

EQUAL PAY FOR WORK OF EQUAL VALUE - A SOUTH AFRICAN PERSPECTIVE

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1. Introduction

The Employment Equity Amendment Act,¹ which came into force on 1 August 2014, amended the Employment Equity Act² *inter alia* by the introduction of sections 6(4) and 6(5). Section 6(4) provides that a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in section 6(1),³ is unfair discrimination. Section 6(5) empowers the Minister of Labour, after consultation with the Commission for Employment Equity, to prescribe the criteria and the methodology for assessing work of equal value.⁴

The introduction of sections 6(4) and 6(5) does not amount to a substantive change in the law in relation to pay discrimination in South Africa. The prohibition of unfair discrimination in remuneration practices was in fact acknowledged in our law even prior to the dawn of democracy in South Africa in 1994.⁵ Item 2(1)(a) of Schedule 7 to the Labour Relations Act,⁶ which came into force on 11 November 1996, provided that an unfair labour practice meant any unfair act or omission that arises between an employer and an employee including the unfair discrimination, either directly or

¹ Act 47 of 2013.

² Act 55 of 1998. This Act gives effect to the right to equality as contained in s. 9 of the Constitution of the Republic of South Africa Act 108 of 1996, in the employment context.

³ S. 6(1) provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

⁴ The Minister did so in the Employment Equity Regulations, 2014 GN R595 in GG 37873 of 1 August 2014.

⁵ See for example *Mithembu v Claude Neon Lights* (1992) 13 ILJ 422 (IC) and *South African Chemical Workers Union v Sentrachem* (1988) 9 ILJ 410 (IC), both of which concerned alleged unfair pay discrimination determined under the Labour Relations Act No 28 of 1956. See also Grogan, J, *Workplace Law*, Eleventh Ed. Juta, at p130 and the cases cited there.

⁶ Act 66 of 1995.

indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.⁷ This item was subsequently repealed and replaced by section 6(1) of the Employment Equity Act, which now contains the express prohibition of unfair discrimination in any employment policy or practice.⁸

Remuneration, employment benefits, terms and conditions of employment as well as job classification and grading are expressly listed as employment policies or practices in respect of which unfair discrimination is prohibited, and it is on this basis that litigants complaining of unequal pay practices have sought recourse in the Labour Court.⁹

Why then the need for section 6(4)? In terms of the Explanatory Memorandum¹⁰ that accompanied the Employment Equity Amendment Bill,¹¹ South Africa had been criticised by the International Labour Organisation for lacking an express statutory provision dealing with wage discrimination on the basis of race and gender.¹² The purpose of the inclusion of section 6(4) was accordingly 'to deal explicitly with unfair discrimination by an employer in respect of the terms and conditions of employment of employees doing the same or similar work or work of equal value'.¹³ Section 6(4) thus provides 'an explicit basis for equal pay claims', which 'gives effect

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

⁸ S. 1 of the Employment Equity Act contains a broad definition of 'employment policies or practices' and these include (a) recruitment procedures, advertising and selection criteria; (b) appointments and the appointment process; (c) job classification and grading; (d) remuneration, employment benefits and terms and conditions of employment; (e) job assignments, (f) the working environment and facilities; (g) training and development; (h) performance evaluation systems; (i) promotion; (j) transfer; (k) demotion; (l) disciplinary measures other than dismissal; and (m) dismissal.

⁹ See for example *Mangena & Others v Fila South Africa (Pty) Limited and others* [2009] 12 BLLR 1224 (LC) at par. 5.

¹⁰ Memorandum on Objects of Employment Equity Amendment Bill, 2012.

