative action in this chapter, Ebrahim holds that affirmative action is one of the justifications for pay discrimination which then becomes fair discrimination alongside the inherent

[90] Section 9(2) of the Constitution.
[91] 2004 6 SA 121 (CC).
[92] *Van Heerden* case, para 37.
[93] Ebrahim at 26.

requirements of the job. In the *van Heerden* case, it is clear that unfair discrimination in the workplace should not be tolerated and should not be advanced by employers. Employers should take necessary steps to curb unfair discrimination, especially regarding remunerating their employees, that does the same work or work of equal value.

The purpose of section 9(2) is very important when it comes to fixing the injustices of the past. In the case of *SA Chemical Workers Union v Sentrachem Ltd,*[94] the principle of equal pay for work of equal value is discussed.,[95]. In the *Sentrachem* case, the old Industrial Court held that "wage discrimination based on race or any other difference other than skill or experience was an unfair labour practice".[96] Therefore, the court disagreed with unfair discrimination. The relevance of this decision today is of paramount importance as unfair discrimination in the workplace on the grounds of race, gender and any other grounds other than skill or experience is still an ongoing issue.

3.3 Employment Equity Act 55 of 1998

Section 6 of the EEA prohibits unfair discrimination. Discrimination can be fair and justified. Cohen states that:

> "To speak of justified discrimination sounds strange. It is understandable to say that b
> ehaviour that looks discriminatory at first glance really is not
> after all. . .But the law invites us to do something else as well: to take a complaint abo
> ut discrimination that is in all other respects valid, and to
> allow it to be overridden in the name of some competing objective".[97]

According to Cohen, justifiable discrimination, although still does not mean we should be proud of it, is however lawful and enforceable. Instances such as affirmative action are needed to help ensure that the mistakes of the past are not repeated. In the workplace, a topic of relevance in this study is unfair discrimination when it comes to unequal pay for equal-value work. Cohen argues that legislation such as the EEA is a

[94] 1988 9 ILJ 410 (IC) (This is an old case heard in terms of section 46 (9) of the repealed Labour Relations Act 28 of 1956).
[95] T Cohen "Justifiable Discrimination-Time to set the parameters" (2000) 12 *SA Merc LJ* 255-268.
[96] *Sentrachem* case, para 21.
[97] Cohen at 255.

blessing to a country like South Africa which has a dark history.[98] She praises the EEA, particularly section 6 and its late amendments. Section 6(1) of the EEA stipulates that:

> ”No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground”.[99]

Cohen argues that this subsection should not be read in isolation with section 9(2) of the Constitution and the Bill of Rights.[100] The argument made by Cohen is the argument this study will adopt and investigate further in concurring with Cohen’s argument. This chapter puts emphasis on section 6(4) of the EEA which states:

> “A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination”.[101]

“Section 6(4) of the EEA prohibits unfair discrimination in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value”.[102] Therefore, from this, it could be deduced that the most important thing is to “prevent unfair discrimination”. It is unfair discrimination to pay people differently based on the grounds listed in section 6(1) and other arbitrary grounds. What constitutes arbitrary grounds is not important in this particular discussion, the purpose of section 6(4) which is to prevent unfair discrimination is the important aspect to be discussed. The rest of this chapter will focus on sections 6(1), 6(2) and 6(4) in discussing unfair discrimination about unequal pay for work of equal value.

Ebrahim argues about the contents of section 6(1) of the EEA that, a listed ground such as family responsibility would justify unfair discrimination for unequal pay for work of equal value.[103] Ebrahim further refers to the case of *Co-operative Worker Association v Petroleum Oil and Gas Co-operative of SA,* where the court held that if

[98] Cohen at 256.
[99] Section 6(1) of the EEA.
[100] *Ibid.*
[101] Section 6(4) of the EEA.
[102] Ebrahim at 2.
[103] Ebrahim at 8.

the employer paid the employees differently, such that employee A receives more pay than employee B because the two employees have different family responsibilities, then such payment differences justifiable. This study argues that this is unfair discrimination in terms of section 6(1) of the EEA.

In terms of section 6(4) of the EEA, it is unfair discrimination to pay employees differently if they are doing the same work or work of equal value. Ebrahim argues with reference to the case of *Pioneer Foods (Pty) Ltd v Workers Against Regression,*[104] that seniority does play a role in justifying pay differentiation to employees whose level of seniority in the workplace differs. In terms of seniority, it is not unfair discrimination to pay employees differently. The Labour Court in *Pioneer Foods* correctly stated that it is not unfair discrimination to pay employees differently because of seniority but rather a justification for this differentiation in payment.[105] This study concurs with Ebrahims' argument and the conclusion of the Pioneer Foods case. Therefore, the Union for Workers against Regression's argument was not properly and legally sound and did not interpret section 6(4) of the EEA properly.

Concerning issues such as seniority, discrimination could be referred to as fair discrimination or justifiable discrimination, although the EEA does not stipulate so. "The legislation fails to set the parameters of justifiable discrimination, and so leaves open to interpretation the area of employment lawthat underpins the entire transform ation process".[106] This argument by Cohen calls on legislators to amend the EEA so that it may include the factors which would specify what constitutes fair discrimination.

A test should be developed by the courts to assist us in determining what constitutes fair or unfair discrimination. Cohen argues that "in assessing whether or not discrimination is justifiable the particular context in which the discrimination arose and its effect on the affected group should be considered carefully.[107]This will also create certainty and clarification for commissioners and the courts when confronted with the issue of discrimination in the workplace and whether such discrimination would be fair or not. Bruce Robertson in an article titled: "Does the New Code of Good Practice on

[104] 2016 9 BLLR 942 (LC).
[105] *Pioneer Foods* case, paras 32-33.
[106] Cohen at 255.
[107] Cohen at 258.

'Equal Pay For Equal Work' Justify its Existence?",[108] argues that the New Code of Good Practice on Equal Pay for Equal Work draws from the EEA's provision to "reiterate an employer's obligation to take positive steps to promote equal opportunity and eliminate unfair discrimination in the workplace".[109] The employer according to the EEA's provision and Roberson's argument, must take reasonable steps to make sure that discrimination of any kind, including pay discrimination for employees doing the same work or work of equal value does not exist in the workplace. This argument by Robertson is valid and one should assist employers in making sure that the employees in the workplace do not face discrimination of any kind as stipulated in section 6(1) of the EEA. Robertson further holds that, not all pay differentiation results in unfair discrimination. He holds: "Differences which are fair and rational" will not result in unfair discrimination.[110] The study has already discussed this narrative in the above paragraphs. Therefore, when it comes to pay differentiation and what constitutes fair discrimination by section 6 of the EEA, there is still more that needs to be done concerning the clarification of what constitutes fair discrimination regarding pay differentiation.

3.4 Case law discussion

In *Louw v Golden Arrow Bus Services (Pty) Ltd*,[111] the applicant was a coloured male employed by the respondent company as a buyer at a certain salary per month. The applicant's salary was different from one of the company's employees who was earning a different salary from Louw that was much higher than that received by Louw. Louw and other buyers complained to the respondent company that the difference in their salaries was motivated by discrimination. The other buyer was white and a warehouse supervisor. Louw and another employee of the company felt justice was not being done and instituted proceedings in the Labour Court for unfair discrimination and contended that the company was discriminating against them by paying the employees doing the same work of equal value different salaries due to race, therefore the complaint about unfair discrimination was based on race as contemplated by the decision of a residual unfair labour practice in item 2(1)(a) of Schedule 7 to the LRA

[108] B Robertson "Does the new code of good practice on 'equal pay for equal work' justify its existence?" (2015) 36 ILJ 2522-2528.
[109] Robertson at 2523.
[110] Robertson at 2524.
[111] (2000) 21 ILJ 188 (LC).

1995.[112] Louw claimed that at all different times, the work performed by him and the other employee of the company was of equal in value and therefore ought to be compensated equally.[113] Louw also argued that the difference in salaries is disproportionate to the difference in the value of the two jobs.[114]

The company agreed in Louw's pleadings that there was a differential in pay between Louw and Beneke but this difference was justified as the roles and duties of the applicant and Beneke were different and were not of the same value as Louw contended. But Louw maintained that the work of a buyer and that of one of a supervisor was of the same value. Louw therefore argued that the difference in pay between him and Beneke was motivated by race and claimed residual unfair labour practice on racial discrimination.[115] The court held that to prove discrimination, the *Harksen v Lane* test must be applied to prove unfair discrimination. The Harksen test requires that the discrimination must infringe upon an individual's right to human dignity in terms of the Constitution.[116] The Harksen test requires that for discrimination to be unfair discrimination, it must be of such a nature to infringe upon a person's human dignity and equality,[117] otherwise, the differential in treatment will justify the discrimination and the discrimination will be fair.

