EQUAL PAY FOR EQUAL WORK

by

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DECLARATION OF AUTHENTICITY

The dissertation

Equal pay for equal work

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ABSTRACT

The notion of Decent Work has been broadly advocated since 1999 by means of various International Labour Organisation (ILO) Conventions. Through these Conventions and as part of its Decent Work Agenda, the ILO strives to foster the creation of social and economic systems, capable of ensuring basic security and employment and adaptable to rapidly changing local and global economic circumstances. The Decent Work Agenda has been widely accepted as an important strategy to eradicate poverty and enable socio-economic development. It is submitted that the concept of Decent Work as contemplated by the ILO, firstly focuses on the payment of an income, which allows the working individual a good life. It secondly strives to ensure that everybody has an equal chance to develop themselves; that working conditions are safe; that there is no instance of child and forced labour; and that discrimination does not occur.

The elimination of discrimination in the workplace is not only an ever-evolving pursuit, given that it continues to manifest in innumerable forms, but it has also proven to be an extremely pervasive pursuit as evidenced by the jurisdiction-specific literature review in this study. The jurisdictions focused on in this study are the United States of America, the United Kingdom and Australia. This study concerns itself with pay-related discrimination which strains ILO Conventions No 100 and 111. Convention 100 focuses on equal pay for equal work and Convention No 111 focuses on the elimination of all forms of discrimination in the workplace.

In spite of extensive legislative developments in the various jurisdictions which form part of this study, enhanced by the creation of various practical mechanisms to enable the elimination of pay-related discrimination, the stubborn problem of discriminatory pay practices has survived structured and deliberate attempts to get rid of it.

In South Africa, the amendment to section 6(4) of the Employment Equity Act, assented on 1 August 2014, specifically describes a difference in conditions of
employment between employees of the same employer performing the same or substantially the same work or work of equal value based on any one or more of the grounds listed in section 6(1), as unfair discrimination. This amendment therefore seeks to prohibit such unfair discriminatory practices. Based on the newness of this amendment and the fact that courts have not yet delivered judgments arising from litigation related to this particular amendment, a sense of uncertainty exists with respect to the adequacy of the amended section 6 in the Employment Equity Amendment Act. If progress in the other jurisdictions in this regard is anything to go by, there is no reason to believe that the amendment to section 6 will be a panacea capable of addressing all alleged discriminatory pay practices.
CHAPTER 1
GENERAL OVERVIEW AND BACKGROUND

1.1 INTRODUCTION

It is proffered that the South African legislative provisions, prior to 1 August 2014, were not sufficient to explicitly proscribe or regulate the growing pervasiveness of the lack in equal pay for equal work within its jurisdiction. The Employment Equity Amendment Act, 47 of 2013\(^1\) (the EEA) and the Employment Equity Regulations, 2014\(^2\) (EER) which came into effect on 1 August 2014, could be serve as legislative developments capable of overcoming that deficient situation. This paper will review, amongst other aspects, the efficacy of equal pay-related legislative developments in selected jurisdictions, discuss the issue of equal pay in South Africa against the backdrop of selected cases and reflect on the relevant amendments to the EEA.

Although the notion of non-discriminatory employment or pay practices have been generically catered for in South Africa (SA) in the EEA since its inception, there has been a paucity of case law in that regard.\(^3\) Unlike equality legislation in many other jurisdictions, the EEA has however not, up to 1 August 2014, specifically regulated equal pay claims.\(^4\) The Labour Court in *Mangena v Fila South Africa (Pty) Ltd* as the first respondent and *Footwear Trading CC, Footwear Trading CO (Pty) Ltd and Footwear Trading (Pty) Ltd*\(^5\) as the second respondents, held that “section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in section 6(1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential

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to impair the fundamental human dignity of a person or to affect them in a comparably serious manner”\(^6\). The court further pointed out that “‘employment policy or practice’ is defined by section 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment”. In reaching its conclusion the court stated that an employee who is paid “less for performing the same or similar work on a listed or an analogous ground clearly constitutes less favourable treatment on a prohibited ground, and any claim for equal pay for work that is the same or similar falls to be determined in terms of the EEA. Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by section 6 are sufficiently broad to incorporate claims of this nature”\(^7\).

Leading up to the creation of the necessary legislative provisions, the Department of Labour in SA embarked on a consultation process as part of the development of proposed amendments to the EEA.\(^8\) At the time these proposed amendments intended to make specific provision for equal pay for equal work, and are to the following effect:

- A new clause was proposed to deal with unfair discrimination by employers in respect of terms and conditions of employment of employees doing the same work, similar work or work of equal value.
- Differences in pay and conditions of work between employees performing the same or substantially the same work or work of equal value will amount to unfair discrimination unless the employer can show that differences are fair in relation to experience, skill, responsibility and qualifications.


An amendment was proposed to provide for lower paid employees to refer a dispute concerning discrimination (including equal pay claims) to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration.9

1 2 PROBLEM FORMULATION

Although equal pay for equal work legislation has since been created and promulgated to give effect to the relevant International Labour Organisation (ILO) Conventions as well as the Constitution of SA, effective implementation of such legislation remains to be seen.

1 3 THE ILO PERSPECTIVE ON EQUAL PAY FOR EQUAL WORK

As a member state of the ILO, South Africa ratified both ILO Conventions promoting equal pay, namely Convention No 100 of 195110 and Convention No 111 of 1958.11 In summary, these two Conventions respectively promote equal pay on the one hand and pronounce on access to both material well-being and spiritual development for all human beings regardless of race, creed or sex.

Convention No 111 furthermore emphasises that “discrimination constitutes a violation of rights enshrined by the Universal Declaration of Human Rights”.12 The South African legislature has also enacted the EEA13 and the Labour Relations Act 66 of 1995 (the LRA)14 to promote equality in the workplace. In the LRA, remuneration is defined in section 213 as “any payment in money, or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person including the state”.15

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9 Ibid.
10 Convention No 100 of 1951 International Labour Organization (ILO).
11 Convention No 111 of 1958 International Labour Organization (ILO).
13 The Employment Equity Amendment Act 47 of 2013.
The ILO strives to improve working conditions globally by providing minimum standards in respect of employment conditions. Member states are therefore able to improve upon such minimum employment conditions. Convention No 100, which deals with 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 by means of national laws, wage determination machinery, collective bargaining, or a combination of such methods. The Convention states that “each member state shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”.

Further discussion in respect of the ILO position on the matter of equal pay for equal work will be presented in chapter two of this study.

Equal pay for equal work is also provided for by way of Article 7 of the International Covenant on Economic, Social and Cultural Rights, Article 4 of the European Social Charter, and Article 15 of African Charter on Human and Peoples' Rights.

Equal pay generally refers to the full range of payments and benefits offered to employees. This includes basic pay, non-salary payments, bonuses and allowances. Equal pay for equal work is a workplace right applicable to individuals doing the same work which gives rise to the requirement that they should receive the same remuneration. According to the International Covenant on Economic, Social and Cultural Rights, the concept of equal pay relates specifically to the gender pay gap in

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16 Equal Remuneration Convention No 100 of 1951 International Labour Organization (ILO).
17 Ibid.
that it emphasises the right of women to enjoy equal pay for equal work in relation to their male counterparts.\textsuperscript{21}

\section*{1.4 IN BRIEF: THE POSITION OF THE SOUTH AFRICAN CONSTITUTION ON THE MATTER}

In South Africa, section 23 of the Constitution of the Republic of South Africa (the Constitution) provides for the right to fair labour practices. In terms of section 9(1) “everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(3) further provides that “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth”.\textsuperscript{22}

In terms of section 9(4) no person may unfairly discriminate directly or indirectly against anyone on one or more grounds as contemplated in subsection 9(3). The Constitution furthermore decrees that national legislation must be enacted to prevent or prohibit unfair discrimination.\textsuperscript{23} It is submitted that the unfair discrimination proscribed in section 9 of the Constitution, includes unfair discrimination related to remuneration\textsuperscript{24} practices.

The 12th Commission on Employment Equity (CEE) Annual Report\textsuperscript{25} released in 2012 was intended to target, reflect and measure the extent of income differentials in terms of race and gender discrepancies in the workplace. This formed part of efforts by the Department of Labour to ensure equal pay for work of equal value in an attempt to eliminate unfair discrimination in salaries paid to employees. This initiative

\begin{itemize}
  \item \textsuperscript{22} The Constitution of the Republic of South Africa 12\textsuperscript{th} ed 2013.
  \item \textsuperscript{23} The Constitution of the Republic of South Africa 12\textsuperscript{th} ed, 2013. s 23 and s 9.
  \item \textsuperscript{24} The Labour Relations Act 66 of 1995 as amended in 2007. s 217
\end{itemize}
was part of a drive to enforce the relevant constitutionally engendered legislation and give impetus to remuneration equity in the workplace.26

1.5 POSSIBLE LITIGATION RAMIFICATIONS

It is argued that employees who hold the view that they are entitled to the same pay as another person doing the same job, have many hurdles to clear when electing to litigate against his or her employer. Such employees must be able to prove that the difference in pay is manifestly based on one of the listed grounds mentioned in section 6 of the EEA27 before such a dispute will succeed.28 That said, the EEA does not expressly prohibit unequal pay for work of equal value, but it does prohibit discriminatory practices in that regard.29

Clearly, there is abundantly more to it than simply making a claim or crying foul to this effect. Failure to apply the general principle of equal pay for equal work, even though the principle is statutorily provided for, will only amount to unfair discrimination if the reason for distinguishing between the higher paid and the lower paid employee is attributed to one or more of the listed grounds or any other arbitrary ground contemplated in section 6 of the EEA. The listed grounds are

“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 and birth”.30

27 The Employment Equity Amendment Act 47 of 2013.
30 Ibid.
A broader discussion on the South African legislative framework relevant to the issue of equal pay for equal work and selected case law will be presented in chapter three of this study.

16 PRACTICAL HUMAN RESOURCES IMPLICATIONS

From a practical human-resources perspective in dealing with equal pay for equal work and in an attempt to achieve the statutorily contemplated dispensation supportive of equal pay for equal work, the following factors are pertinent to employers:

- Comparative merit of individual jobs
- Individual employee performance
- Experience of individual employees in a particular job
- Length of service of employees
- Career path impacts which include factors such as job rotation and demotion
- Succession planning and its implications on employees’ remuneration
- Skills supply and demand and its implications on employees’ remuneration

From the above it becomes apparent that the concept of equal pay for equal work is fraught with potentially subjective factors which are difficult to assimilate in reaching acceptable legislative and practical outcomes.31

In terms of the Employment Equity Regulation 3, employers are required to take steps “to eliminate differences in the terms of conditions of employment of employees performing work of equal value if those differences are directly or indirectly based on a listed ground or any arbitrary ground which are prohibited by section 6(1) of the EEA”.32

Typical issues arising from the EEA amendments related to equal pay for equal work which South African employers will have to grapple with include:

• the definition and meaning of equal pay for equal work;
• the methodology for determining equal pay claims;
• how to assess whether work is indeed of equal value; and
• factors that could justify the differentiation of terms and conditions of employment.  