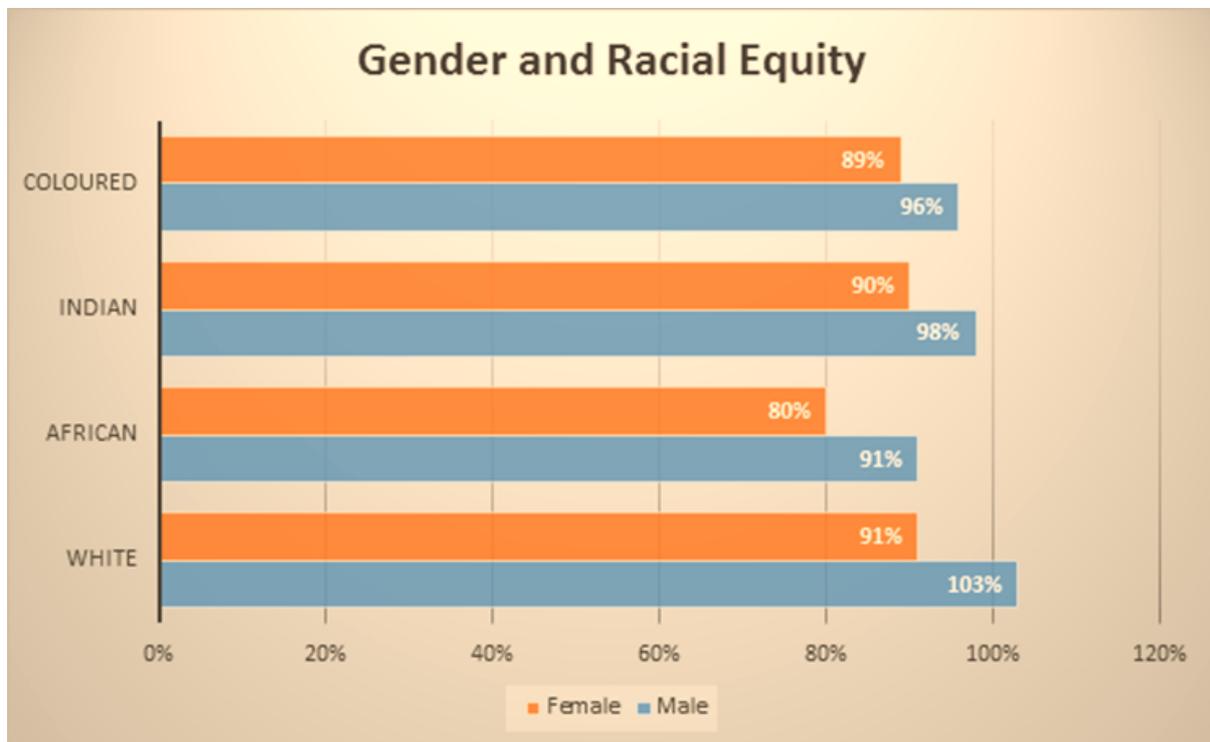
¹¹ B-31 - 2012.

¹² Explanatory Memorandum at par 3.3.3.

¹³ Explanatory Memorandum at par 3.3.2.

to the constitutional protection of equality and achieves compliance with core international labour standards binding on South Africa'.¹⁴

The principle of equal pay for equal work, and equal pay for work of equal value, has its roots in pay discrepancies between men and women. In South Africa, as can be seen from the graph below, statistics compiled by The HayGroup®¹⁵ indicate that while women generally earn less than their male colleagues, the discrepancy in pay is also apparent between the races with Africans trailing their White, Coloured and Indian counterparts.¹⁶



¹⁴ Explanatory Memorandum at par 3.3.3. The explicit basis for equal pay claims as now contained in s. 6(4) is therefore similar to the explicit basis for harassment claims as set out in s. 6(3) of the Employment Equity Act. Prior to the enactment of the Employment Equity Act and the express prohibition on harassment in s. 6(3), harassment cases too were brought under the general prohibition of unfair discrimination as set out in Item 2(1) of Schedule 7 of the 1995 Labour Relations Act.

¹⁵ The HayGroup® is a management consulting firm which operates in about 47 countries around the world, including South Africa. My sincere thanks to Shaun Barnes for the generous way in which he shared recent trends and statistics on this topic with me and for permitting me to reproduce the information here.

¹⁶ In terms of this graph, which reflects the results of payroll audits by The HayGroup® of the payrolls of about 22 of its clients between 2014 and 2015, White men lead the pack at 103%, followed by Indian men at 98%, Coloured men at 96%, Black men and White women both at 91%, Indian women at 90%, Coloured women at 89% and Black women at 80%. This graph reflects all categories of employment and more pronounced differences might exist within the various categories of employment.