The court then had to investigate the question of causation to determine whether the discrimination in question was based on permissible grounds or impermissible grounds. *In this case,* the court had to show that the applicant proved discrimination based on race. Consequently, the court found that Louw could not prove objectively that the two jobs were of equal value that the discrimination was unfair in pay and that if there was indeed discrimination it was motivated by race.[118]

In *Mangena & others v Fila SA (Pty) Ltd & others*,[119] the applicant brought an application to the Labour Court contending that he and other employees of the company were being paid differently due to race as compared to other employees of the company who were of a different race. The comparator here was M, whom S, the

[112] *Louw* case (2000), para 4.
[113] *Louw* case (2000), para 4(a).
[114] *Louw* case (2000), para 4(b).
[115] *Louw* case (2000), para 7.
[116] Section 10 of the Constitution.
[117] Section 9 of the Constitution.
[118] *Louw* case (2000), para 106.
[119] (2010) 31 ILJ 662 (LC).

applicant contended was being paid more than them on account of race. The applicant argued that M and he were doing the work of equal value and the only reason they were being paid differently was due to their differences in their race. Firstly, the court looked at whether claims for equal work of equal value were contemplated by the Employment Equity Act 55 of 1998. In this regard, the court found that claims of this nature could be read in section 6 of the EEA as this latter section was broad enough to include claims of this nature.[120] In this case, section 6(1) of the EEA is of importance since it lists grounds which will lead to unfair discrimination. One of these grounds is the ground complained of in this case, which is race. The court held that to pay an employee less compared to another employee who does the same work of equal value on a listed ground constituted less favourable treatment on a prohibited ground and any claim for equal pay for work of equal value fell to be determined by the EEA.[121]

The court noticed that the EEA does not specifically provide for relief for claims of unfair discrimination about remuneration for work of equal value or similar value, the court held that section 6(1) should be interpreted broadly to include claims such as the one in this case. The court therefore interpreted section 6(1) broadly and held that, claims for unequal pay for work of equal value based on race can be brought based on race and the courts ought to make this wide interpretation so that it can be in line with regards to what the Constitution aims to achieve in section 9 for equality. There must be equality in the workplace and the employer must ensure that there is equality in his workplace, including paying his employees who are doing the same work or similar work of equal value. The court held that a claim for equal pay for doing equal-value work was justified for the prohibition of unfair discrimination.[122]

The court further held that for the applicant to succeed with a claim for unfair discrimination based on being paid differently for doing the same work or substantially the same work of equal value, the said applicant must identify a comparator with whom he can compare for being paid differently for doing the same value work.[123] The applicant claiming equal pay then had to show that his work and the work of that of the identified comparator is the same or similar work and the value of the work is also the same or similar justifying the claim for equal payment. If this can be proven in the

[120] *Mangena* case, para 5.
[121] *Mangena* case, para 5.
[122] Mangena case, para 5.
[123] Mangena case, para 6. This was the requirement as well in *Louw v Golden Arrow Bus Services*.

affirmative by the claimant, then it can be said the work of the claimant and that of the comparator is the same or similar which justifies what the applicant is claiming for. In this regard, the skills required to do the work, the physical and mental efforts needed to do the work, responsibility and other factors will be considered by the courts to conclude that the work done by the claimant and the comparator is the same and therefore the claimant should succeed in their claim.

The court then came to the issue of differentiation in the salaries of the claimant and the comparator and it held that there must be a causal link between the differentiation and the listed ground complained of, in this regard, race. If the causal link was established, the court held that the employer had to show that the discrimination was fair and just to justify the discrimination complained of. This is in terms of section 11 of the EEA. The court held that the claimant had to show this causal link that the difference in pay was due to unfair discrimination in race, mere allegation of discrimination on race would not suffice to establish a prima facie case.[124] Mangena therefore failed to establish this causal link and therefore failed to prove that the difference in pay was motivated by race and that the discrimination was unfair.

In *Pioneer Foods v Workers against Regression and others*,[125] the respondent employees were hired as drivers. They had previously been employed by the labour broker as drivers. Their union referred a matter to the CCMA for unfair discrimination based on section 6(4) of the EEA. However, the employees referred to a matter of unfair discrimination without identifying the ground they were relying on. On their heads of argument, they contended that they were relying on arbitrary grounds for unfair discrimination, in that as newer employees, they were being paid less than the longer-serving employees for doing the same or similar work of equal value.[126] In the CCMA, the commissioner found that it was unfair discrimination of the employer to pay the new employees less than the longer-serving employees and the reason for this was because the newer employees and the long-serving employees did the same work of equal value. The commissioner also looked at the fact that the newer employees were not new as they had been hired by the labour broker and as such

[124] *Mangena* case, para 7.
[125] (2016) 37 ILJ 2872 (LC).
[126] *Pioneer Foods case,* para 36.

have been in the employ of the company and are worthy of being recognised as not new employees.

Pioneer Foods took the matter for review in the Labour Court. The court noted that the employees did not identify any grounds listed in section 6(1) of the EEA. [127]The employees had an onus to prove that the discrimination they are alleging exists in terms of section 6(1) and the onus rested on them to prove that the complaint of discrimination against the employer was rational and that it amounted to discrimination and that the discrimination was unfair.[128] The court held that to establish pay discrimination it is important for the employees alleging discrimination to show that the work done by them is of the same value or equal value as compared to the work done by the comparator being paid more than the complainants and that the difference in pay is based on the ground prohibited in terms of section 6(1) of the EEA.

Since the complainants relied on an unlisted ground for unfair discrimination, being the period of service, the court held the complainants must ensure that the ground relied on qualifies as an arbitrary ground. Once there is proof that there is differentiation based on salaries of the employees doing the same value work, the test to prove that this differentiation could lead to unfair discrimination, the test as applied in *Harksen v Lane* should be applied. This test was also applied in *Louw's* case as discussed above. In terms of this test, the question is: “Will the differentiation complained about lead to the infringement of the complainants’ right to equality and human dignity as stipulated in sections 9 and 10 respectively”?. If this can be answered in the affirmative, then the differentiation will then be considered to have led to unfair discrimination. *In this case*, the court found that being paid differently due to being ‘new employees’ to the long-serving employees does not amount to an unlisted arbitrary ground of discrimination and the practice of paying new employees at a lower rate for two years is not irrational or unfair.[129] The court concluded by saying paying people differently because of their different lengths of service is rational, allowed and does not amount to unfair discrimination. It is also exceedingly common.[130]

[127] *Pioneer Foods case,* para 18.
[128] *Pioneer Foods case*, para 13.
[129] *Pioneer Foods*, para 32.
[130] *Pioneer Foods* case, para 57.

In *Naidoo and others v Parliament of the Republic of SA*,[131] the applicants brought a claim of unfair discrimination to the Labour Court against the respondent, who is their employer. The claim was in terms of section 6(4) of the Labour Appeal Court. They claimed that they were being paid less favourably compared to their comparators, that is, the other employees of the respondent, who according to the employees were being paid more even though the value of work between the complainants and the comparators was the same or similar. The ground that they relied on to bring a claim of discrimination was on an arbitrary ground in terms of section 6(1) of the EEA. The claimants argued that nepotism was the reason they were paid less and not favoured compared to the other employees who had been previously employed by the SA Police Service.[132] This was even though the complainants had been employed longer than the comparators. The respondent argued that nepotism and the fact that the comparators were previously employed by the SA Police Service did not constitute an arbitrary ground of discrimination in terms of section (1) of the EEA.[133] The court then had to determine the meaning of "on any other arbitrary ground" and held that arbitrary ground can be determined in broad terms and that other grounds not listed in section 6(1) of the EEA will be considered and also on narrow terms, wherein only the listed grounds in terms of section 6(1) would constitute discrimination in terms of listed ground. The narrow approach should have the ability to infringe upon the complainants' right to human dignity and equality in terms of the Constitution and accordingly, the *Harksen* approach was followed in this regard as was in the *Louw* and *Pioneer Foods* cases. The court favoured and applied the narrow approach and held that there was no discrimination on arbitrary grounds as claimed by the employees and they then appealed to the Labour Appeal Court.

In the Labour Appeal Court, the court held that:

> "The statement by the Constitutional Court in *Harksen v Lane NO & others 1998 (1) SA 300 (CC)* that
> there would be discrimination on an unspecified ground in contravention of s 8 of the i nterim Constitution 1993 If the discrimination was
> based on attributes or characteristics which had the potential to impair the fundament al dignity of persons as human beings, or to affect

[131] (2020) 41 ILJ 1931 (LAC).
[132] *Naidoo and Others* case, para 28.
[133] *Naidoo and Others* case, para 30.