In addition to the South African context, this study also focuses on the matter of equal pay for equal work in the following jurisdictions:
(i) United Kingdom (UK);
(ii) United States of America (USA); and
(iii) Australia.

A detailed discussion follows in chapter three of this study, focusing on each of these jurisdictions to explore whether the focused attention on the doctrine of equal pay for equal work, the relevant legislative mechanisms and the practical implementation of such mechanisms have provided effective outcomes.

1.7 PURPOSE AND OBJECTIVES OF THIS STUDY

This study will attempt to review whether the relevant ILO Conventions, the Constitutional injunctions and the EEA provisions provide consistent and practical solutions to alleviate equal pay for equal work disparities in a South African workplace context.

In pursuit of that purpose, this study will focus on the following objectives:

• Identify the possible social and political dogmatic origins of pay inequalities within the selected jurisdictions;

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• research the legislative developments in the selected jurisdictions which have been assented to establish equal pay for equal work practices;
• research the legislative instruments that have been developed and utilised to achieve equal pay for equal work in the selected jurisdictions;
• research the South African legislative developments in respect of the EEA purposed to achieve equal pay for equal work as well as eradicate discriminatory practices that may inhibit the achievement of equal pay for equal work; and
• make certain recommendations which may assist in achieving equal pay for equal work within the South African workplace context.

1 8 THE RESEARCH APPROACH

In order to achieve the stated objectives related to this study, the researcher will conduct a review of available literature, judgments, statistics and legislation pertaining to the research questions.

1 9 LIMITATION OF RESEARCH

The inescapable reality of equal pay for equal work has been increasingly challenged in South African courts. However, the lacuna in the South African labour law landscape has made it difficult for employers to be held statutorily responsible for refusing or failing to observe the principle of equal pay for equal work. The ILO deals with equal pay for equal work in particular, and discrimination in general, by way of two different Conventions, hence placing an obligation on its member states to develop the necessary measures to ameliorate and possibly eradicate unfair and discriminatory pay practices in workplaces within their jurisdiction. The Constitution of SA is equally clear on the matter of fair treatment and the eradication of discrimination. This study is therefore limited to focusing on the following aspects:
• Legislative developments and other mechanisms in other jurisdictions which were designed and promulgated to address the lack of equal pay for equal work; and

• legislative developments within the South African context intended to address the lacuna in the labour law with regards to the equal pay for equal work principle in South African workplaces.

1.10 HYPOTHESIS

South African legislation pertaining to the principle of equal pay for equal work will be inadequate to enable practical and consistent application of this legal provision.

1.11 SUMMARY

In a society which is burdened by an unfortunate legacy of various forms of workplace-based inequality, the South African legislation pertaining to equal pay for equal work is bound to ruffle the feathers of many employers. Redress and restitutionary measures have thus far been at the epicentre of legislative reform in pursuit of a more equal society. Prior to August 2014, South African labour legislation was distinctly silent on the matter of equal pay for equal work in spite of a huge outcry against the prevalence of unfair discriminatory pay and employment practices.

It can reasonably be anticipated that much litigation arising from pay-based unfair discrimination will be the order of the day. Many employers may have done extensive analyses as a means of determining the extent of possible unfair discriminatory practices in relation to conditions of service and remuneration, while others may have simply elected to play the “wait and see” game. Either way, employers can be certain of a spike in discrimination challenges as a result of the EEA amendments pertaining to equal pay for equal work.
CHAPTER 2
THE INTERNATIONAL LABOUR ORGANISATION (ILO) POSITION IN RESPECT OF EQUAL PAY FOR EQUAL WORK

2.1 INTRODUCTION

This chapter will focus on the position of the ILO regarding equal pay for equal work. As a member state who has ratified the ILO Conventions pertaining to equal pay for equal work in particular, as well as anti-discrimination principles within the workplace in general, the South African Government and its social partners, namely the employers’ and workers’ organisations,\(^{34}\) have a legal obligation to develop legislation aimed at giving effect to the spirit and intent of ILO Conventions No 100 of 1951 and No 111 of 1958.\(^{35}\) Convention No 100 relates to equal remuneration for men and women workers for work of equal value and refers to rates of remuneration established without discrimination based on sex. Convention No 111 on the other hand deals with any distinction, exclusion or preference made on the basis of colour, race, sex, religion, political opinion, national extraction or social origin, which has the effect of impairing or nullifying equality of opportunity or treatment in employment or occupation in the workplace.\(^{36}\)

2.2 THE GENERAL ROLE AND PURPOSE OF THE RELEVANT ILO CONVENTIONS IN RELATION TO MEMBER STATES

The overarching goal of the ILO in relation to equality between men and women is to promote equal opportunities for them in their pursuit of decent work. Decent work refers to fairly paid productive work carried out in conditions characterised by freedom, equity, security and human dignity.\(^{37}\) In particular, the ILO considers

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\(^{37}\) Ibid.
gender equality as a critical element in respect of its efforts to achieve four strategic objectives. These strategic objectives are:

- The promotion and realisation of standards, fundamental principles and rights at work;
- the creation of greater opportunities for men and women to secure decent employment and income;
- the enhancement of coverage and effectiveness of social protection for all; and
- the strengthening of tripartism and social dialogue.  

In summary, these objectives focus on inclusivity, fairness and equality in the workplace and certain social aspects flowing from the employment relationship.

The concept of equal pay for work of equal value is both a fundamental right and a founding principle of the ILO. This concept is a core component of ILO-related work. Achieving pay equity remains a challenge in all member states; however, it is believed that this principle can be applied in a variety of ways notwithstanding the uniquely complex conditions which may prevail in the various countries. The effective implementation of the equal pay for equal work principle relies heavily on governments, and employers’ and workers’ organisations taking responsibility for their respective roles in respect of the implementation of Convention No 100 of 1951 and Convention No 111 of 1958, and realising pay equity. In this regard, the ILO has an obligation to assist governments, employers’ and workers’ organisations in the realization of fundamental rights.  

The design and implementation of certain practical remuneration equity approaches, as a means of giving effect to ILO Conventions No 100 and No 111 as well as the

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40 Ibid.
attendant legislative instruments within the South African context, will be discussed in chapter five of this study.

2.3 THE ILO CONVENTION NO 100 OF 1951 AND CONVENTION NO 111 OF 1958

The Governing Body of the ILO convened for its Thirty Fourth Session (34th) in June 1951, in Geneva, Switzerland to adopt certain proposals with regard to the principle of equal remuneration for men and women performing work of equal value. It was determined that these proposals shall take the form of an International Convention. As a consequence, ILO Convention No 100 came into being. This Convention has subsequently been cited as the Equal Remuneration Convention, 1951.41

Convention No 100 defines the term ‘remuneration’ as being inclusive of ordinary, basic or minimum wage or salary and any additional amounts payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.42 Convention No 100 further defines the term “equal remuneration for men and women workers for work of equal value” as rates of remuneration designed and applied without discrimination based on sex.43

The General Conference of the International Labour Organisation, convened in Geneva by the Governing Body of the International Labour Office, on 4 June 1958, decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation.44 It was determined that these proposals shall take the form of an International Convention, and with due regard to the Declaration of Philadelphia.45 The Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions which are characterised by

42 Art 1 of Convention No 100.
43 Ibid.
freedom and dignity, economic security and equal opportunity.\textsuperscript{46} It furthermore determined that discrimination constitutes a violation of rights in terms of the Universal Declaration of Human Rights.\textsuperscript{47} This gave rise to the adoption of the ILO Convention No 111 on 25 June 1958. This Convention has subsequently been cited as the Discrimination (Employment and Occupation) Convention, 1958. This particular Convention which consists of six Articles defines, in summary, the term “discrimination” as being inclusive of the following:

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

(b) other forms of distinction, exclusion or preference which have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as determined by the member state concerned after consultation with representative employers’ and workers’ organisations, and with other appropriate bodies.\textsuperscript{48}

It is evident that Convention No 100 and Convention No 111 advocate a stance which opposes unfair discrimination in the workplace. Convention No 100 limits its stance to sex-based discrimination in relation to remuneration. Convention No 111 takes the matter further in that it explicitly refers to workplace discrimination based on other grounds such as race, colour, social origin and political opinion, to name a few. This implies that Convention No 111 imposes on member states that have ratified this particular Convention, the need to design legislation which prohibits all forms of workplace discrimination in relation to all matters related to the employment relationship.

\textsuperscript{47} The declaration of 10 December 1944.
\textsuperscript{48} ILO Convention No 111, art 1(a) and (b).
These two Conventions have been ratified by 168 countries (Convention No 100) and 169 countries (Convention No 111) respectively. Furthermore, these two Conventions form part of the eight “Fundamental ILO Conventions”. On that basis, every ILO member state is obliged to follow the principles contained in the Conventions on Equal Remuneration and Discrimination in Employment and Occupation. Governments of the countries that ratified these Conventions have to submit a report which outlines the measures they have implemented to effectively apply the Convention.

2.4 IMPLEMENTATION OF ILO CONVENTION NO 100 AND CONVENTION NO 111

In giving effect to its gender equality-based mandate, the ILO strengthened its intention and resolve by adopting Resolutions related to the general cause of equality in the workplace. The most recent of these Resolutions include the Resolution concerning Gender Equality at the Heart of Decent Work, adopted in June 2009; and the Resolution concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection, adopted in June 2004. The ILO took this commitment further by adopting an approach aimed at mainstreaming gender equality by means of a two-pronged approach. This two-pronged approach, on the one hand, entails awareness that have these different needs and interests integrated into all policies, programmes, projects and institutional structures and procedures within organisations. On the other hand, especially where inequalities are extreme or deeply entrenched, they are addressed through gender-specific measures involving women and men, either independently or collectively. The mainstreaming of this issue is therefore designed to include gender-specific actions where necessary. A

further demonstration in respect of the ILO’s focused attention to addressing gender equity in the workplace, the organisation has designed a single, integrated Action Plan for Gender Equality for the period 2010 to 2015, which gives operational effect to the 1999 ILO policy on gender equality.53

An overarching gender equality policy is essential for promoting equal pay. The establishment of equal pay practices is inseparably linked to the attainment of gender equality. The gender-based pay gap can only be closed where ongoing and meaningful progress is made in respect of gender equality on the whole within the workplace, in society and elsewhere. The inverse is equally true, namely that gender equality on the whole in the workplace cannot be achieved without equal pay for work of equal value.54

In its generalised pursuit to the realisation of equality in the workplace, the ILO has aggressively focused on Conventions 100 and 111 which respectively deal with pay equity and the prohibition of exclusions, distinctions or preferences in the workplace based on race, colour, sex, religion, political opinion, nationality or social origin that may have the effect of impairing equality of opportunity or treatment in employment or occupation.55

Evidence of the extensive efforts can be seen in the more than 90% of ILO member states that have ratified Conventions No 100 and No 111.56 It can be concluded that this high ratification rate in respect of Convention No 100 and No 111 by member states, confirms the importance of the rights and principles inherent in these two Conventions.