2. The international law context

Section 3(d) of the Employment Equity Act makes it compulsory to interpret the Act in compliance with the international law obligations of the Republic.¹⁷ This is in accordance with the provisions of section 39(1) of the Constitution,¹⁸ which obliges any court, tribunal or forum, when interpreting the Bill of Rights,¹⁹ to ‘consider international law’.

The earliest expression of the right to pay-equality is article 23(2) of the Universal Declaration of Human Rights,²⁰ which provides that ‘everyone, without discrimination, has the right to equal pay for equal work’. Soon afterwards, on 21 June 1951, the International Labour Organisation Convention 100 on Equal Remuneration was adopted, which, in article 2(1), requires states to ‘ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value’.²¹ Likewise, the International Covenant on Economic, Social and Cultural Rights guarantees the right to ‘fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work’.²²

All the major regional human rights instruments then followed suit. The Treaty of Rome²³ (establishing the European Economic Community)²⁴ provides in article 119/141 that member states must ensure, and subsequently maintain, the application

¹⁷ S. 3(d) makes specific reference to the international law obligations contained in the International Labour Organisation Convention (111) concerning Discrimination in respect of Employment and Occupation, which provides, *inter alia*, that member states should formulate a national policy for the prevention of discrimination in employment and occupation concerning work of equal value. See also *Mangena & Others v Fila South Africa (Pty) Limited and others* [2009] 12 BLLR 1224 (LC) at par. 5.

¹⁸ Act 108 of 1996.

¹⁹ Because the Employment Equity Act gives effect to the right to equality guaranteed in s. 9 of the Constitution (which in turn forms part of the Bill of Rights as contained in Chapter 2 of the Constitution), the interpretation of the provisions of the Employment Equity Act ultimately concerns the interpretation of the Bill of Rights and as such falls under the ultimate jurisdiction of the Constitutional Court.

²⁰ The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10 December 1948.

²¹ South Africa ratified Convention 100 on 30 March 2000.

²² Art. 7(1). Although South Africa signed this Covenant in 1994, it is yet to ratify it.

²³ 25 March 1957.

²⁴ The European Economic Community was the predecessor to the European Union.

of the principle that men and women should receive equal pay for equal work. The Equal Pay Directive²⁵ expanded on this provision to encompass work of equal value,²⁶ and article 4.3 of the European Social Charter²⁷ likewise contains the undertaking by contracting parties to recognise the right of men and women workers to equal pay for work of equal value.

Across the Pacific, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights²⁸ guarantees the right to 'remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction'. And on own soil, the Organisation of African Unity²⁹ adopted the African Charter on Human and People's Rights³⁰ on 28 June 1981, which, in article 15, guarantees the right of every individual to work under equitable and satisfactory conditions, and to receive equal pay for equal work.

Various countries have adopted national legislation in order to give effect to the principle of equal pay for equal work or work of equal value.³¹ The manner in which foreign jurisdictions grapple with the issue of equal pay provides important guidance to South African tribunals and courts interpreting the provisions of section 6 of the Employment Equity Act. The Constitution of the Republic of South Africa³² recognises the value of such comparative analysis³³ and in considering the various elements of the right to equal pay in South Africa, appropriate reference to foreign statutes and case law may need to be made – of course always keeping the unique

²⁵ Council Directive 75/117/EEC of 10 February 1975.

²⁶ JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at p8-88.

²⁷ This Charter initially came into force on 26 February 1965 and it was revised in 1996. The revision did not amend the provisions of art. 4.3.

²⁸ This Protocol was adopted on 17 November 1988 and came into force on 16 November 1999.

²⁹ The predecessor to the African Union.

³⁰ Also referred to as 'the Banjul Charter'. The Charter came into force on 21 October 1986.