> them adversely in a comparably serious manner, which linked the alleged unlisted gro und to the listed grounds by reference to the core value
> of human dignity, was the foundation of a line of authority supporting the narrow com pass interpretation of s 6(1) of the EEA".[134]

Accordingly, the court endorsed the narrow approach as applied in the Labour Court and enforced the *Harksen* test. In terms of this narrow approach, the court had to analyse whether nepotism can be seen as an arbitrary ground justifying discrimination in terms of section 6(1) of the EEA and the court held that it did not.[135] However, the court noted that nepotism should not be encouraged in the workplace as it is a wrongful act, but it did not infringe upon the human dignity of the employees in terms of section 9 of the Constitution or section 6(1) of the EEA. Therefore, nepotistic behaviour did not amount to unfair discrimination.[136]

In *Minister of Justice and Correctional Services v Ramaila*, Ramaila left his job in a private law firm and joined the Public Sector in the Department of Justice and Correctional Services as a state law advisor. The other employees with whom the respondent referred to when bringing a claim of unfair discrimination (the comparators) were also employed at the same time as the respondent. They all signed the same contract under which they were expected to perform and their contracts were the same in all respects. Their jobs were also similar and were therefore performing the same work of equal value according to the respondent and this is reflected in the fact that their salaries were on the same level too. Ramaila was on probation for 12 months and after this period was employed permanently.

Ramaila was however not considered for annual pay progression, despite performing well in his first 12-month period. On request as to why this is so, he was told that those employees who joined the Public Service were only eligible for pay progression after serving 24 months. However, this notion did not apply to the other employees with whom Ramaila was doing the same work or work which is substantively the same in value which should call for equal pay as a result in terms of section 6(4) of the EEA. Ramaila then referred a dispute to the CCMA which was not resolved. He then referred the matter to the Labour Court and his claim was unfair discrimination arguing that this

[134] *Naidoo and Others* case, para 17.
[135] *Naidoo and Others* case, para 29.
[136] *Ibid.*

differential treatment he had received at work about pay progression was unfair discrimination on an arbitrary ground. The Labour Court held that the fact that there was a clause for pay progression for meeting certain targets in the public service meant that length of service should be disregarded in terms of such a clause and that the"annual pay progression served to reward employees who met a certain expected level of performance and was not in recognition of the employee's length of service".[137] The Labour Court therefore held that the differentiation was not rational and discriminated against the employee and indeed new employees in the public sector.[138]

This decision of the Labour Court was appealed in the Labour Appeal Court and the appeal court identified two issues, firstly:

> "Whether the employee's unfair discrimination claim in which he claimed it was based on "any other arbitrary ground", and in respect of which he bore the onus to prove that the period of eligibility to receive the annual pay progression was not rational and amounted to unfair discrimination, was justiciable under section 6(1) of the EEA".[139]

"Whether the impugned clauses of the collective agreement constituted administrativ e action to be reviewable under PAJA".[140] This study will only focus on the merits of the first issue and in this regard, the court held the importance of interpreting the provision of "on any other arbitrary ground",[141] and held that this ground must be similar to the one of a listed ground in section 6(1) of the EEA.[142] This provision of "on any other arbitrary ground" by the EEA has the aim of achieving results which would ensure that employees' rights to human dignity are not adversely affected. This is in line with the Harksen test. The court in closing held that being a newcomer in the public sector was not a factor which would adversely affect the newcomer employee's right to human dignity and was far removed from falling on the brackets of the listed ground or analogous ground in terms of section 6(1) of the EEA. Ramaila had failed to prove

[137] *Ramaila* case, para 19.
[138] *Ramaila* case, para 21.
[139] *Ramaila* case, 25(b)(i).
[140] *Ramaila* case, para 35.
[141] *Ramaila* case, para 24.
[142] The cases *of Louw, Mangena, Pioneer Foods and Naidoo* also discussed this and held that "on any other arbitrary ground" means that this is a ground analogous or similar or have the same effect of the grounds listed in section 6(1) of the EEA.

the onus of unfair discrimination on any other arbitrary ground and the appeal was upheld. This is the second issue which had to be decided in the Ramaila decision.

On what constitutes or qualifies as discrimination on any other arbitrary ground, Newaj discusses this view in the article titled: "Defining Discrimination on an Arbitrary Ground: A Discussion of *Minister of Justice & Correctional Services & others v Ramaila & others*",[143] in terms of this article, Newaj holds that the Ramaila's case was wrongly decided by the LAC. She argues that the narrow approach adopted in Ramalila was not good in law, to determine what constitutes discrimination on an arbitrary ground.[144] She argues that the court failed to interpret section 6(1) in a holistic manner and in doing so failed to interpret what constitutes discrimination on arbitrary grounds. [145] Newaj holds that the LAC was supposed to interpret section 6(1) broadly by not just looking at the Harksen test but by also looking at the international standards in terms of the International Labour Standards on what constitutes discrimination and correlate it to the meaning of section 6(1).[146] This would have allowed the court to interpret discrimination on any other arbitrary ground in terms of section 6(1) of the EEA broadly, and had they done that, Ramaila's claim for unfair discrimination would have succeeded in terms of this broad interpretation of what constitutes unfair discrimination on any other arbitrary ground. The study concurs with this argument by Newaj as Ramaila performed the same job as other employees, satisfied the requirements and passed the probation period by obtaining a high score as the other employees and therefore paying him differently compared to the other employees which resulted in him receiving a different treatment by the employer indeed resulted in her unfair discrimination and his claim in this regard was justified. Therefore, the court erred in its finding that Ramaila did not discharge the onus to unfair discrimination on any other arbitrary ground. This study argues in this regard that he proved his onus and should have therefore succeeded in his claim.

The take this study has while looking at the above cases of *Louw, Mangena, Pioneer Foods, Naidoo* and *Ramaila* is that differentiation at work is not discrimination and the importance of the Harksen was prevalent in the above case law, in proving what

[143] (2021) 42 ILJ 339 (LAC) (2021) 42 ILJ 1405.
[144] Newaj at 1411.
[145] Newaj at 1412.
[146] Newaj at 1414.

constitutes discrimination “on any other arbitrary ground” as per section 6(1) of the EEA.

3.5 Conclusion

As seen above, on the issue of discrimination based on race which leads to the employer paying the employees different salaries based on race, the courts take a cautionary approach and do not follow the “say so” of the applicant who complains or brings an application of unequal pay for work of equal value in terms section 6(4) of the EEA. As noted in the cases of *Louw* and *Mangena*, two cases which dealt with a complaint of unfair pay for work of equal value based on race, the court will determine whether there was unfair discrimination by the employer towards the employees objectively and the courts seem to apply this objective test. As seen above, the courts consider the length of service that the different employees have served with their respective employers as a fair reason for pay differentiation. In the *Pioneer Foods* decision, the Labour Court held that paying employees differently due to their length of service is justified as a fair reason for paying employees differently and this accordingly will not be unfair discrimination and does not qualify as unfair discrimination on arbitrary grounds.

The study also discussed the issue of nepotism, and whether nepotism as a practice to favour certain employees over others can be seen as unfair discrimination on an arbitrary ground and the Labour Appeal Court in *Naidoo* decision subsequently held that it does not, although the court stipulated that nepotistic practices are unlawful and should not be encouraged in the workplace. The issue of employees in the public service being treated differently compared to those who are newcomers in the public service was also discussed in the study. In terms of this issue, the question as to whether paying newcomers in the public sector less than those who have been in the public service for a while, although these categories of employees were on probation for the same period and received the same score for this period should then be compensated equally. As it stands in the courts, particularly in the Labour Appeal Court, it does not amount to discrimination on arbitrary grounds and the narrow approach according to the Labour Appeal Court seems to be preferred. In her study titled; “Defining Discrimination on an Arbitrary Ground: A Discussion of *Minister of*

Justice and Correctional Services v Ramaila", Newaj argues that paying newcomers in the public service less than the ones who have been in the public service before even after both of these two categories of employees have served the same probationary period and both had satisfactory results in the probationary period, in terms of which they both were offered permanent posts, their different treatment in pay is unfair discrimination on arbitrary grounds in terms of section 6(1) of the EEA, and the court subsequently erred in finding that the difference in pay was justified and therefore not discrimination on arbitrary grounds in terms of section 6(1) of the EEA. Therefore, the court should have had a wide interpretation of what constitutes discrimination on arbitrary grounds in terms of the *Ramaila* decision.