53 Ibid.
54 Supra 8. See also Oelz et al Equal Pay 23 – 66.
55 Ibid.
56 Ibid
The high ratification rate of these two ILO Conventions, as illustrated in Figure 1 above is a positive indication and it augurs well for the creation of legislative instruments and other appropriate mechanisms that will enhance focused attempts to alleviate workplace discrimination in general and pay-based discrimination in particular. This high ratification rate is possibly also an indication of the widespread global political support for the alleviation of workplace discrimination. It is significant that the level of ratification in respect of the two Conventions has increased by 54% (Convention No 100) and 55% (Convention No 111) over a period of approximately sixteen years. One wonders if the various countries that have ratified these two conventions have gone further by creating enabling legislation and other appropriate measures that would have workplace equity-enhancing consequences.

The enforcement efforts by member states in respect of Convention No 100 and No 111 will be discussed under paragraph 2.4.

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57 Ibid.
58 Ibid.
It is noteworthy that the United States of America had not yet ratified either of these two Conventions by 2005.\textsuperscript{59} To date, the United States of America have only ratified two of the core ILO Conventions, namely Convention 105 (Abolition of Forced Labour Convention) and Convention 182 (Worst Forms of Child Labour Convention).\textsuperscript{60}

There appears to be paucity however in respect of research studies which focus on the cost-benefit analysis related to pay equity. The scarcity of research studies indicates the challenges attached to obtaining wage data which spans several years. The scarcity of research studies also underscores the difficulty of proving a positive correlation between pay equity and other equality-enhancing measures on labour productivity.\textsuperscript{61}

During the ILO – United Nations Global Compact webinar it was revealed that the benefits derived from equal pay in the workplace include a more effective use of skills, a more positive impact on female workers, improved human resources management, improved working relationships and that it has a positive effect on the reputation and attractiveness of the organisation.\textsuperscript{62}

According to a survey from 27 February to 2 March 2015 in the USA, 66% of respondents said that women are not paid the same as men for equal work.\textsuperscript{63} Following on this survey, four reasons, in the main, were advanced in support of an immediate equal pay for equal work intervention. These reasons include the following:

\begin{itemize}
  \item \textit{Ibid.}
  \item \textit{Supra} 8. See also Oelz \textit{et al} Equal Pay 23 – 66.
\end{itemize}
Economic growth: It is suggested that when a woman earns a lower salary, it constrains her spending power. It was also found that women are the main consumers in their homes. A total of 85% of purchasing decisions are made by women. It was revealed that women decide on most everyday items, like groceries and clothing, as well as on half of all motor vehicles, home-improvement products and consumer electronics purchased in the USA. Over the next decade, women are expected to control two-thirds of consumer spending.64

Strengthening the middle class: Based on the findings of this study, it was found that paying women fairly would go a long way towards strengthening the middle class. Smaller salaries cost the US woman worker between $700,000 and $2 million over the course of her work life. With increasing numbers of women contributing to household incomes, the lack of equal pay for women for the same work has an adverse impact on all middle-class families, including the men and children who rely on their contributions.65

Attacking poverty: A third of American women either live in poverty or are just on the brink.66

The wage gap places an unfortunate burden on families with only one female earner, which particularly hits African-American and Latino communities, where women are likely to support families on their own. The wage gap also increases the likelihood that women of retirement age will slip into poverty because their pensions and Social Security cheques are shrunk by years of lower pay.67

Global competitiveness: Pay inequality presents a serious threat to the competitiveness of the USA in that it keeps women out of the workforce and renders

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65 Ibid.
67 Ibid.
them less likely to contribute the full benefit of their skills and talents to the economy. A 2014 report by the World Economic Forum however, shows that the USA ranks 65th in wage equality out of 142 countries studied.\footnote{World Economic Forum report. 2014. \url{http://reports.weforum.org/global-gender-gap-report-2014/} (accessed 2015-07-09).} The International Labour Organisation’s Global Wage Report 2014 – 2015 indicates that the USA was at the very bottom of the rankings on wage inequality out of 38 countries surveyed, lagging behind countries such as Sweden, Denmark, Iceland and Germany. It is noteworthy that the USA even lagged behind Bulgaria, Greece and Slovakia.\footnote{ILO Global Wage Report 2014/2015. Wage and income equality. \url{http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_324678.pdf} (accessed 2015-07-09).}

It is submitted that the envisaged impact of equal pay for equal work on areas such as economic growth possibilities, strengthening of the middle class, poverty alleviation and global competitiveness could be an important catalytic intervention in socio-economic advancement in a country where it is implemented.

This begs the question whether and what type of positive effect equal pay for equal work could have on an organisation. The information in Table 1 below provides an insightful synthesis of how equal pay for equal work actually and potentially impacts an organisation.
Table 1: Synthesis of benefits of pay equity

<table>
<thead>
<tr>
<th>BENEFITS</th>
<th>INDICATORS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Improvement in human resource management practices</td>
<td>Less time devoted by employees to the recruitment process</td>
</tr>
<tr>
<td>Greater efficiency in staffing practices</td>
<td>Increased productivity and quality of work</td>
</tr>
<tr>
<td>Greater effectiveness of skills development</td>
<td>Decreases in recruiting and training costs</td>
</tr>
<tr>
<td>Improved retention of new employees at the end of their probationary period</td>
<td>Improved compensation management; time savings for employees in charge of managing the pay system; More efficient distribution of the total payroll among various jobs</td>
</tr>
<tr>
<td>Coherent pay policy and harmonized pay structure based on the value of jobs</td>
<td></td>
</tr>
<tr>
<td>Highlighting the undervalued skills of female workers</td>
<td>Fewer errors or customer complaints</td>
</tr>
<tr>
<td>Better perception of workplace equity and improved labour relations</td>
<td></td>
</tr>
<tr>
<td>Greater job satisfaction and stronger commitment to the organization</td>
<td>Lower employee turnover, absenteeism and related costs</td>
</tr>
<tr>
<td>Greater speed in resolving complaints or conflicts</td>
<td>Less time devoted to resolving conflicts</td>
</tr>
<tr>
<td>Fewer conflicts</td>
<td>Ibid.</td>
</tr>
<tr>
<td>Impacts on the organization’s reputation and attractiveness</td>
<td></td>
</tr>
<tr>
<td>Lower costs related to recruiting qualified personnel</td>
<td>Less time devoted to the search for qualified candidates, especially in high demand occupations</td>
</tr>
<tr>
<td>Reduction in time that positions remain vacant</td>
<td>Value of stalled production or lost contracts</td>
</tr>
</tbody>
</table>

Source: Chicha, 2008

In Table 1 Chicha provides an additional list of benefits related to equal pay in the workplace. The information is synthesized into four broad categories of benefits with corresponding indicators. These four broad categories are

(i) improvement in human resources practices;
(ii) highlighting undervalued skills of female workers;
(iii) better perception of workplace equity; and

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(iv) impact on the organisation’s reputation and attractiveness.71

2.5 EQUALITY AT WORK: HOW MEMBER STATES COULD ADDRESS CHALLENGES

The Second Global Report (hereafter referred to as the Report) on Discrimination72 which serves as a follow-up to the ILO Declaration on Fundamental Principles and Rights at Work73 provides compelling insights in relation to the emerging issues related to workplace discrimination and inequalities. The Report has as its core theme, the notion of “equality at work: tackling the challenges”. The Report also comments on recent policy responses, and provides insights related to the ILO’s experience and achievements and challenges faced to date. It emphasises the need for better enforcement of anti-discrimination legislation as well as equipping the social partners to be more effective in making equality a reality at the workplace. Of particular importance, the Report proposes that equality in the workplace must become a mainstream objective of the ILO’s Decent Work Country Programmes.74

The Report further recommends that achieving equality at the workplace must be complemented by conventional anti-discrimination policy measures, such as clear and comprehensive enabling legislation, effective enforcement mechanisms together with other policy instruments, such as active labour market policies.75

Some innovative and radical measures are proposed in respect of equality-enhancing enforcement. The Report calls for inclusion of fundamental equality-enhancing principles and rights in regional economic integration and free trade

71 Ibid.
75 Ibid.
agreements. It is argued that such inclusion can play a defining role in reducing discrimination at work.\textsuperscript{76} Parties to such agreements should be required to make commitments on non-discrimination and equality issues and increase their efforts in respect of effective enforcement mechanisms. An example of a systemic intervention in this regard, relates to the approach which development financing institutions have adopted. In recent times, such institutions have implemented a requirement which compels private borrowers to adhere to the principles and rights laid down in the fundamental ILO standards related to non-discrimination in the workplace. It is believed that this will place an onus on employers to institute equality-enhancing labour practices at the workplace.\textsuperscript{77}

It is further argued that discrimination is a very nebulous phenomenon when it comes to creating key indicators that could effectively track and quantify progress in its elimination. This constraint is aggravated by political and ideological barriers which prohibit the collection and analysis of data of certain groups. These factors give rise to the challenge of setting up statistical instruments for the effective monitoring of discrimination elimination progress. The slow progress in respect of a statistical instrument capable of producing high-quality data integrity seems fundamental to measuring progress in the elimination of discrimination.\textsuperscript{78}

2.6 THE ENFORCEMENT OF ILO CONVENTIONS NO 100 AND NO 111

The ILO drafts and oversees compliance with international labour standards by its 185 member states as set down in the various conventions drafted under its auspices. In addition, the ILO Constitution provides for two grievance mechanisms for purposes of avowing that a member state is failing to meet its obligations under a particular ILO Convention. These two mechanisms are the complaints procedure and the representation procedure.\textsuperscript{79}

\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
The complaints procedure operates by allowing for the lodging and consideration of complaints against a member state by:

(i) another member state of the same convention;
(ii) a delegate to the International Labour Conference (of member states); or
(iii) the ILO Governing Body.80

To investigate and adjudicate the allegations raised through the complaints procedure, a Commission of Inquiry may be formed to investigate the allegation.81

The representation procedure enables employers and workers' unions to make representations to the ILO Governing Body alleging that a member state has failed to comply with its obligations under an ILO convention. A committee consisting of three members may be convened to review the allegation and the member state's submissions.82

ILO member states submit periodic compliance reports as a means of demonstrating adherence to ratified ILO conventions. In addition, the ILO also conducts extensive research, reporting and campaigning in respect of workers' rights.83

The enforcement of fundamental workers' rights has become a matter of increasing concern, especially in the midst of ongoing and deepening economic crises. Continued state budget deficits could lead to the adoption of measures that could undermine the level of protection of workers' rights.84 The study of Canetta, Kaltsouni and Busby focuses on the enforcement of fundamental workers' rights in Greece, France, Hungary, Italy, the Netherlands, Sweden and the United Kingdom.85 This study found that the national frameworks in the seven member states do not

80 Ibid.
81 Ibid.
82 Ibid.
83 Ibid.
85 Ibid.
show major differences and provide for an effective system of enforcement of these rights. This can be ascribed to the influence of international and European law standards which provide consistent and similar standards in the foundational national principles and rules.\textsuperscript{86}

The eight fundamental ILO Conventions are as follows:

- Forced Labour Convention, 1930 (No 20)
- Abolition of Forced Labour Convention, 1957 (No 105)
- Worst Forms of Child Labour Convention, 1999 (No 182)
- Minimum Age Convention, 1973 (No 138)
- Freedom of Association and the Protection of the Right to Organise, 1948 (No 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No 98)
- Discrimination (Employment and Occupation), 1958 (No 111)
- Equal Remuneration Convention, 1951 (No 100)\textsuperscript{87}

As regards the ILO requirements in respect of Convention No 100, it is expressly stated that each member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. This principle may be applied by means of the following instruments:

(a) national laws or regulations;
(b) legally established or recognised machinery for wage determination’
(c) collective agreements between employers and workers; or
(d) a combination of these various means.\textsuperscript{88}

\textsuperscript{86} Ibid.
In respect of Convention No 111, the following is expressly recorded:

Each member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.\textsuperscript{89}

In addition, each member for which Convention 111 is applicable undertakes, by methods appropriate to national conditions and practice:

(a) to seek the co-operation of employers’ and workers’ organisations and other appropriate bodies in promoting the acceptance and observance of this policy;

(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;

(d) to pursue the policy in respect of employment under the direct control of a national authority;

(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority; and

(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.\textsuperscript{90}


This particular study will focus on how the South African legal instruments are aligned to the effective enforcement of the ILO Conventions No 100 and No 111 – two of the eight fundamental conventions.