³¹ For example, the Canadian Human Rights Act R.S.C, 1985, c.H-6 & Equal Wages Guidelines, 1986; United Kingdom Equal Pay Act, 1970, most recently superseded by the Equality Act, 2010; USA Equal Pay Act 29 USC § 206(d), 1963; Title VII of the Civil Rights Act, 1964; New Zealand Equal Pay Act No 118 of 1972; Australian Fair Work Act, 2009 as well as the Sex Discrimination Act, 1984 and the Workplace Gender Equality Act, 2012; Irish Employment Equity Act 21 of 1998; German General Act on Equal Treatment, 2006.

³² Act 108 of 1996

³³ S. 39(1)(c) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.

manner in which the foreign statute is drafted and the circumstances in which it applies in mind. For example, in the United Kingdom (UK) an implied equality clause is inserted into a woman's contract of employment where she is performing "like work" to a man in the same employment, or where she is performing work which has been rated equivalent to that of a man in the same employment under a job evaluation study, or where she is performing work of equal value to a man in the same employment.³⁴ In the United States of America (US), wage discrimination on the basis of sex is prohibited in terms of the Equal Pay Act,³⁵ and men and women performing 'like work' are required to be paid equally. Equal value claims are accordingly not allowed under the US Equal Pay Act, and the complainant would therefore only succeed if the complainant proves that s/he and the comparator are performing 'like work' (i.e. work that is 'the same' or 'similar').³⁶ This is also the position in Australia.³⁷

The jurisdiction that is perhaps most closely aligned with the position under section 6(4) of the South African Employment Equity Act is Canada. Section 11 of the Canadian Human Rights Act³⁸ provides that 'it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment³⁹ who are performing work of equal value'.⁴⁰ In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.⁴¹ It is not a discriminatory practice to pay male and female employees different wages if the difference is based on a factor prescribed by guidelines issued by the Canadian Human Rights Commission as a reasonable factor

³⁴ Ss. 65 and 66 of the UK Equality Act, 2010. See also JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at p8-89.

³⁵ 29 USC § 206(d).

³⁶ JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at p8-90-91.

³⁷ *Ibid.*

³⁸ Canadian Human Rights Act R.S.C., 1985, c.H-6.

³⁹ S.11(3) of the Canadian Human Rights Act provides that separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed to be the same establishment.

⁴⁰ S. 11(1) of the Canadian Human Rights Act.

⁴¹ S. 11(2) of the Canadian Human Rights Act.

that justifies the difference.⁴² These Guidelines include, for example, different performance ratings, differences in seniority, the existence of an internal labour shortage and regional rates of wages as factors that would justify differences in pay.⁴³

3. What section 6(4) does not do

Section 6(4) has been criticised as being prescriptive of an equalisation of pay irrespective of seniority, performance and output. This is, of course, not so. Section 6(4) prohibits *unfair discrimination* where the employees concerned perform the same or similar work, or work of equal value. Section 6(4) does not prohibit differentiation on justifiable grounds.⁴⁴ Accordingly, as was stated in *Louw & Another v Golden Arrow Bus Services (Pty) Limited*:⁴⁵

*In other words it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds eg race or ethnic origin.*⁴⁶

The prohibition in section 6(4) is therefore only triggered if the reason for the differentiation is one of the grounds listed in section 6(1) or an arbitrary ground.⁴⁷ Where there is a justifiable reason for the difference in treatment, no violation of section 6(4) would occur.⁴⁸

⁴² S. 11(4) of the Canadian Human Rights Act.

⁴³ Equal Wages Guidelines, 1986 SOR/86-1082.

⁴⁴ See Regulation 7 of the Employment Equity Regulations, 2014 GN R595 in GG 37873 of 1 August 2014. This is discussed in more detail below.

⁴⁵ (2000) 21 ILJ 188 (LC), which decision was upheld on appeal – see *Louw v Golden Arrow Bus Services (Pty) Ltd* (2001) 22 ILJ 2628 (LAC). See also OC Dupper, C Garbers, AA Landman, M Christianson, AC Basson, EML Strydom ed, *Essential Employment Discrimination Law*, Juta & Co Ltd, 2004 at p140.

⁴⁶ *Louw & Another v Golden Arrow Bus Services* (2000) 21 ILJ 188 (LC) at par 23.