CHAPTER FOUR

FACTORS FOR UNEQUAL PAY FOR WORK OF EQUAL VALUE

4.1 Introduction

In this chapter, the focus will be on the factors which raise questions of equal pay for work of equal value. Some of these factors are seniority, length of service, experience, level of education, skill(s), entry-level and marketability. According to the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value, these factors justify pay differentiation applied by employers to their employees.[147] Discrimination in terms of these factors will result in fair discrimination which is neither illegal nor unlawful. There are however some factors which cannot justify pay differentiation at the workplace. The unjustifiable factors include race, gender, disability, religion and other factors mentioned in section 6(1) of the EEA. An undertaking by the employer to pay his employees differently according to these factors will result in unfair and unlawful discrimination. The study will expand further on this.

4.2 Factors Justifying Pay Differentiation

Robertson argues further that the Code does not justify its existence. He argues that the new code of good practice should "amplify and clarify the law and make it easier for people to follow and use it", [148] and not cause confusion and uncertainty on how to apply the regulations in the Code. This study argues that the new Code, especially when dealing with the factors justifying pay differentiation in the workplace for people doing the same value work, does justify its existence. Regulation 7 of the Code provides for factors that would justify pay differentiation. Section 6(4) of the EEA on the other hand does not provide clarity and certainty of what would and/ would not

[147] Item 7 of the Equal Pay Code (2015).
[148] Robertson (2015) at 2526.

justify pay differentiation. The new Code of Good Practice provides factors which enable the reader of the Code to differentiate what justifies pay differentiation in the workplace for employees doing the same work with equal value. Ebrahim acknowledges that it is often difficult to differentiate what constitutes work of equal value but is of the view that the new Code of Good Practice has made good developments in bringing the factors that would constitute and justify pay differentiation. Section 11(1) of the EEA stipulates that:

> "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".[149]

This chapter will focus on the provisions of section 11(1) (b) of the EEA. The said subsection requires that an employer must prove, on a balance of probabilities that the discrimination at hand (being complained about) is rational and justifiable instead of being unfair and holds that factors such as skill(s), effort, working conditions and responsibilities are reasonable circumstances for the employer to demonstrate why the employees doing the same value work are being compensated differently. This narrative proves that the objective test is satisfied when determining whether there is discrimination with regards to paying employees engaged in the same or similar work differently as held in the 2000 Labour Court *Louw* decision.[150]

In the CCMA case of *Shongwe v Mbombela,*[151] the commissioner substantiated that discrimination in the workplace regarding pay differentiation can be fair. In the Shongwe case, the complainant did not have the same experience and qualifications as compared to those of her comparator and the employer was able to prove, on a balance of probabilities that the differentiation in pay was fair, rational and justified. [152]The commissioner subsequently held that there was no unfair discrimination in this case. The argument by the commissioner is in line with the provision of sections 6(4)

[149] Ebrahim (2018) at 4.
[150] Ebrahim (2008) at 6.
[151] (2021) 42 ILJ 2539 (CCMA).
[152] *Shongwe* case, para 33.

and 11 of the EEA. In *Sasol Chemical Operations (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*,[153] the respondent employee contended that the applicant employer was discriminating against him by not paying him the same salary as compared to his white fellow employee, who happened to perform the same value work as him. The issue in this case was discrimination based on race. The applicant employee argued that there was pay differentiation between the Black and the White employees. The court however found that the pay difference occurred because the White employee had more experience (seven years) as compared to the black employee. Therefore the court decided that the difference in length of service and experience justified the pay differentiation.[154] Judge Steenkamp held that the employer had proved on a balance of probabilities that there was no unfair discrimination based on race as alleged by the commissioner in the CCMA and that allegations of discrimination based on a listed grounds in section 6(1) are not good enough, the employee must prove this on a balance of probabilities.[155]

The remainder of the chapter will discuss the factors that contribute to claims of unfair discrimination on unequal pay for work of equal value, in particular factors such as gender, race, and age as discussed by Dupper and Garbers in "Equality in the Workplace",[156] and other factors relevant in the discussion of equal pay for work of equal value in the workplace.

4.3 Factors Which Justify Claims of Unfair Discrimination on Unequal Pay for Equal Value Work

In terms of section 6(1) of the EEA,

> "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".[157]

[153] (2019) 40 ILJ 436 (LC).
[154] *Sasol* case, para 8.
[155] *Sasol* case, para 20.
[156] O Dupper and C Garbers (Eds) *Equality in the Workplace: Refletions from South Africa and Beyond* (2009).
[157] Section 6(1) of the EEA.

In terms of this subsection, it is unfair discrimination by an employer against an employee if any of the above-listed factors is the reason or form part of the reasons why an employee would be paid differently compared to other employees doing the same work of equal value. This study will be discussing factors such as race, gender, disability and language. The study seeks to focus on the factors deemed necessary and relevant at the time of writing. Another reason why the study will not focus on discrimination based on arbitrary grounds is because there is no clarity on what constitutes discrimination on arbitrary grounds and more research needs to be conducted on this issue. The study will not dwell much on it.

This study focuses on factors which are justifiably and reasonably lead to claims of unfair discrimination due to unequal pay for work of equal value. Ebrahim argues, with reference to the *Mangena* decision and the *Equal Remuneration Convention* that the principle of the prohibited discrimination in the workplace against gender should be extended to also accommodate the prohibition of discrimination against race in the workplace.[158] Dupper and Garbers in their book titled “Equality in the Workplace: Reflections from South Africa and Beyond”, [159]argue that judging people on whether they can and will do a certain job because of their race is unacceptable and unwarranted.[160] They argue that anyone can do any type of job and their race will be irrelevant. The argument is towards those employers who for example believe that only white people can go to space and therefore only white people should be employed by NASA or that only Black people can run 100 metres better than other races and therefore only Black people should be sponsored when it comes to 100 metres track and field competitions. The argument by Dupper and Garbers cautions employers, promotors and sponsors of the historical narratives of the working world although most of these narratives persist until today. Unfortunately, many capable people of various races are denied opportunities in the workplace because of their race. Employers paying different wages to their employees due to factors such as race, gender, disability, etc. should, according to Dupper and Garbers pay damages for the unfair discrimination practices towards the treatment of their employees.[161] This study is in agreement with this argument because I believe this notion will demotivate employers

[158] Ebrahim (2018) at 7.
[159] Dupper and Garbers (eds) at 313.
[160] Dupper and Garbers (eds) at 41.
[161] Dupper and Garbers at 73.

from treating their employees unfairly and will set precedence for other employers and potential employers practising or intending to practice unfair discrimination and treatment practices towards their employees or potential employees.

In the 2023 Labour Court decision of *SACCAWU obo Mabaso and Others v Masstores (Pty) Ltd t/a Makro*,[162] race was the main issue. In terms of this case, the South African Commercial Catering Allied Workers Union (SACCAWU) brought a case of unfair discrimination on behalf of Jabsy Mabaso, the applicant and four other applicants against the employer respondent Masstores (Makro) contending that the respondent was paying the applicants and the comparator different salaries although the work performed by the applicants and the comparator was of similar and equal value.[163] The comparator whom the applicants complained of was a White female person. Therefore, the issue was unfair discrimination on grounds of race as per section 6(1) of the EEA. The applicants based their complaint in terms of section 6(4) of the EEA which provides that employees doing the same or substantially the same value work should be remunerated the same.[164] The court pointed out section 11(1) of the EEA which states that where there is a complaint of unfair discrimination alleged on grounds listed in section 6(1) of the EEA the burden then shifts to the employer to prove on a balance of probabilities that the discrimination did not take place as alleged by the employee or that the discrimination is rational, fair or justifiable.[165] In terms of this provision, the court held that it is not enough of the employees to merely allege that the difference in pay is due to race and that the employees should prove more to give the effect that the difference in pay was motivated by race.[166]

This finding by the court is according to this study not enough in an attempt to achieve social justice in a country such as South Africa where it was found that it is the most unequal society in the world.[167] Accordingly, the court should have given regard to this social issue which is still prevalent in many of our workplaces. The Constitution in its founding provisions in section 1 states that the Republic of South Africa is one,

[162] [2023] ZALCJHB 49 (9 March 2023).
[163] *SACCAWU obo Jabsy Mabaso*, para 1.
[164] Section 6(4) of the EEA, also para 8 of *SACCAWU obo Mabaso* decision.
[165] Section 6(1) of the EEA and para 14 of *SACCAWU obo Mabaso* decision.
[166] *SACCAWU obo Mabaso* para 21.
[167] International Center for Transitional Justice (Accessed 3 October 2022 https://www.ictj.org/node/35024#:~:text=South%20Africa%20is%20the%20most,World%20Bank%20report%20has%20said.

sovereign, democratic state founded on values such as human dignity and the achievement of equality.[168] The argument this study intends to make is that the Labour Court failed to interpret and consider the provisions of this part of the Constitution. The labour court in its judgement failed to consider the provisions of the research conducted by the Center for Transitional Justice and the painful history of this country where race played and continues to play a big role in determining salaries of people doing the same work of equal value.