2 7 SYNTHESIS AND CONCLUDING REMARKS

The monitoring and enforcement role of the ILO in the effective implementation of Convention No 100 and No 111 is clearly critical given that it has designed very clear and compelling requirements to member states that have ratified these two ILO Conventions. Member states’ commitment to giving effect to the spirit and intent of the various Articles associated with the respective conventions, remains a matter domestic to each member state’s internal realities. Where member states have indeed enacted legislation in accordance with the implementation requirements of these two ILO Conventions, effective implementation at that level will require robust monitoring and enforcement systems and processes.

As opposed to viewing equal pay for equal work as onerous and imposing, organisations should perhaps consider the benefits to be derived, such as those suggested by Chicha.91

91 Supra par 2 4. See at Table 1.
CHAPTER 3
EQUAL PAY FOR EQUAL WORK: A DISCUSSION OF SELECTED JURISDICTIONS

3.1 INTRODUCTION

This chapter focuses on the matter of equal pay for equal work in the following jurisdictions:

(i) United Kingdom;
(ii) United States of America; and
(iii) Australia.

The rationale behind the focus on these three countries in terms of their respective responses and experiences related to equal pay for equal work is based on various factors. These factors include, amongst others, the fact that these countries are deemed to be developed economies, that they have developed and implemented various instruments to assist in alleviating problems related to equal pay for equal work and to ascertain whether these instruments have been sufficient for the purposes for which they had been designed. The extent to which they may have succeeded in doing so will be discussed in the ensuing paragraphs of this chapter.

3.2 EQUAL PAY FOR EQUAL WORK IN THE UNITED KINGDOM

In the United Kingdom, the principle of equal pay originates from article 119 of the Treaty of Rome.\textsuperscript{92} In terms of article 119, member states of the European

Community shall “in the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work”\(^{93}\).

The United Kingdom subsequently adopted and implemented these provisions on the basis of the Equal Pay Act of 1970\(^{94}\) (the EPA). The EPA at the time had the effect of implanting an equality clause into employment contracts that do not make provision for such a clause in their formulation. In terms of this provision, all terms and conditions of employment are contemplated not only with regard to pay but also extend to other benefits such as sick pay. The supremacy of the EPA over any contractual term that imposes a limitation or exclusion of any of the EPA provisions was deemed as unenforceable. The EPA was subsequently replaced by the Equality Act of 2010\(^{95}\) which came into effect in October 2010. The Equality Act (EA) of 2010 which contains 218 sections and 28 schedules was considered as one of the “most influential pieces of legislation”, purposed to “simplify and strengthen” existing equality legislation in the UK.\(^{96}\)

Other factors pertinent to treatment of equal pay for equal work in the UK will be discussed in 3 2 1. These factors are:

- The salient features of the Equality Act of 2010; and
- Facts and statistics pertinent to a lack of equal pay for equal work in the UK.

### 3 2 1 THE SALIENT FEATURES OF THE EQUALITY ACT OF 2010

\(^{93}\) Ibid.


The EA has a Statutory Code of Practice (the Code) which is a comprehensive, authoritative and technical guide intended to guide the implementation of the EA.97 The Code is informed and shaped by case law and precedent which enable the application of its provisions to actual cases of dubious lack of pay equity within the workplace. The Code has been drafted in a manner that is capable of being used by advocates, lawyers, human resources professionals, courts and tribunals.98 Although it fundamentally relates to equal pay between women and men, it could also enable challenges on pay systems based on race, gender and any other listed ground in terms of the EA of 2010.99 Thirty four years after the EPA of 1970100 came into effect and six years after the EA of 2010101 came into effect, a “black pay gap” which refers to Asian and black workers earning up to £7,000 less per year than white people, was revealed in a shocking report from a government task force.102 It was found that ethnic minority employees earn an average of 7% less than white employees in the UK. This inequality also extended to ethnic groups. It was further revealed that, as a whole, ethnic minority workers earn only £18,044 per annum on average, compared with the £19,552 for a white employee.103

3 2 2 FACTS AND STATISTICS PERTINENT TO A LACK OF EQUAL PAY

It is argued that the gender pay gap reduces the lifetime earnings and pension benefits of women. As is the case in the USA,104 this is one of the significant causes of poverty in later life for women.

98 Ibid.
99 Ibid.
100 Ibid.
101 Ibid.
103 Ibid.
According to the gender pay gap statistics released by the Office for National Statistics (ONS) in the UK, the average pay of women working full-time was only 85.1% of the pay received by their male counterparts in 2012.\textsuperscript{105} The gender pay gap varies across sectors of the economy and regions and rises to up to 55% in the finance sector. It was further reported that 64% of the lowest paid workers in 2012 were female. This created a knock-on effect in that it not only contributed to women's poverty, but also to the poverty of their children.\textsuperscript{106}

For all workers (part-time and full-time) the gender pay gap was 19.1% in 2013, having risen from 18.6% in 2012. This implies that for every £1 earned by a man in the UK in 2013, a woman earned only 81 pence.\textsuperscript{107}

In 2013, the average pay of women working full-time dropped by 0.9% to 84.3% of their male counterparts. This implies that, compared to their male counterparts, women stopped earning an income as from 4 November 2014. Women were effectively working for no money after this date, which is referred to as Equal Pay Day in the UK. On average, a woman working full-time in 2013 earned £5,000 less a year than a man in that particular year.\textsuperscript{108}

A further startling revelation suggests that low paid women are severely impacted; resulting in a situation where nearly 1 in 2 women indicated that they are worse off presently than they were five years ago. Furthermore, nearly 1 in 10 women have accessed a short term loan in the twelve months preceding the publication of the report. Nearly 1 in 12 low paid women with children have obtained food from charities in the twelve month period prior to the release of this particular report.\textsuperscript{109}

\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid.
\textsuperscript{109} Ibid.
From the facts and statistics pertaining to equal pay for equal work in the UK, it appears that gender and race-based pay inequalities have continued to plague the workplace, in spite of the EPA of 1970\textsuperscript{110} and the EA of 2010.\textsuperscript{111}

\begin{footnotesize}
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid.
\end{footnotesize}
In the United States of America, recent research findings have indicated that women in the American workforce earn 77 cents for every dollar earned by their male counterparts. The prevalence of this gender–based wage gap has been a vexing policy issue since the advent of female participation in the USA workforce.\(^{112}\) The promulgation of the Equal Pay Act of 1963 (the USA EPA), its impact, as well as the impact of subsequent legislation related to this matter, will be discussed in ensuing paragraphs of this section. Legislative initiatives arising from the USA EPA include the Title VII of the Civil Rights Act of 1964,\(^{113}\) the Civil Rights Act of 1991\(^{114}\) and the recent Lilly Ledbetter Fair Pay Act of 2009\(^{115}\) which has been aimed at addressing the gender-based wage gap in the USA. Of particular interest is when President Obama signed the Lilly Ledbetter Fair Pay Act on 29 January 2009, his first major piece of legislation, Lilly Ledbetter herself fittingly stood beaming by President Obama's side during the signing ceremony.\(^{116}\)

In their efforts to better understand the nature and extent of the gender-based wage gap in the USA, researchers have concerned themselves with phenomena such as wage disparities among the sexes, noted even within similar groups (like men and women, where both groupings have a bachelor’s degree and one full year’s work experience) in the workforce, why male and female high school graduate cohorts revealed similar wage inequalities with males earning substantially more than their female counterparts and why the wage gap is at its narrowest among the youngest members of the workforce and typically widens as employees’ ages increase.\(^{117}\) It has been reported that the most prominent period of increased pay equity to date in

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117 Ibid.
the USA occurred during the 1980s during which period women’s wages steadily climbed to reach nearly 70 cents for every dollar a man earned. The Bureau of Labour Statistics stated that this steady upward climb of women’s wages was however not sustained during the 1990s.\textsuperscript{118}

Various reasons have been cited to give explanation to why this seemingly perpetual gender-based gap in the USA was a matter of grave concern. These reasons include factors such as:

- when women are paid less than men, the means by which they are able to support themselves, as well as their families, are compromised;
- the gender-based wage gap has adverse consequences for women in the American workforce as well as their children; and
- as a result of being paid less than their male counterparts, women will be predisposed to the drawback of a more perilous economic status.\textsuperscript{119}

\section{THE PROMULGATION OF THE EQUAL PAY ACT OF 1963\textsuperscript{120} (THE USA EPA) AND ITS IMPACT ON PAY PRACTICES IN THE USA}

In 1971 the USA Congress declared 26 August as Women’s Equality Day.\textsuperscript{121} In 1963, eight years prior to this declaration, the Equal Pay Act (EPA) of 1963\textsuperscript{122} was signed by President Kennedy with the intention of ending gender-based pay discrimination. Women’s Equality Day and the Equal Pay Act signaled two important strides toward enabling women to exercise their right to participate meaningfully in civil and political affairs and to become contributing and thriving citizens in socio-economic spheres.\textsuperscript{123}

\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid.
The EPA of 1963\textsuperscript{124}, which is an amendment to the Fair Labour Standards Act of 1938\textsuperscript{125}, expressly prohibits wage discrimination by employers and labour organisations based purely on sex.\textsuperscript{126} To establish a \textit{prima facie} case in terms of the EPA, an employee is required to prove that:

(i) different wages are paid to employees of the opposite sex;
(ii) the employees perform substantially equal work on jobs requiring equal skill, effort and responsibility; and
(iii) the jobs are performed under similar working conditions.\textsuperscript{127}