Clarity is needed in our law about equal pay for work of equal value. The EEA in sections 6(1), 6(4) and 11 set precedence alongside case law in attempting to resolve what constitutes work of equal value. However, this study shows that many employers will persist in paying different wages to their employees with the mistaken view that the difference in pay is justified because they are unsure of what constitutes work of equal value. Dupper and Garbers argue that South Africa should have its pay equity, [169] its legislation which seeks to ensure, clarify and answer questions such as what is work of equal value, which categories of work qualify as work of equal value and what is meant by "substantially the same work" as provided for by subsection 6(4). This will assist Judges in interpreting these questions and employers will be guided by these provisions.

In the 2022 Labour Court decision of *Mkhatshwa v Shanduka Coal Pty (Ltd),*[170] the issue was unfair discrimination based on race for pay differentiation and that he (the applicant) was paid less as a Black person compared to the comparators of the employer who were being paid higher salaries and the reason according to the applicant was that they are White and therefore by their skin colour are entitled to receive higher salaries than him. The court followed the narrative of *SACCAWU obo Mabaso* that the employer should prove on a balance of probabilities that the complaint by the applicant is unfounded and that even if discrimination is present it is fair, just and reasonable.[171] The court went further and held it is not what the applicant says that will grant their claim but rather there is more proof needed. This ultimately calls for the employee to establish a causal nexus between the difference in pay and his

[168] Section 1(a) of the Constitution.
[169] Dupper and Garbers at 104.
[170] [2022] ZALCJHB 177.
[171] Section 11 (1) of the EEA and para 18 of the *Mkhatshwa* decision.

race.[172] If the employee can prove this causal nexus in the affirmative, then he would have established his complaint of unfair discrimination by the employer and the discrimination would be rectified by paying the employee the same as the comparator and where necessary compensation. However, if the causal nexus cannot be established by the employee, then this means there is no merit to his claim. This is the route the court took in *SACCAWU obo Mabaso* and the study argues that this approach is not good enough as important provisions such as research indicating that South Africa is the most unequal society in the world and the founding provisions of the Constitution were not interpreted by the court and were ignored.

4.4 Conclusion

As seen above, factors such as seniority or length of service, qualifications, ability, competence or potential, performance, quantity or quality of work, being demoted yet still getting the same salary, where employed temporarily for purposes of gaining experience or exposure and showing of skill are factors which justify pay differentiation for people doing the same work or work of equal value. If one party can prove these factors, usually the employer, then the pay differentiation in the workplace for work of equal value due to the above-mentioned factors would justify the said and contested pay differentiation, usually by the employee. The Code of Good Practice on Equal Pay for Equal Value Work is clear in establishing these factors justifying the pay differentiation. Furthermore, the study discussed factors which justify claims of unfair discrimination on unequal pay for equal-value work. Race and gender were discussed in great detail by Dupper and Garbers who argue that it should never be acceptable to judge people based on race to determine if they could perform certain types of jobs because that narrative is not only discriminatory on the face of it but also unlawful, unjust and unfair and will most dangerously result into inequality in the workplace.

In the case of *SACCAWU obo Mabaso, Mkhatshwa v Shanduka*, the courts seem to want to see more from the employees alleging unfair discrimination in the workplace and will not accept a mere allegation from the applicant. This narrative was argued by the study to show that the judges also need to consider research containing facts that

[172] *Mkhatshwa* decision para 24.

South Africa is the most unequal society in the world and social justice and the injustices of the past when dealing with cases concerning unequal pay for equal value work, especially in sensitive cases of race and gender. In terms of this narrative, Dupper and Garbers argue that an entire legislation is needed to address the issue of unequal pay for work of equal value as also called for by the ILO in Regulation 100 of the 1951 Convention. Ebrahim argued a similar point in holding that it should be concerning that a country like South Africa with the most unequal society in the world is not doing much to resolve this issue and appears to be dragging its feet in addressing this important issue in the workplace.

CHAPTER FIVE

COMPARATIVE ANALYSIS

5.1 Introduction

Countries such as Kenya and Canada are progressive and have been developing. These two countries are setting a perfect picture for the rest of the world is battling to adjust on the issue of equal pay for equal-value work. Majuzi's article "The right not to be discriminated against in the employment environment in Kenya",[173] will be discussed when looking at the issue of equal pay for work of equal value in Kenya. Of importance will be discrimination in the labour market in Kenya especially with regards to discrimination in the workplace which usually leads to workers doing the same work of equal value being discriminated against on factors such as pregnancy, gender, disability and others. However, the study will show that discrimination can also be fair and allowed even though the work done and performed by the workers is the same and equal in value, particularly when factors such as experience and longevity are brought into the discussion. This is a similar discussion that the study has already touched on above about the South African labour market when looking at legislation and case law as discussed in the above four topics of this study. The study will discuss

[173] Majuzi 2020.

the legislative framework as well as case law about the issue of equal pay for work of equal value and discrimination in the workplace in Kenya.

Canada is a country where the rule of law and the rights of workers are protected, including the rights of workers doing the same work of the same or substantially the same in value. This chapter will discuss in great detail the Canadian Human Rights Act,[174] which affords the protection of employees doing the same work of equal value, particularly the protection between men and women doing the same work of equal value, The chapter also seeks to discuss The Canadian Equal Wages Guidelines 1986, [175] which prescribe factors justifying different wages for work of equal value. [176] Among these factors that are prescribed by the Guidelines are skill, effort, responsibility and working conditions.[177] These factors justify the pay differentiation and are similar to the factors discussed above in the study by Ebrahim,[178] (skill, physical and mental effort, responsibility, experience and longevity among others.)

5.2 Kenya

5.2.1 Legislative Framework in Kenya

Article 27(4) of the Kenyan Constitution,[179] states as follows:

> (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

This provision is similar to section 6(1) of the EEA.[180] Any discrimination in the workplace which eventually leads to employees being remunerated differently

[174] Canadian Human Rights Act of 1986.
[175] The Canadian Equal Wages Guidelines, 1986 (hereinafter "The Equal Wages Guidelines, 1986").
[176] The Equal Wages Guidelines, 1986 at 1.
[177] The Equal Wages Guidelines, 1986 at 1-2.
[178] Ebrahim at 8.
[179] The Constitution of Kenya, 2010.
[180] Section 6(1) contains a similar provision to that of Article 27(4) of the Kenyan Constitution, 2010. It provides that: "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground".

because of their race or gender or any other ground mentioned in Article 27(4) of the Kenyan Constitution of 2010 will amount to unfair discrimination and is therefore prohibited by the Kenyan law. Majuzi argues that for persons to succeed with their discrimination claims in the workplace they will have to prove that they belonged to one of the classes mentioned in the Constitution.[181] It is not enough to allege unfair discrimination in the workplace in terms of wages, the alleged unfair discrimination must be in line with Constitutional provisions.[182]

In terms of the Kenyan Employment Act,[183] section 5 of the Act seeks to prevent discrimination in the workplace and challenges employers to ensure that discrimination of any kind in the workplace is avoided. Section 5(2) of the Act provides that: "An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice".[184] This provision can be extended in meaning to include wages to employees, and therefore employers must ensure that no unfair treatment about wages exists in their respective workplaces in terms of remunerating their employees.

Section 5(5) of the Act provides that: "An employer shall pay his employees equal remuneration for work of equal value".[185] This subsection is self-explanatory and it is clear what the legislature was trying to achieve in this regard. It would be unfair discrimination for employees doing the same work which is equal in value to be remunerated differently by their respective employers. Employees in Kenya doing the same work which is equal in value have a remedy in the Employment Act of 2007, particularly in section 5(5). Section 5(5) provision is similar to the provision contained in section 6(4) of the EEA.[186]

5.2.2 Case law

The case of *Barclays Bank of Kenya Ltd and another v Gldys Muthoni and 20 others*,[187] referred to arbitrary discrimination. The important aspect is that discrimination in terms

[181] Majuzi at 1548.
[182] Majuzi at 1548.
[183] Kenyan Employment Act, 2007.
[184] Section 5(2) of the Kenyan Employment Act.
[185] Section 5(5) of the Kenyan Employment Act.
[186] Section 6(4) of the EEA provides that: "A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination".
[187] [2018] Eklr.

of wages is not prescribed in the Kenyan Constitution or the Kenyan Employment Act is arbitrary. The arbitrariness stems from the fact that this discrimination is not listed in the Constitution[188] or the Kenyan Employment Act.[189] In terms of the *Barklays Bank of Kenya* decision, the court held that discrimination whether arbitrary or non-arbitrary has been outlawed in Kenya.[190]

In *James Mulinge v Freight Wings Limited*,[191] discrimination was not on wages that the employer was paying his employees that are doing the same work of equal value differently, but the issue was regarding discrimination by the employer on health in terms of Article 27(4) of the Constitution and section 5(3) of the Kenyan Employment Act,[192] the argument that held is that discrimination is never justified in the workplace whether about pay disparities or other listed or unlisted grounds of discrimination by the employer towards the employees.

In *Wyclffe Lisalitsa v Chief Executive Officer Kenyatta National Hospital and 5 others*,[193] the applicant employee argued that the respondent employer's policy of paying different salaries to different health workers was discriminatory and therefore contrary to s 5(3) of the Kenyan Employment Act,[194] the court herein ruled that:

> "For an employee to prove discrimination, the employee has to demonstrate that two or more persons doing the same work were being paid differently with one earning and the other not earning the allowance and that there is no justification or explanation for the difference such as merit, seniority or length of service".[195]

This therefore means that the employee must establish discrimination on a balance of probabilities, and then the employer must show that the discrimination in paying the employees differently is justified in terms of factors such as length of service or seniority. This view is similar to the South African view as held in case law,[196] and as well as in legislation.[197]

---

[188] In Article 27(4) of the Kenyan Constitution.
[189] Section 5 of the Act.
[190] *Barklays Bank of Kenya*, para 58.
[191] [2016] Cklr.
[192] *James Mulinge* case, paras 58-61.
[193] [2014] e KLR.
[194] *Wyclffe Lisalitsa* case, para …..
[195] *Wyclffe Lisalitsa* case, para……
[196] *Mangena* and *Louw* decisions.
[197] Section 6(4), 11(1) EEA.

5.3 Canada

5.3.1 Legislative Framework in Canada

The Canadian Human Rights Act[198] is an equal wages provision or section.[199] In terms of this section, it is discriminatory for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.[200] This means an employer ought to pay the same wages to his employees employed in the same establishment who undertake to perform work of equal value. This subsection focuses more on gender and attempts to protect females who are often overlooked and underpaid as compared to their male counterparts. It is important to note that the important part is the phrase “equal in value”. This would mean that if a female and a male are performing work that is the same but their value input in the work is not the same then they should not get paid the same wages. This is true, especially in sports. Males and females play football for instance but their value input is not the same. It is undeniably true that male footballers should be paid more than female footballers and the reason for this is simple male footballers are putting more value in terms of filling stadiums, television rights and licences, attracting lucrative sponsorship and so on. Female footballers are not on that level yet when it comes to value input and in an instance like this, it is justified discrimination for the males to be paid more than the females. Section 11(1) in this instance would not apply.

In terms of the Equal Wages Guidelines of 1986,[201] the guidelines are very important because they show factors in which discrimination would be regarded as justified for paying different employees doing the same work or similar work equal in value. These are factors such as skill, effort, responsibility and others. These factors have already been discussed in this study above.[202]

[198] The Canadian Human Rights Act of 1985 (hereinafter “The Canadian Human Rights Act”).
[199] Section 11 of the Canadian Human Rights Act.
[200] Section 11(1) of the Canadian Human Rights Act.
[201] Guidelines respecting the application of Section 11 of the Canadian Human Rights Act and prescribing factors justifying different wages for work of equal value.
[202] See Chapter 4 above, especially the discussion in Ebrahim article.

5.3.2 Case law

In the case of the *Canadian National Railway Company v. Canadian Human Rights Commission*,[203] the Court stated that it is essential to create a climate in which negative practices and attitudes are discouraged to combat systemic discrimination.[204] In terms of this case, both the employer and the legislature have a duty concerning their employees and citizens to ensure that the work climate of the employers is without any unfair discrimination, including unjustified pay differences to employees doing the same value work.

In the decision of *Mississauga Hydro Electric Commission*,[205] the employer, Mississauga Hydro Electric Commission ("Hydro"), and the International Brotherhood of Electrical Workers Local 636 (the "union") had been unable to resolve a dispute regarding the union's allegations that Hydro had failed to maintain pay equity. Hydro had given pay increases to the Outside Unit, which consisted mainly of male jobs, under their collective agreement without giving corresponding increases to the female job classes in the Inside Unit that had been found comparable to various male job classes in the Outside Unit. The Review Officer had issued an Order requiring Hydro to give the female job classes the negotiated increase. He also made orders regarding retroactive pay adjustments and the identification of male comparators, which were matters that had not been in dispute.[206]

It is clear in terms of this decision that males and females doing the same work which has the same value ought to be compensated equally as any differences in pay that are not justified will amount to unjustified discrimination, as seen in the above case of *Mississauga Hydro Electric Commission*. This is unfair and should not be promoted by employers nor should it be encouraged by the legislature.

5.4 Conclusion

The purpose of this chapter was to compare equality in the workplace about unequal pay for work of equal value through the lens of Kenyan law and Canadian law. The study discussed equality in the workplace for purposes of equal pay for equal-value

[203] (1987), 87 C.L.L.C 16255 at 17,022 (S.C.C.).
[204] Canadian National Railway Company case, Supra, note 135 at 116.
[205] (I June 1992) 0321-92 (P.E.H.T.).
[206] *Mississauga Hydro Electric Commission, para 12.*

work in Kenya. About the issue of equal pay for work of equal value in Canada, gender is one pressing issue. Women and men are still being compensated differently. However, it should be noted that the gap has since been narrowed down and more often than not, the workers doing the same work of equal in value in Canada are being compensated equally.

In Kenya, the study looked at the important article by Majuzi “The right not to be discriminated against in employment in Kenya”. Majuzi argued that work is being done by Kenyan lawmakers with the assistance of the Kenyan constitution of 2010 to ensure that no person is discriminated against in his or her employment in Kenya in one way or the other, including their remuneration in their respective employment. Article 27(4) of the Kenyan Constitution ensures that everyone is not discriminated against whether in race, gender, or belief, with an attempt to ensure that discrimination does not thrive in Kenya. The provision of Article 27(4) also includes employers conducting their business in Kenya. These employers should ensure that there is no discrimination in the workplace, including non-discrimination of remunerating their employees, of course with existing exceptions such as experience, period of employment, and education just to mention a few wherein these factors often justify pay differentiation to those workers doing the same work of equal in value.

The Kenyan Employment Act of 2007 and the Employment and Labour Relations Court (ELRC) exist to act as safeguards to workers who might suffer prejudice in the hands of their employers with regards to not receiving equal remuneration for their work which they perceive as being equal in value. Section 5(5) of the Employment Act is particularly very important as it ensures that employees doing work of equal value ought to be compensated for their equal work value with their fellow employees equally, again it is important to emphasize that there are exceptions to this provision as discussed above in case law.

In Canada, legislation is very important. It is through legislative means that many laws are effected to both employers and employees. Human Rights are very important in the Canadian Constitution. The Canadian Human Rights Act of 1985 is very key in ensuring and safeguarding human rights, including the rights of employees working for an establishment. Section 11 of the Canadian Human Rights Act is very important as it ensures that there is no discrimination in the workplace for workers doing the

same work of equal value in the same establishment, that is, the workplace of the employer. This section is similar to section 6(4) of the EEA in South Africa and it is through this comparison that the South African and the Canadian jurisdictions have similar interests in attempting to protect workers doing the same work which is equal in value in the same workplace. The Canadian Human Rights Act of 1985 and the South African Employment Equity Act of 1998 are best placed to protect and act in the best interests of employees in their respective jurisdictions in this regard.

The Equal Wages Guidelines of 1986 is also a key tool which seeks to protect the rights of workers employed in different establishments in Canada. The guidelines give effect to section 11 of the Canadian Human Rights Act in that they furnish ways which can best help solve issues of discrimination and injustices in the different establishments of employers wherein their workers are employed. The guidelines provide factors which will easily be understood by complainants of discrimination and unfair treatment in the establishments of workers so that workers know exactly what constitutes unfair treatment and unfair discrimination about their remunerations when they compare with their comparators doing work of equal value. It should however also be noted that the guidelines also contain those factors which are seen as fair factors contributing to pay discrimination in the workplace, better referred to as fair differentiation in pay in the same establishment of an employer. The discrimination in this regard is fair and justified and it is also contained in the Code of Good Practice: Equal Pay contained in the Employment Equity Act.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This study has demonstrated that the issue of equal pay for work of equal value is still a contested field of labour law. Societal issues such as race, gender, disability, language and other arbitrary grounds are still unfortunately determining how employees are treated by their employers in the workplace.[207] The study has discussed that pay differentiation in terms of these factors, including factors on arbitrary grounds does not justify pay differentiation and is consequently discriminatory in terms of the EEA, the Constitution and case law. It should be noted however, that pay differentiation can be justified and not be discriminatory. For example, Ebrahim discusses the factors which will not necessarily lead to discrimination of employees performing the same work or work which is substantially the same yet they are compensated differently.[208] These factors as shown and discussed above and skill(s), effort, experience, qualifications and longevity. In terms of these factors, it would not be unfair discrimination when an employer pays his workers different wages doing the same value of work.[209]