### 3.3.2 Subsequent Legislation Related to This Equal Pay for Equal Work in the USA, and Its Impact

Legislation related to the protection of employees' rights in respect of equal pay and the abolition of discrimination in the workplace subsequent to the promulgation of the EA of 2010,\textsuperscript{128} includes the Title VII of the Civil Rights Act of 1964,\textsuperscript{129} the Civil Rights Act of 1991\textsuperscript{130} and the recent Lilly Ledbetter Fair Pay Act of 2009.\textsuperscript{131}

The Title VII of the Civil Rights Act of 1964\textsuperscript{132} proscribes most forms of workplace harassment and discrimination and applies to all private employers, the state and local governments, as well as educational institutions with fifteen or more employees. In addition to prohibiting discrimination against workers on the basis of race, colour, national origin, religion, and sex, those prohibitions are more broadly applied to include discrimination on the basis of pregnancy, sex stereotyping, and sexual harassment of employees at all private employers, and workplaces such as state and

\begin{footnotes}
\item 124 \textit{Ibid.} \\
\item 126 Creasy \textit{Wage discrimination claims under the Equal Pay Act and Title VII. 7} (12 January 2010) Georgia State University College of Law. \url{http://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1029&context=lib_student} (accessed 2015-07-22). \\
\item 127 \textit{Ibid.} \\
\item 128 \textit{Ibid.} \\
\item 129 \textit{Ibid.} \\
\item 130 \textit{Ibid.} \\
\item 132 \textit{Ibid.}
\end{footnotes}
local governments departments, as well as educational institutions with fifteen or more employees.133

The Civil Rights Act of 1991134 was in essence brought into being by the USA Congress as a result of a number of decisions taken by the Supreme Court in that country. These decisions of the Supreme Court had the effect of changing what was consider to be a well-entrenched landscape of law which prohibits discrimination.135 These decisions also impacted the precedents which existed at the time related to civil rights and anti-discrimination issues.136

Court judgments in the USA that caught the attention of Congress were amongst others, Price Waterhouse v Hopkins137 and Wards Cove Packing Co. v Antonio.138 In Price Waterhouse, the court held that, “even where a plaintiff demonstrates that an employer was motivated by discrimination, the employer can still escape liability by proving that it would have taken the same action based upon lawful motives.”139 Wards Cove reinterpreted the disparate impact of the method of proof, and held that an employer can avoid liability merely by showing a business justification for the practice causing a disparate impact, and that the plaintiff has the burden of proving a lack of a business justification.140 These two cases were viewed as making it more onerous for plaintiffs to succeed in employment discrimination lawsuits.

Women in the USA were paid, on average, only 77 cents for every dollar paid to men141 in 2012. This has been the case since 2007142. It has been reported that the

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135 Such as the EPA of 1963 and the Title VII of the Civil Rights Act of 1964.
136 Ibid.
139 Ibid.
140 Ibid
gap is even worse for African American women who earn only 64 cents and Latino women who earn only 55 cents for each dollar earned by males.\textsuperscript{143} To assist in the eradication of this unfair wage gap, President Obama signed the Lilly Ledbetter Fair Pay Act on 29 January 2009.\textsuperscript{144}

The Lilly Ledbetter Fair Pay Act of 2009\textsuperscript{145} arises from Lilly Ledbetter’s plight, who was one of a small number of female supervisors at the Goodyear plant in Gadsden, Alabama. During the twenty year period that Lilly Ledbetter had worked there, she was subjected to sexual harassment, in addition to being told by her boss that a woman should at that particular workplace. Her male co-workers gloated about their overtime pay, in spite of the fact that Goodyear had a policy that prohibited employees from discussing their salaries. Ledbetter was unaware of the pay discrimination that she was being subjected to until she was handed an anonymous letter which provided details of her male counterparts' salaries. She approached the court as a result, and was awarded her compensation equating to approximately $3.3 million given the severe nature of the pay discrimination.\textsuperscript{146} This amount was however later reduced to $360,000 by the district judge.\textsuperscript{147}

However, the Court of Appeals reversed that particular verdict, holding that her case was filed too late, because the company’s alleged pay discrimination occurred many years earlier. The Court of Appeals adopted this stance even though Ledbetter had still been receiving discriminatory pay. In a 5-4 decision issued by Justice Alito, the Supreme Court held that employees cannot challenge ongoing pay discrimination if the employer’s original discriminatory pay practice occurred more than 180 days earlier, even when the employee continues to be subjected to pay practices that are

\begin{itemize}
  \item \textsuperscript{143} Ibid.
  \item \textsuperscript{144} National Women’s Law Centre “Lilly Ledbetter Fair Pay Act” (29 January 2013) \url{http://www.nwlc.org/resource/lilly-ledbetter-fair-pay-act-0} (accessed 2015-07-25).
  \item \textsuperscript{145} Ibid.
  \item \textsuperscript{147} Ibid.
\end{itemize}
of a discriminatory nature.\textsuperscript{148} In an opinion dissenting from the majority decision in \textit{Ledbetter v Goodyear}, Justice Ginsberg emphasised that it was up to Congress to correct the court’s “parsimonious reading of Title VII”.\textsuperscript{149}

In the end, the USA Congress intervened, promulgating the Lilly Ledbetter Fair Pay Act of 2009\textsuperscript{150} and consequently reversing the controversial and damaging Supreme Court decision in \textit{Ledbetter v Goodyear Tyre and Rubber Co}.\textsuperscript{151} The Supreme Court’s decision that restricted an employee’s ability to file claims to 180 days from the date that the first discriminatory pay decision was thus corrected. The Lilly Ledbetter Fair Pay Act of 2009\textsuperscript{152} provides that each discriminatory paycheck is a separate act of discrimination that can be challenged in court.\textsuperscript{153}

From the above it seems that, in spite of the long-standing presence and ongoing strengthening of legal frameworks regulating equal pay for equal work in the USA, this matter remains a bone of contention in the USA.

\section{3.4 Equal Pay for Equal Work in Australia}

Pay equity transformation in Australia has been addressed by means of a three-phased process.\textsuperscript{154} The first phase entailed the adoption of equal pay principles in 1969 and 1972. In 1969, the Commonwealth Conciliation and Arbitration Commission (the Commission) adopted the equal pay for equal work principle which led to the first

\footnotesize
\textsuperscript{148} \textit{Ledbetter v Goodyear Tire & Rubber Co.}, Inc., 127 S.Ct. 2162, 2178 (2007).


\textsuperscript{151} \textit{Ledbetter v Goodyear Tire & Rubber Co.}, Inc., 127 S.Ct. 2162, 2178 (2007)


phase of national equity pay reform. This principle was found to be limited in its scope on the basis that only 18% of women derived equal pay-related benefit from its application. This led to the Commission’s decision to broaden its scope in 1972 by extending the male minimum wage to women in 1974. This resulted in a rapid increase in the gender-based pay ratio.

The second phase involved a legal entitlement to equal remuneration, introduced in 1993 by the Keating government. The Commission however found the interpretation to be anti-discriminatory in nature, which requires proof of a discriminatory origin, to be restricted in terms of its practical application. Pay equity legislation in Australia was taken further by the Workplace Relations Act of 1996 that replaced the Industrial Relations Reform Act of 1993. The last two decades have seen drastic labour law changes in Australia. This is viewed as an attempt on the part of the Australian government to introduce rigorous laws governing the health, safety, and welfare of workers. This commitment from the Australian government led to The Fair Work Act of 2009 replacing the Workplace Relations Act of 1996.

Despite these legislative developments, such statutory entitlements to equal remuneration in Australia continue to be applied in a haphazard fashion, and the lack of equal pay continues to be a pervasive challenge. Remuneration statistics issued by the Australian Bureau of Statistics indicated that there is a pay gap in Australia between women and men. In February 2011, the average weekly earnings for permanent workers were approximately 17% lower for women than for men.

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156 Ibid.
157 Ibid.
160 Ibid.
162 Ibid.
The reasons for the gap between earnings for women and men are numerous. Some of the reasons cited, include:

- the improper valuation of skills in industries and areas where women are in the majority;
- the problem for women to access work-based training;
- different levels of eligibility for discretionary payments such as bonuses and performance pay; and
- inflexible organisational structures that limit the employment prospects of workers with family responsibilities.\(^{163}\)

The third stage involved the development of new equal remuneration principles within the various states in Australia.\(^{164}\) It is contended that labour legislation in Australia has experienced “seismic shifts” as a result of changes at federal government level.\(^{165}\) The Workplace Relations Amendment (Transition to Forward with Fairness) Act of 2008, intended to amend the Workplace Relations Act of 1999\(^{166}\) did not explicitly address the issue of equal remuneration in Australia.\(^{167}\) However, the Fair Work Act of 2009\(^{168}\) explicitly deals with equal remuneration, but these legislative amendments apparently still lack the robustness to deal with gender pay equity in a sustained manner.\(^{169}\) A number of other salient developments manifested in Australian industrial relations in 2011, such as decisions in two major cases brought in terms of the Fair Work Act of 2009\(^{170}\) to address the low and unequal pay in two feminised sectors, aged care and community services. These decisions led to a resolution being taken in 2012 to review key equal pay-related provisions contained in the Fair Work Act of 2009.\(^{171}\)

\(^{163}\) Ibid.  
\(^{164}\) Ibid.  
\(^{165}\) Ibid.  
\(^{166}\) Ibid.  
\(^{168}\) Ibid.  
\(^{169}\) Ibid.  
\(^{170}\) Ibid.  
3.5 SUMMARY

Quite apart from the plausible efforts of the governments in the USA, UK and Australia in respect of the development of equal pay for equal work supportive legislation, as well as legislation which prohibits discrimination in the workplace, there remains a troubling lack of compliance by employers on the one hand, and a paucity of successful litigation on the part of those who have been prejudiced by the lack of pay equity and its inevitable companion, workplace discrimination.

This raises the question as to whether the newly promulgated section 6(4) of the Employment Equity Act 55 of 1998\(^{172}\) will be capable of addressing possible cases of unfair discrimination related to equal work for equal pay. This question will be addressed in chapter four of this study.

\(^{172}\) S 6(4) of 55 of 1998.
CHAPTER 4
SOUTH AFRICAN EQUALITY LEGISLATION, RELATED CASE LAW
AND COMMENTARY: EQUAL PAY FOR EQUAL WORK

4.1 INTRODUCTION

The primary sources of labour law in South Africa are the Constitution of the Republic of South Africa,\textsuperscript{173} international law, enabling legislation, as well as the common law.\textsuperscript{174} Various forms of enabling labour legislation such as the Basic Conditions of Employment Act (BCEA),\textsuperscript{175} Labour Relations Act (LRA)\textsuperscript{176} and the Employment Equity Act (EEA)\textsuperscript{177} have been developed to give effect to the various constitutional principles related to all workplace relations.\textsuperscript{178}

These Acts have given rise to the creation of various statutory bodies that have made, and will most likely continue to make, a considerable contribution to the development of the labour law.\textsuperscript{179} In terms of the BCEA, the Employment Conditions Commission has been established to advise the Minister of Labour on sectoral determinations and other matters related to basic conditions of employment.\textsuperscript{180} In a similar manner, the LRA gave rise to the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA) as well as the Essential Services Committee (ESC).\textsuperscript{181} The ESC decides on applications and recommendations in relation to employers and sectors that can be considered as essential, minimum and maintenance services, and accordingly cannot embark on industrial action.\textsuperscript{182} The CCMA has the role and purpose of conciliating or adjudicating disputes arising from

\textsuperscript{173} The Constitution of the Republic of South Africa, 1996.
\textsuperscript{175} 75 of 1997.
\textsuperscript{176} 66 of 1995.
\textsuperscript{177} 55 of 1998.
\textsuperscript{178} Ibid.
\textsuperscript{179} Grogan Workplace Law (2007) 12.
\textsuperscript{180} S 59 of 75 of 1997.
\textsuperscript{181} Ss 70-74 of 66 of 1995, read with s (65)(1)(d).
\textsuperscript{182} Ibid.
the employment relationship in terms of the LRA. The EEA gave rise to the establishment of the Commission for Employment Equity that advises the Minister of Labour on codes of good practice to be issued in terms of the EEA.

4.2 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

The Constitution has resulted in various significant and “far-reaching” changes in the South African legal system since its inception in 1996. The Constitution was approved by the Constitutional Court on 4 December 1996 and came into effect on 4 February 1997. The Constitution is the supreme law in South Africa and no other law or government action can supersede the provisions of the Constitution. The legal obligations imposed by it must be fulfilled. The Bill of Rights in Chapter Two, subject only to the limitations in section 36 or the socioeconomic rights accorded in terms of sections 26 and 27 respectively, may not be unreasonably encroached on by the legislature. The Bill of Rights promotes the notion of equality before the law and prohibits discrimination on various grounds which include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The Constitution also accords the right to fair labour

183 S 115(1)(a).
188 Ibid.
189 Ibid.
190 Ibid.
191 Ibid.
192 Ibid.
193 Ibid.
194 Ibid.
195 S 26(2) of 55 of 1998.
196 S 27(2) of 55 of 1998.
197 Ibid.
198 Ibid.
199 Ibid.
200 Ibid.
practices to “everyone”.\textsuperscript{201} This implies that both employees and employers are protected under that particular provision. The Constitutional injunction at section \textsuperscript{202} 23 places the responsibility on the South African legislature to enact labour legislation that will affirm the notions of equality and non-discrimination in respect of “everyone”\textsuperscript{203}.

The prohibition of unfair discrimination which is at the heart of ILO Convention No 111\textsuperscript{204} finds expression in section 9 of the Constitution\textsuperscript{205} which equally prohibits unfair discrimination by way of the following provisions:

- **Section 9(2):** Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.

- **Section 9(3):** The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

- **Section 9(4):** No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.\textsuperscript{206}

The unfair discrimination provisions provided for in the EEA must accordingly give

\begin{itemize}
\item \textsuperscript{201} S 23 of the Constitution.
\item \textsuperscript{202} The Constitution of South Africa.
\item \textsuperscript{203} Cole *The effect of labour legislation in the promotion and integration of persons with disabilities in the labour market* (Unpublished Masters Treatise, Nelson Mandela Metropolitan University) 2013 16.
\item \textsuperscript{205} See at Chap 2 s 9 of the Constitution.
\item \textsuperscript{206} *Ibid.*
\end{itemize}
effect to section 9 of the Constitution as well as article 1 of ILO Convention No 111.\textsuperscript{207}

\section*{4.3 THE EMPLOYMENT EQUITY ACT (EEA) 55 OF 1998 – AS AMENDED}

The EEA which is considered as the “third major legislative innovation in labour law”\textsuperscript{208} quintessentially forms the subject of this study. In particular, this study focuses on section 6(4) of the EEA which flows from section 9 of the Constitution.\textsuperscript{209}

Flowing from ILO Convention No 111\textsuperscript{210} and section 9 of the Constitution,\textsuperscript{211} the EEA, at section 6(1), equally places a prohibition on unfair discrimination in the following manner:

“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, age, disability, religion, HIV status, conscience, belief, political opinion, language, birth or on any other arbitrary ground.”\textsuperscript{212}

In addition to placing a prohibition on all forms of discrimination already provided for,\textsuperscript{213} the EEA\textsuperscript{214} also prohibits a differential application of “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)”\textsuperscript{215} Given the newness of section 6(2), courts may have had limited requests to adjudicate disputes related to equal pay for equal work. It is contended that the task of actually determining that one job is of equal value when compared to another, is not a simple one.\textsuperscript{216} The process of making this determination may, however, be assisted by the methodology which the

\begin{thebibliography}{9}
\bibitem{207} Ibid.
\bibitem{209} Ibid.
\bibitem{210} Ibid.
\bibitem{211} Ibid.
\bibitem{212} See s 6(1) of 55 of 1998.
\bibitem{213} See s 6(1) of 55 of 1998.
\bibitem{214} Ibid.
\bibitem{215} See s 6(2) of 55 of 1998.
\bibitem{216} Grogan \textit{Employment Rights} (2014) 280.
\end{thebibliography}
Minister may prescribe, after consultation with the Commissioner, for assessing work of equal value, as contemplated in section 6(5). The notion of equal pay for equal work flows from ILO Convention No 100. In particular, the ILO adopted a critical stance in respect of the provisions of the unamended EEA on the basis that it did not make unambiguous reference to the notion of “equal pay”.

In the midst of the complexity surrounding equal pay for equal work, employers are in any event advised to safeguard against differentiating between employees in a manner that may cause the differentiation to result in discriminating against their employees on any ground that is listed in section 6(1) of the EEA, or any arbitrary ground as per the new regulations.

The Regulations in terms of the EEA provide the following details in respect of equal work:

(1) is the same as the work of another employee of the same employer, if the work is identical or interchangeable;

(2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable; and

(3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 and 7.

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217 See s 6(5) of 55 of 1998.
220 Ibid.
223 See Reg 4 of 55 of 1998.

46
Inasmuch as section 6 of the EEA\textsuperscript{224} prohibits unequal treatment on the basis of a listed or arbitrary ground, Regulation 7,\textsuperscript{225} provides grounds on the basis of which differences in remuneration may be justified.\textsuperscript{226} On condition that the difference in conditions of service is fair and rational, the employer can differentiate between employees by taking into account one or more of the following factors:

- seniority and length of service;
- qualifications, ability, competence or potential;
- performance, quality and/or quality of work (provided that employees are subjected to the same performance evaluation system which is consistently applied);
- demotion due to operational requirements;
- temporary employment for purposes of gaining experience and/or training (internships or learnerships);
- shortage of relevant skills or market value in a particular job classification; and
- any other relevant factor that is not discriminatory.\textsuperscript{227}

Should the employer however fail or refuse to observe the provision of section (6)(1),\textsuperscript{228} employees may elect to declare a dispute. Depending on the bases for the dispute, the burden of proof may either be on the employer or on the employee.\textsuperscript{229} If the alleged discrimination is based on one or more of the listed grounds in section (6)(1), the burden of proof falls on the employer to prove on a balance of probabilities that the alleged discrimination did not take place. However, if it is found that the alleged discrimination did take place, the employer will bear the onus to show that the differentiation was rational and not unfair or otherwise unjustifiable.\textsuperscript{230}

\textsuperscript{224} Ibid.
\textsuperscript{225} 55 of 1998.
\textsuperscript{227} Reg 7 of 55 of 1998.
\textsuperscript{228} 55 of 1998.
\textsuperscript{229} See s 11 of 55 of 1998.
\textsuperscript{230} Ibid.
If the alleged discrimination is based on an “arbitrary ground”, the burden of proving the claim would rest on the employee. The applicant would, on a balance of probabilities, have to prove that the conduct of the employer was irrational, that it amounted to discrimination and that the discrimination was unfair.\textsuperscript{231}

4.4 EQUAL PAY FOR EQUAL WORK: SELECTED SOUTH AFRICAN EXAMPLES OF CASE LAW

In terms of section 6 of the EEA\textsuperscript{232} that deals with the prohibition of unfair discrimination, it is stipulated that “\textit{no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice}.”\textsuperscript{233} The term “employment policy or practice” is comprehensively defined in section 1 of the EEA\textsuperscript{234} and includes “\textit{remuneration, employment benefits and terms and conditions of employment}.”\textsuperscript{235} The remainder of section 6\textsuperscript{236} provides a detailed list of grounds that are considered to be forms of unfair discrimination. In respect of the amended section 6,\textsuperscript{237} it is submitted that the basis for an employee to initiate litigation proceedings against his or her employer in relation to discriminatory pay practices.

However, in judgments handed down prior to the amendments\textsuperscript{238} which became effective in August 2014, the Labour Court adjudicated claims of unfair discrimination on the ground of wage differentials based on prohibited grounds in terms of section 6 of the unamended EEA, as well as the Labour Relations Act 55 of 1995\textsuperscript{239} and the Labour Relations Act 28 of 1956.

The following cases are briefly discussed as a means of illustrating how courts in

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Ibid.
\item See s 6 of 55 of 1998.
\item Ibid.
\item See s 1 of 55 of 1998.
\item Ibid.
\item 55 of 1998.
\item In s 6 of 55 of 1998.
\item Ibid.
\end{enumerate}
\end{footnotesize}
South Africa have dealt with certain salient issues pertaining to such matters.

4 4 1  **LOUW v GOLDEN ARROW BUS SERVICES**\(^{240}\)

In this case, Louw, the applicant, alleged that Golden Arrow had committed an unfair labour practice in terms of item 2(1)(a) of Schedule 7 to the unamended Labour Relations Act 66 of 1995. In particular, his claims were that:

(a) at all material times the work performed by the applicant and Mr Beneke was and is of equal value; alternatively,
(b) the difference in salaries is disproportionate to the difference in the value of the two jobs.\(^{241}\)

In response, Golden Arrow conceded that there was a wage differential between the salary paid to Louw and that paid to Mr Beneke but claimed, that the jobs of the two men were not of equal value and that the differential was justifiable on the basis of a number of considerations, none of which involved racial discrimination.\(^{242}\)

Much was made of the burden of proof\(^ {243}\) in this case. Representatives of parties to this case attempted to persuade the court that the burden of proof rested on the other party.

“Both Mr Cheadle and Mr Freund urged me to consider carefully the question of the onus of proof in regard to discrimination claims framed as residual unfair labour practices. This also requires consideration of the evidential burden or, as it is technically known in this country in the Afrikaans tongue, the “weerleggingslas”.\(^ {244}\)

In the end, the court was satisfied that “onus or burden of proof lies on the applicant claiming relief”.\(^ {245}\) Counsel for both the applicant and the respondent concurred that


\(^{241}\) *Ibid.*

\(^{242}\) *Ibid.*

\(^{243}\) S 11 of 55 of 1998.

\(^{244}\) *Ibid.* See par [37].