6.2 International Organisations

International organisations such as ILO contain Conventions and Recommendations in terms of which labour law should be practised by countries which have ratified these

[207] See the discussion in chapter 3.3.
[208] Ebrahim 2016, at 11.
[209] See the discussion above by Cohen.

conventions and recommendations. South Africa is one of the countries which have ratified the ILO conventions and recommendations, and our labour law should subscribe to the ILO conventions and recommendations, failure to subscribe to the ILO perceives the country as being disrespectful to international law. The Constitution holds that when interpreting any legislation law that is consistent with international law over other interpretations that are not consistent with international law, the court should prefer the former.[210]

The ILO is not the only organisation of international laws and standards about labour law. As shown above, the study also discussed the Organisation for Economic Corporation and Development (OECD) which is similar to the ILO and has guidelines and recommendations on the member states on how to ensure that the member states economies develop and in doing so attract investors to invest in these member states' economies so they may develop and strengthen which will lead to the creation of sustainable employment for the member states' participating economies. The guidelines and recommendations of the OECD (although not binding) are influential and challenge employers to create a workspace that does not condone discrimination, especially unfair discrimination in the workplace of the employer, whether on race, gender, disability or other factors.

The European Union (EU), shows how South Africa can improve when it comes to the issue of equal pay for doing equal-value work. For example, Jurisdictions such as England have done great work in ensuring that gender pay disparities are a thing of the past when it comes to pay equity for workers doing the same work of equal value. South Africa can learn from jurisdictions such as England, in issues concerning gender pay differentiation which is not justified on factors such as skill, longevity, experience and qualifications and the nature of the work.

6.3 The Position in South Africa

As seen above, the EEA and the South African Constitution have ensured that employers treat their employees without discriminating against them. The EEA in Sections 5 and 6 safeguards that discrimination in workplaces is avoided and where there is a claim of unfair discrimination based on pay, there are remedies in legislation

[210] Section 233 of the Constitution.

such as in sections 6(1) and 6(4) of the EEA. Section 11 of the EEA is also very critical and as shown above, case law however discusses section 11 of the EEA very strictly.[211] The Constitution in its nature is a tool which certifies discrimination in our society is prevented and discouraged. As seen above, case law is very important in establishing and confirming the provisions of the EEA and the LRA in curbing unfair discrimination in terms of employees being treated unfairly by being compensated differently other than on skill, the value they are bringing to their employment, experience, length of service and other contributions which would normally justify pay differentiation in the workplace.[212]

In *Shongwe v Mbombela*,[213] the CCMA commissioner held that discrimination complained of by the applicant was fair and justified because the complainant and the comparator did not have the same qualifications and experience which were key in the job that they were doing and this justified their pay differentiation. The same argument was provided by the commissioner in the decision of *Sasol Chemical Operations v CCMA*[214]. The case outlined that the difference in length of service and experience between the complainant and the comparator was justified in paying them differently. As seen above, the *Mangena* decision however focused on factors which do not justify pay differentiation, that is, factors which are discriminatory in their nature such as race, gender, disability and other factors.[215] The *Mangena* case as discussed by Ebrahim in his article,[216] is also supported by the cases of *SACCAWU obo Mabaso v Masstores t/a Makro* and *Mkhatshwa v Shanduka*.[217]

6.4 Kenya and Canada

In Kenya, Majuzi's article is very important in light of discussing discrimination in the workplace in Kenya. Majuzi argues that for people to succeed with their claim of unfair discrimination in their workplace, they will have to prove that using the grounds as provided for by the Kenyan Constitution of 2010.[218] Article 27(4) of the Kenyan Constitution provides grounds for which discrimination is prohibited. This provision is

[211] See the cases of *Mkhatshwa* and *SACCAWU obo Mabaso* discussed above in Chapter 4.3.
[212] See Chapter 4.2.
[213] See Chapter 4.2.
[214] See Chapter 4.2.
[215] See Chapter 4.3.
[216] See Chapter 3.2.
[217] See Chapter 4.3.
[218] See Chapter 5.2.1.

similar to the provision in section 6(1) of the EEA.[219] The Kenyan Employment Act of 2007 is critical of discrimination and unfair treatment in the workplace that is not allowed, which includes pay discrimination for employees doing the same work equal in value.

In Canada, the Canadian Human Rights Act of 1985 is very important as it guards and protects human rights, including the rights of employees against abuse by their employers or sometimes, against fellow employees. Section 11 of the Canadian Human Rights Act is very important, especially about the rights of employees when it comes to pay differentiation for employees employed in the same establishment and doing the same or similar work equal in value. In terms of this section, it is discriminatory for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.[220] Equal Wages Guidelines of 1986 is another legislation that has been discussed in the study. These guidelines contain factors which justify pay differentiation between employees employed in the same establishment but earning different salaries. These factors include amongst others, skill, length of service, experience, and qualifications to mention just a few. In terms of these factors, it is not unfair discrimination to be paid differently even though the work done by the employees is the same or similar and is equal in value. This is a contested issue and still needs further instigation in it.

6.5 Conclusion and Recommendations

As demonstrated above, equality at work with the focus on unequal pay for work of equal value is a contested field of labour law. Equal Remuneration Convention No. 100 of 1951 aims to eliminate discrimination in respect of employment and occupation.[221] Due to the nature of the binding of this convention by ILO every nation which has ratified ILO Conventions and Recommendations must comply with the conventions. As already stated, however, the recommendations by ILO are not binding to the member states which have ratified them.

[219] See Chapter 1.2.
[220] See Chapter 5.3.1.
[221] See Chapter 2.2.

Ebrahim offers another perspective on the discussion of equal pay for work of equal value. According to Ebrahim, the EEA requires the Act to be interpreted with reference and with due regard to international labour law.[222] The EEA should be tried and tested according to the provisions of international labour law according to Ebrahim. Equal pay for work of equal value is not an easy field of labour law to establish. Ebrahim argues that perhaps many more amendments to the EEA and the LRA are still going to take place. This is in light of the amendment and the insertion of sections 6(4) and (5) of the EEA and the Code of Good Practice: Equal Pay which are there to ensure that employers comply with the provision of the Constitution in terms of equality (section 9) and human dignity (section 10).

The Louw v *Golden Arrows* case is a game-changer decision regarding equal pay for work of equal value.[223] In terms of this decision, the Labour Court held "that the mere differential treatment of persons from different races was not *per se* discriminatory on the ground of race unless the difference in race was the reason for the disparate treatment".[224] The judge went further and stated that "the Labour Court further found that the applicant had failed to prove that the two jobs, on an objective evaluation, were of equal value".[225] What the study draws from this decision is that the CCMA or relevant bargaining councils and the courts will not easily grant a decision in favour of the applicant or the complainant for discrimination in differential pay for people doing work which on the face of it the applicant or the complainant believes it is the same or is of the same value. The CCMA, relevant bargaining councils and the courts will objectively weigh different factors between the complainant and his comparator such as skill, qualifications, experience, length of service and other relevant factors in deciding whether there was discrimination in the workplace of the employer towards certain employees doing work of equal in value but compensating them differently.

The *Louw* decision is in line with the provision of section 11 of the EEA. Section 11(1) of the EEA stipulates that if discrimination is alleged on a listed ground in terms of section 6(1) of the EEA, then the employer must prove on a balance of probabilities that such discrimination did not occur and if it did occur it was fair, just and rational

[222] See discussion in Chapter 3.3.
[223] See discussion of the case in Chapter 3.4.
[224] See discussion of the case in Chapter 3.4.
[225] See discussion of the case in Chapter 3.4.

and justifiable.[226] Section 11(2) however requires the complainant to prove on a balance of probabilities that the discrimination is based on arbitrary grounds that the conduct complained of is discriminatory, irrational and the discrimination is unfair.[227] This study concurs with this provision of the EEA, although more can still be done as already seen from the provisions of the Code of Good Practice: Equal Pay for Work of Equal Value as demonstrated above and discussed in the article by Robertson.[228]

The recommendations this study has are as follows. Firstly the EEA in section 6 in its current disposition is a great tool in trying to eliminate discrimination in the workplace and attempting to achieve equality by forcing employers to treat their employees equally, respectfully and in a dignified way. One of these ways is through paying their employees, doing the same work or work which is subsequently the same and is equal in value to the same salary as stipulated in section 6(4) of the EEA. Secondly as seen in the decision of *Louw v Golden Arrows*, if there is a claim for discrimination on grounds listed in section 6(1) or even on unlisted grounds, that is, on arbitrary grounds, the said discrimination should be fair, just and rational as stipulated in section 11 of the EEA.