\(^{245}\) *Ibid.* See par [41.1].
the onus proper was on the applicant. They also agreed that “the mere averment of discrimination does not constitute proof of discrimination”.246

In respect of the relief sought by the applicant in this matter, the court held as follows:

“that the applicant has not succeeded in demonstrating that the two jobs, on an objective evaluation, are jobs of equal value. It is therefore unnecessary to delve into the reasons, causes or motivation for the difference in wages. It does not mean that the difference is not attributable to race discrimination. It does mean that racial discrimination has not been proven.”247

In essence, this judgment, it is submitted, underscores the fact that the mere allegation of racial discrimination in advancing a claim of equal pay by the employee, will continue to require proof that the difference in pay was primarily motivated by race.

It is noteworthy that Louw, who was represented, Mr Halton Cheadle (Senior Counsel), not only lost his case, but also had to pay the costs of the respondent. One therefore wonders, whether employees will be financially capable to litigate with the assistance of legal counsel beyond the CCMA in matters of this nature.

4.4.2 MANGENA v FILA SA (PTY) LTD248

In arguing the case before the Labour Court, the applicant in this matter sought to rely on the unamended EEA 55 of 1998249 on the basis of an equal pay claim against the respondent.250

In this particular matter two issues are salient. The first issue relates to the need for a “factual foundation” and the second issue relates to “the potential to impair the fundamental dignity of persons”.

246 Ibid. See par [48].
247 Ibid. See par [106].
249 S 6(1).
In dealing with the applicant’s claim to equal pay for the same or similar work, van Niekerk J asserted as follows:

“an essential element of a claim for equal pay for equal work is a factual foundation, to be laid by the claimant, that the work performed by the comparator is “equal”. By this is not meant only that the work must be identical or interchangeable - it is sufficient that the work is similar in nature where any differences are infrequent or of negligible significance in relation to the work as a whole”. 251

The explicit reference to a “factual foundation” suggests that merely crying foul without being able to provide factual proof between the complainant’s job and a comparator, will lead to unsuccessful challenges.

Furthermore, in the absence of an explicit “equal pay” provision252 in the EEA, the court had to apply its mind to whether the equal pay claims were contemplated by the then version of the EEA.253

The court found that section 6254 was sufficiently broad to include equal pay claims.255 In particular, the court held that:

“Section 6(1) prohibited discrimination in any employment policy or practice, on any of the grounds listed in that section or on any analogous ground if an applicant was able to show that the ground was based on attributes or characteristics that had the potential to impair the fundamental dignity of persons or to affect them in a comparably serious manner.”256

What is strikingly interesting about this assertion is the reference to “impair the fundamental dignity of persons”. This implies that the grounds which applicants seek to rely upon, in the furtherance of a claim of discriminatory pay practices, must have the potential of impairing the fundamental dignity of the applicants. That seems to be

251 Ibid.
252 As per the unamended Employment Equity Act 55 of 1998.
254 Ibid.
255 Ibid.
256 Ibid.
a very stringent test and one which may further deter frivolous and vexatious claims from being made on the basis of the amendments to section 6.\textsuperscript{257}

\section*{4 4 3 MTHEMBU v CLAUDE NEON LIGHTS\textsuperscript{258}}

This matter was heard before the Industrial Court in Durban during March 1990.\textsuperscript{259} The applicant in this matter, Mthembu, alleged that his employer, Claude Neon Lights, had discriminated unfairly against him in not granting him a merit increase. He accordingly alleged that his employer had committed an unfair labour practice. In determining whether unfair labour practice had in fact been committed, the court had to consider whether there was an unfair labour practice infringement in terms of the LRA 28 of 1956.

In this instance, the court held that it is “neither in the interest of employers nor employees nor society in general”\textsuperscript{260} to find that an employer may not differentiate employees’ remuneration on the basis of their productivity.\textsuperscript{261} The court found that “differentiation does not amount to discrimination”.\textsuperscript{262} The court accordingly dismissed the application brought in terms of section 46(9).\textsuperscript{263}

Of interest in this matter, is that, although the application was brought long before\textsuperscript{264} the recently amended section 6(4),\textsuperscript{265} the court nevertheless found it necessary to embellish the need for differentiation on the basis of productivity which resonates with Regulation 7(c).\textsuperscript{266}

\begin{itemize}
\item \textsuperscript{257} \textit{Ibid.}
\item \textsuperscript{258} 13 Indus. L.J. (Juta) 422 (1992).
\item \textsuperscript{260} \textit{Ibid.} See also par [F].
\item \textsuperscript{261} \textit{Ibid.}
\item \textsuperscript{262} \textit{Ibid.} See par [F].
\item \textsuperscript{263} 28 of 1956.
\item \textsuperscript{264} It was brought in terms of the Labour Relations Act 28 of 1956.
\item \textsuperscript{265} Employment Equity Act 55 of 1998.
\item \textsuperscript{266} Regulations of 55 of 1998.
\end{itemize}
In *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala*, a case based on racial discrimination, the Supreme Court of Appeal found that:

“Discrimination against an employee on the grounds of race or other arbitrary grounds clearly has no place in employment practices, quite apart from being unlawful. But while a court must be vigilant to ensure that that does not occur, equally it must be wary of concluding too hastily that an employee has been discriminated against on grounds of race merely because disparity of treatment coincided with racial disparity.”

In the case of *Mahlangu v Amplats Development Centre* the Labour Court held that:

“Perceptions of racial discrimination in the employment environment, endemic in the aftermath of the apartheid era, are not uncommon and are frequently justified. Those are causes which, if proved and established upon application of the relevant legal principles, will justify the award of the maximum relief which the Labour Relations Act 1995, recognizing the absolute unacceptability of that form of conduct on the part of employers, prescribes. What is however a phenomenon also of not infrequent occurrence, although perhaps equally understandable in the historical context, is a hyper-sensitivity to a perceived state of affairs in which, upon objective analysis, the true facts are distorted.”

From the cases of *Raol Investments* and *Mahlangu*, it is further evident that the courts adopted an approach, which can possibly be described as ultra-circumspect, when having to determine if the racial discrimination was at play in cases where employees received disparate treatment. It remains to be seen if courts will continue to observe levels of circumspection when called upon to adjudicate matters based in terms of section 6(4).

### 4.5 CONCLUSION

The Constitution has clearly laid the basis for redress and restitution in the South African society in general and South African workplaces in particular. Under the

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269  (2002) 23 ILJ 910 LC.
direction and guidance of the ILO\textsuperscript{273} as well as the constitutional\textsuperscript{274} mandate, workplace equality legislation has significantly evolved since the advent of democracy in South Africa. The recent spate of legislative amendments arguably bears testimony of the need for and commitment to workplace equality and fairness. The issue of equal pay for equal work has been, and will increasingly become, a hot bed of conflict within the South African workplace, not only because of the emotionality underlying remuneration in general, but also because of the unfortunate and protracted history of pay differentials based on racial discrimination prior to the abolishment of apartheid. It is possible, that the apartheid-based pay structures may have been perpetuated, in instances where organisations have not taken the necessary care to overhaul their remuneration structures, through the tried and tested scientific methods that have become available over the past few decades. That said, based on the cases discussed in this section, it appears that applicants wishing to challenge what they believe to be a violation of their rights in terms of section 6(4), will have to pay close attention to the “factual foundation”\textsuperscript{275} as well as the “potential impairment of the fundamental dignity”,\textsuperscript{276} amongst other things, when arguing their cases.

\textsuperscript{273} In respect of Convention No 100 and Convention No 111.
\textsuperscript{274} Ibid.
\textsuperscript{275} Ibid.
\textsuperscript{276} Ibid.
CHAPTER 5
RESEARCH FINDINGS AND DISCUSSION

5.1 INTRODUCTION

This chapter is intended to report on the research findings related to the matter of equal pay for equal work. These research findings were garnered through the examination of various aspects arising from the implementation of equal pay for equal work in the United Kingdom, the United States of America and Australia. The manner in which equal pay for equal disputes have been dealt with by the South African courts prior to the amendment to section 6(4) of the EEA\textsuperscript{277} has equally provided much food for thought.

5.2 EQUAL PAY FOR EQUAL WORK IN SELECTED JURISDICTIONS: REALITY OR FANTASY?

Disparate pay practices have been described as a “stubborn and universal”\textsuperscript{278} challenge. Considering that countries like the UK, USA and Australia created the necessary enabling legislation several decades ago, one would have expected that equal pay for equal work had been effectively implemented and systemically integrated. Although there is evidence of general progress in terms of comprehensive and dynamic legislative instruments, as well as the necessary Human Resources process refinements, one is left with a sense that equal pay for equal work remains a bridge too far to cross as suggested by the continued difficulties outlined in chapter three of this study.

As an example, in the USA in 2012, women were still receiving 77 cents\textsuperscript{279} for every dollar earned by their male counterparts.\textsuperscript{280} Apart from being pervasive along the gender and sex divide, this disparate remuneration situation has even continued to

\textsuperscript{277} Employment Equity Act 55 of 1998.
\textsuperscript{279} See Chap 3 par 3 3 Equal pay for equal work in the United States of America 34. 
\textsuperscript{280} Ibid.
exist along racial lines.\textsuperscript{281} During the 1980s, women employed in the USA experienced the most significant pay equity adjustments in relation to their male counterparts.\textsuperscript{282} This progress was however not sustained into the 1990s and beyond.\textsuperscript{283}

The equal pay legislative developments and reinforcements in the UK promised to eradicate the pervasive and rather blatant disparate pay practices in that country. However, empirically derived information discussed in chapter three of this study suggests that unequal pay practices not only continued, but had arguably worsened. Reference is made to the “black pay gap”, \textsuperscript{284} even after the introduction of the Equal Pay Act of 2010.\textsuperscript{285} These continued unequal pay practices are reportedly prevalent between males and females as well as along racial and ethnic lines. The gap between male and female pay peaked in 2013, resulting in a bizarre situation where females, by comparison, stopped earning a salary from 4 November 2014. Effectively, women in the UK worked without receiving any form of remuneration after this date. The date of 4 November, as a consequence, is now referred to as Equal Pay Day in the UK.\textsuperscript{286}

As in the case of the UK and the USA, the Australian government took equally decisive steps in their efforts to address equal pay for equal work difficulties. In spite of the ongoing and progressive legislative amendments in relation to the matter of equal pay, Australian females are still languishing in a state of inferior remuneration compared to their male counterparts. In February 2011, it was reported that the average weekly earnings of full-time female employees lagged remuneration of males by 17\%.\textsuperscript{287} This statistic begs the question about the effectiveness of the Fair Work Act of 2010.\textsuperscript{288}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{281} Ibid.
\item \textsuperscript{282} Ibid.
\item \textsuperscript{283} Ibid.
\item \textsuperscript{284} See Chap 3 par 3 2 1. The salient features of the Equality Act of 2010 32.
\item \textsuperscript{285} Ibid.
\item \textsuperscript{286} See Chap 3 par 3 2 2. Facts and statistics pertinent to a lack of equal pay 33.
\item \textsuperscript{287} See Chap 3 par 3 4. Equal pay for equal work in Australia 40.
\item \textsuperscript{288} See Chap 3 par 3 4. Equal pay for equal work in Australia 41.
\end{enumerate}
\end{footnotesize}
The continued and worsening pay disparities within the selected jurisdictions are perhaps not simply a reflection of the possible ineffectiveness of the legislative instruments per se. It could perhaps be attributed to a chasm between the object and purport of the legislation on the one hand, and, the diligence on the part of those who are required to give practical effect to the relevant legislative requirements on the other hand. Together with giving practical effect, improved monitoring and enforcement may alleviate the state of disconnect between legislative intent and practical effectiveness. This approach may result in equal pay becoming more of a reality than its current characteristic of being a fantasy.