Therefore, the recommendation this study has is that the status quo is working effectively in ensuring that discrimination in the workplace wherein an employer pays his employees differently due to race, sex, religion and other factors is outlawed fearlessly and effectively. This can be through appointing inspectors to go into the workplace and measure the value of work done at the workplace wherein there is a complaint of unequal pay although work done in the workplace is equal in value. This recommendation is also in line with the Employment Amendment Bill of 2020. Another recommendation this study proposes is for Trade Unions to provide more leeway and education for their members to be aware of the possibility of them doing the same work which is equal in value compared to their respective comparators in the workplace. This will then also ensure that employers do not take advantage of their employees who are performing work of equal value but are compensated differently. Of course, the opposite is true as well in that these employees should know and understand fair discrimination and unfair discrimination in this regard, as noted above

[226] See the discussion in Chapter 4.2.
[227] See the discussion in Chapter 4.3.
[228] See the discussion in Chapter 3.3.

in the *Louw* decision. Differences in pay do not at all times mean that the concerned employee and the comparator are treated differently and unfairly as it could be justifiable to pay different salaries even though the workers are doing work of equal value or which is substantially the same and equal value but due to differences such as long service, experience and family responsibility.

By implementing the recommendations as stated above, more employees should find fairness and equality as expressed by legislation in terms of section 23(1) of the Constitution and sections 6(1) and (4) of the EEA, as also provided for by Convention 100 of 1951 of the ILO Conventions on Equal Pay for Work of Equal Value. It should however be taken into account that these recommendations are also in line with the landmark decision of *Louw v Golden Arrow*, in terms of objectivity in the complaint against the employer by the employees in terms of unfair pay differentiation between the complainant and the comparator. By this, the study submits that objectively, a complainant employee should determine that the difference in pay is due to factors which lead to discrimination and the complainant at times might need to prove that there is discrimination in terms of section 11(2) of the EEA, wherein the unfair discrimination complained of is due to arbitrary grounds and not due to the listed grounds in section 6(1) of the EEA.

Bibliography

Books:

1. Ako-Nai RI *Gender and Power Relations in Nigeria* (Lexington Books 2013).
2. Department of Economic and Social Affairs: United Nations *World Social Report: Inequality in a rapidly changing world* (UN 2004).
3. Du Toit D and Others *Labour Relations Law: A Comprehensive Guide* (LexisNexis 2015).
4. Dupper and Garbers *Equality in the Workplace Reflections from South Africa and Beyond* (Juta 2009).
5. Ndulo M and Emeziem C *The Routledge Handbook of African* Law (Routlage 2021).
6. Van Niekerk A and Smit N and others *Law@work* (LexisNexis 2019).

Case law:

1. *Harksen v Lane* (1998) (1) SA 300 (CC).
2. *Imatu and Another v City of Cape Town* [2005] 11 BLLR 1084 (LC).
3. *Louw and Another v Golden Arrow Bus Services (Pty) Ltd* (C 37/97) [1999] ZALC.
4. *Mangena and Others v Fila South Africa (Pty) Ltd and Others* (JS 343/05) [2009] ZALC.
5. *Minister of Finance and Another v Van Heerden* (2004) 25 *ILJ* 1593 (CC).
6. *Minister of Justice and Correctional Services and Others v Ramaila and Others* (CA 5/2019) [2020] ZALAC.
7. *Minister of Finance and Another v van Heerden* 2004 (6) SA 121 (CC).
8. *Mkhatshwa v Shanduka Coal (Pty) Ltd* (JS28/2016) [2022] ZALCJHB.
9. *Naidoo and Others v Parliament of the Republic of South Africa* (CA4/2019) [2020] ZALAC 38.
10. *NUM v Gabriels* (C523/2001) [2002] ZALC74.
11. *Protekon (Pty) Ltd v CCMA* [2005] 7 BLLR 703 (LC).
12. *SA Chemical Workers Union v Sentrachem Ltd* 1988 9 ILJ 410 (IC.)

13. *SACCAWU abo Mabaso and Others v Masstores (PTY) Ltd t/a Makro* [2023] ZALC.
14. *SACCAWU obo Mabaso and Others v Masstores (Pty) Ltd t/a Makro* (JS 618/19) [2023] ZALCJHB 49.
15. *Sasol Chemical Operations (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 436 (LC).
16. *Shongwe v Mbombela Municipality* (A41/2021)[2021] ZAMPMBHC 50.
17. *Sun International Limited v SACCAWU obo Ramerafe and Others* (JR1501/17) [2019] ZALCJHB.
18. *Wyclffe Lisalitsa v Chief Executive Officer Kenyatta National Hospital and 5 others* Ccause 1566 of 2012.

International Case law:

1. *Barclays Bank of Kenya Ltd and another v Gldys Muthoni and 20 others* [2018] eKLR .
2. *Canadian National Railway Company v. Canadian Human Rights Commission* (1987), 87 C.L.L.C 16255 at 17,022 (S.C.C.).
3. *James Mulinge v Freight Wings Limited [2016]* eKLR.
4. *Mississauga Hydro Electric Commission* (I June 1992) 0321-92 (P.E.H.T.).
5. *Wyclffe Lisalitsa v Chief Executive Officer Kenyatta National Hospital and 5 others* Ccause 1566 of 2012.

Journal Articles:

1. Baqwa D “The Resolution of Affirmative Disputes in the Light of Minister of Finance and Another v Van Heerden” (2006) *ILJ* 67-78.
2. Defining Discrimination on an Arbitrary Ground: A Discussion of *Minister of Justice and Correctional Services and Others v Ramaila and Others* (2021) 42 ILJ 339 (LAC) (2021) 42 ILJ 1405.
3. Du Toit D “Discrimination on an Arbitrary Ground and the Right of Access to Justice” (2021) *ILJ* 1-15.
4. Du Toit D “The right to equality versus employer control and employee subordination: Are some more equal than others?” (2016) *ILJ* 27.

5. Ebrahim S "Equal Pay in Terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression* 2016 ZALCCT 14" (2017) *Potchefstroom Electronic Law Journal* 18.
6. Freeman MDA "Equal Pay for Women the British Experience" (1980) *ILJ* 100.
7. Froneman J 'The rule of law, fairness and labour law' (2015) *ILJ* 846.
8. Hlongwane N 'Commentary on South Africa's position regarding equal pay for work of equal value' (2007) *Law Democracy and Development* 83.
9. Laubscher T "Equal Pay for Work of Equal Value- A South African Perspective" (2016*) ILJ* 830.
10. Matlou D "Understating workplace social justice within the Constitutional framework" (2016) *South African Mercantile Law Journal* 562.
11. Mujuzi JD "The Right Not to be Discriminated Against in Employment in Kenya" (2020) *ILJ* 1568.
12. Mujuzi, J "The right not to be discriminated against in employment in Kenya" (2020) *Industrial Law Journal (Juta)* 1567.
13. Robertson, B "Does the new code of good practice on equal pay for equal work justify its existence?' (2015) *Industrial Law Journal (Juta)* 2528.
14. Rycroft A "Inherent requirements of the job" (2015) *ILJ* at 900-906.
15. Seng, M. P "Restorative justice: a model for conciliating fair housing disputes" *Journal of Law in Society* (2021) 62-92.
16. T Cohen "Justifiable Discrimination-Time to set the parameters" (2000) 12 *SA Merc LJ* 255-268.
17. Thabane T and Rycroft A "Racism in the workplace" (2008) *ILJ* 43-51.

International Journal Articles:

1. Fredman, S "Marginalising equal pay laws" (2004) *Industrial Law Journal* 285.
2. Fredman, S "Reforming equal pay laws" (2008) *Industrial Law Journal* 218.
3. Steele, I "Beyond equal pay" (2008) *Industrial Law Journal* 124.
4. Tudor, J "Closing the gender pay gap in the European Union: the equal pay guarantee across the member-states" (2017) *North Dakota Law Review* 472.

Newspaper Articles:

1. Al Jeezera World Report “South Africa most unequal country in the world” (10 March 2022).

Legislation:

1. Employment Equity Act 55 of 1998.
2. Employment Equity Amendment Act 47 of 2013.
3. International Labour Organisation.
4. Labour Relations Act 66 of 1995.
5. National Minimum Wage Act 9 of 2018.
6. The Constitution of the Republic of South Africa, 1996.

International Legislation:

1. Canadian Human Rights Act (RSC,1985, c.H-6).
2. Canadian Equal Wages Guidelines, 1986. (SOR/86-1082).

Treaties/Publications:

1. OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing.

Internet Sources:

1. https://www.ictj.org/node/35024#:~:text=South%20Africa%20is%20the%20most,World%20Bank%20report%20has%20said