Turning to the situation in South Africa prior to the implementation of the amendments to section 6 of the EEA, it appears that there is rather limited authority on how courts dealt with disputes related to equal pay for equal work.

It is noteworthy that, following a complaint from the Congress of South African Trade Unions (COSATU) to the ILO’s Committee of Experts, the ILO recommended that the relevant South African legislation should explicitly include a right to equal pay for work of equal value.  

Cases that have been taken to court were taken there on the basis of either unfair labour practice or under the generalised unfair discrimination jurisprudence. From the judgments discussed in chapter four of this study, albeit in a dispensation which pre-dates the amendments to section 6 of the EEA, a distinct impression emerges which suggests that complainants who elect to embark upon the arduous and costly litigation route, must do so with great circumspection. In Mangena v Fila reference is made to a “factual foundation” which requires the plaintiff to factually substantiate why he or she believes that unfair discrimination is at the heart of their disparate remuneration. The court further held that unfair discrimination on a listed or arbitrary ground must have “the potential to impair the fundamental dignity of

290 55 of 1998.
292 Ibid.
persons”. One wonders how these two very complex legal principles will affect the adjudication of claims related to equal pay for equal work in the context of the amendments to section 6 of the EEA.

Another prominent case which involved an equal pay dispute is that of Louw v Golden Arrow. Advocate Cheadle presented a rather vexing argument when he submitted that his client’s unequal pay was problematic based on the apartheid-based salary scales which Golden Arrow has continued to use.

In arguing this particular point, Mr Cheadle averred as follows:

“Our case will be that [Golden Arrow] inherited racial discrimination in the past and that they have done nothing about it to date. Their responsibility starts and their failure and their unfair labour practice and their unfair discrimination may well be no more than not correcting an historical, inherited racial discrimination situation.”

This particular line of argument, I believe, if supported by a sound factual basis which supports the contention that nothing had been done to remedy the inherited racially discriminatory salary scales and pay practices, could present very real challenges to organisations that face equal pay litigation based on the grounds listed in section 6(1) of the EEA.

If not remedied as part of an integrated and technically defensible remuneration strategy, the effects of historically discriminatory salary scales and practices could cause much trepidation for employers in defending their remuneration practices in an objective manner.

The merged Nelson Mandela Metropolitan University (NMMU) in Port Elizabeth, as part of its efforts to achieve harmonisation and internal parity in respect of its remuneration practices, embarked on an extensive post-merger remuneration review

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293 Ibid.  
295 (C 37/97) [1999] ZALC 166.  
296 Ibid.  
297 Ibid.  
in order to make the appropriate adjustments. Through the use of these instruments, the NMMU not only incurred significant remuneration costs, but effectively addressed the potential belief of having inherited apartheid-based salary scales and remuneration practices. In essence, the internal parity model took into account two criteria, namely years of service and qualifications. These two criteria were accepted by organised labour who actively participated in the formulation of the internal parity model. In terms of the internal parity model, years of service, as the one criterion, were accorded a 75% weighting, while qualifications, being the second criterion, were accorded a 25% weighting. The aggregate of these two criteria was correlated by means of a sliding scale with corresponding salary adjustments, and each employee’s years of service and qualifications were considered for purposes of arriving at the internal parity salary adjustment.

The following section provides general guidelines which organisations could apply in their proactive efforts to address the misery of equal pay for equal work challenges.

5.3 OVERCOMING EQUAL PAY FOR EQUAL WORK CHALLENGES: SOME RECOMMENDATIONS

In terms of the ILO Pay Equity Guide, it is recommended that a Pay Equity Committee be established which must fulfil the following functions:

- ensure that the pay equity-related processes are carried out in a consistent manner;
- ensure the creation of reliable and credible in-house expertise in the areas of equality and job evaluation; and
- avoid and/ or reduce delays brought about when Committee members change between the various steps of the process.

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299 Jarvis (the collator) based on various expert input from Task Team members from NMMU. NMMU Harmonisation and Internal Parity Proposals. (Unpublished proposals. 12 November 2007) as well as the Internal Parity Proposal (Unpublished proposal. 29 October 2009).

300 Ibid.

For purposes of credibility and inclusivity, the Pay Equity Committee must:

- include members who have first-hand knowledge of the main jobs to be evaluated;
- include members who are capable of objectively identifying and eliminating any gender bias that could derail the process or the evaluation tools; and
- empower female workers to perform a substantive role in this process which is intended to address their plight. 302

International best practice in the field of equal pay suggests a few practical steps to ensure the smooth-running of this very important process in an organisation. Effective planning appears to be salient in respect of this process. 303 These steps include:

- Securing the necessary financial and human resources. The financial resources relate to the administration cost arising from the process. The cost of possible salary adjustments arising from the process are not included at this point. Human resources refer to the individuals who will form part of the Pay Equity Committee and its activities.
- The development of a training programme that takes care of the technical job evaluation and remuneration aspects as well as the complexities related to the various forms of discrimination in the workplace.
- Determining whether external consultants will be engaged to manage the process. The NMMU internal equity process was very effectively facilitated by an external consultant who had no vested interest in the outcome of the process. 304
- Given the importance and delicate nature of pay equity, the need for an effective communication strategy is a critical success factor. This will assist in

302  Ibid.
303  Ibid.
304  See para 5.2. Equal pay for equal in selected jurisdictions: reality or fantasy 56.
avoiding or reducing the spread of rumours and possibly allaying employees’ fears.

• The creation of an overall work plan will assist in guiding the process and enhance effective coordination of the various activities. It could also assist in communicating progress achieved from time to time.

• Establishing a joint employer-employee participation model.305 As in the case at the NMMU, a cross-functional internal parity Task Team was established which allowed for the active participation of organised labour, individuals from the Information Technology department, the Marketing and Corporate Relations department, Human Resources department as well as the Finance department.306

Given that the job evaluation is at the core of this recommended approach, the following job evaluation principles which form part of most job evaluation systems are pertinent:

• qualifications;
• effort;
• responsibility; and
• the working conditions.307

These recommended steps and considerations form part of an in-depth review of remuneration practices and pay structures within organisations. The three categories of jobs that must receive particular attention throughout this process are as follows:

• male-dominated jobs;
• female-dominated jobs; and
• mixed-gender jobs.308

305 Ibid.
306 See par 5.2. Equal pay for equal in selected jurisdictions: reality or fantasy 56.
307 Ibid.
308 Ibid.
The ILO Committee of Experts refers to these categories of jobs as “occupational segregation” and attributes the under-valuing of female jobs to this segregation.\textsuperscript{309}

Once the remuneration attached to these three job categories has been adjusted in accordance with its value, it can be said that internal pay equity has been achieved in an organisation.\textsuperscript{310}

\section*{5.4 CONCLUSION}

In accordance with the amendment to section 6 of the EEA, unfair discrimination claims related to remuneration and conditions of service can be referred to the CCMA. These claims can be based on listed or arbitrary grounds.\textsuperscript{311} The burden of proof is on the employer if the claim is based on a listed ground. If the claim is on an arbitrary ground, the burden of proof shifts to the employee.\textsuperscript{312}

Given the approach on the part of COSATU to the ILO Committee of Experts regarding the need for an explicit provision dealing with equal pay for equal work in the EEA, one can safely assume that the CCMA and Labour Court will be inundated with disputes related to unfair discrimination linked to remuneration and conditions of service. Whether the amended section 6 of the EEA will provide the necessary ammunition to claimants, is questionable at the very least.

Employers would have to make a very important election in respect of being proactive, by embarking on a structured pay equity process, such as that outlined in section 5.3 of this paper. Alternatively, and unwisely so, employers may of course adopt a wait-and-see approach and deal with equal pay disputes on a reactive basis. Whether the legislative amendment in section 6 of the EEA will prove to be adequate to protect employees against wilful, unfair and discriminatory pay practices remains

\begin{itemize}
\item \textsuperscript{310} Ibid.
\item \textsuperscript{311} CCMA Labour Law Amendments Resource Guide (October 2014) 37-38.
\item \textsuperscript{312} Ibid.
\end{itemize}
to be seen, and will probably, only arise as a result of instances where employers adopt the wait-and-see approach.

Finally, and in addressing the fundamental question of this study: whether the amendments to the section 6 EEA are in fact adequate for purposes of assisting claimants in their attempts to secure relief in respect of pay-related discrimination, the view of McGregor is pertinent. After a comprehensive discussion of the various facets related to inequality related to remuneration, inclusive of the relevant legislative reform as well as a careful analysis of the Mangena v Fila\textsuperscript{313} case, McGregor arrives at the conclusion that reliance upon the legislative amendments only, will not assist in addressing the lack of ongoing pay-related inequality. Specific reference is made of the missed opportunity on the part of the South African government to make explicit reference to Convention 100 in section 6 of the EEA.\textsuperscript{314} McGregor’s conclusion resonates with the researcher’s conclusion on the basis that, in spite of the sophisticated legislative reform in the countries that form part of this particular study, such legislative reform appeared to have been ineffective given the continued disparate pay-related treatment experienced by women and minority ethnic groupings. It is further submitted that the nebulous and uninstructive nature of the amendments to section 6 of the EEA, courts may have difficulty in according the relief sought by claimants in equal pay-related claims. On this basis, it is submitted that the amendment in section 6 of the EEA may not be adequate in addressing equal pay claims in South Africa.

\textsuperscript{313} Mangena v Fila South Africa (Pty) Ltd (JS 343/05) [2009] ZALC 81; (2010) 31 ILJ 662 (LC); [2009] 12 BLLR 1224 (LC).
\textsuperscript{314} McGregor “Equal remuneration for the same work or work of equal value”. (2011) 23 SA Merc LJ 488- 503


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APPENDIX A

DEFINITIONS OF KEY CONCEPTS

• Work of equal value: according to Regulation 4 of the EEA, the work performed by an employee:
  1) is the same as the work of another employee of the same employer, if their work is identical or interchangeable;
  2) is substantially the same as the work of another employee employed by the same employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;
  3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with Regulations 5 to 7 of the EEA.

• Decent work: according to the ILO, this concept relates to opportunities to perform work that is productive, delivering a fair income, providing security, social protection for families, better prospects for personal development, social integration, freedom for people to express their concerns, organising and participating in the decisions that affect their lives and prohibiting any form of unfair discrimination.

• Unfair discrimination: according to the Commission for Conciliation, Mediation and Arbitration (CCMA), unfair discrimination arises when favour, prejudice or bias for or against a person is demonstrated by an employer on grounds such as 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 and birth.