⁴⁷ *Ibid* at par 26.

⁴⁸ Regulation 7 of the Employment Equity Regulations, 2014 GN R595 in GG 37873 of 1 August 2014 list factors that, if any one or a combination of these factors are the cause for the difference in treatment, such difference would not amount to unfair discrimination. See also regulation 6 of the Employment Equity Regulations, which sets out the methodology for claims under s. 6(4).

Second, section 6(4) does not seek to address the so-called wage gap. It accordingly does not permit a complaint along the lines that the wage differential between employees who perform different jobs or jobs of different value is too big and that it ought to be reduced by a specified percentage over a specified period of time.⁴⁹ A different section of the Employment Equity Act seeks to address this: in terms of section 27 of the Employment Equity Act, designated employers⁵⁰ are required to take measures to progressively reduce disproportionate income differentials, subject to such guidance as may be given by the Minister of Labour.⁵¹

4. Section 6(4) unpacked

Section 6(4) provides that ‘a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination’. Each of these elements deserves closer attention.

4.1 *“A difference” in “terms and conditions of employment”*

In order to bring a claim in terms of section 6(4), a complainant must prove that there is ‘a difference’ in terms and conditions of employment between her/him and the comparator. The section does not require the difference to be ‘material’ or ‘significant’ – any difference would do.

While section 6(4) is often referred to as the ‘equal pay’ provision, it does not only

⁴⁹ Such a claim would fail on the basis that the work performed by the complainant and the comparator is not “the same” or “similar” or “of equal value”, and the requirements of section 6(4) would thus not be met.

⁵⁰ The Employment Equity Act defines a “designated employer” as (a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of the Act; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of the Act, to the extent provided for in the agreement.

⁵¹ The progressive reduction of disproportionate income differentials falls outside the scope of this paper and it is accordingly not discussed in any further detail here.

concern differences in ‘remuneration’ or ‘pay’⁵² – it concerns differences in ‘terms and conditions of employment’. This would necessarily include the amount paid to the employees concerned, but it would also extend to other terms such as the amount of leave granted to the employees, the period of notice that may be required to be given upon termination, their working hours, eligibility for bonus payments, etc.

In the UK, because of the implied equality term in the contract of employment of every female employee, the courts have held that each term should be considered separately⁵³ and it is accordingly not a defence to say that, on the whole, the complainant enjoys similar terms and conditions to the comparator. In the UK case of *Hayward v Cammel Laird Shipbuilders Ltd*⁵⁴ the House of Lords held that Hayward, a female cook, was entitled to an increase in her basic salary to bring it in line with the basic pay of her comparators (namely shipyard painters, ladders and joiners). This was despite the fact that she had more generous sick pay conditions and meal breaks.⁵⁵ It was held that the comparators would need to make their own claims to receive the same sick pay and meal breaks.⁵⁶ This approach is also supported by the decision of the European Court of Justice in *Barber v GRE Assurance Group*⁵⁷ where it was held that equal pay must be ensured in respect of each element of remuneration and thus not the overall consideration paid to workers.⁵⁸

It remains to be seen how the South African courts would deal with this, but it is likely that a similar approach would be adopted. This is because section 6(4) refers to ‘a difference’ in ‘terms and conditions of employment’. The phrase ‘terms and

⁵² It may therefore not be necessary to provide an answer to the often difficult distinction between “remuneration” and “benefits” and to delineate precisely what constitutes “pay” for purposes of s.6(4) to apply.

⁵³ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p358.

⁵⁴ [1998] IRLR 257, HL.

⁵⁵ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p359; Bourn C & Whitmore J, *Anti-Discrimination Law in Britain*, 3rd Ed, Sweet & Maxwell 1996, at p188-189.

⁵⁶ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p359.

⁵⁷ [1990] IRLR 240, ECJ cited in Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p359.

⁵⁸ *Ibid.*

conditions of employment' arguably supports an approach where each separate element of the complainant's and comparator's respective 'terms and conditions of employment' would need to be considered and compared; and, as stated above, any 'difference' could potentially underlie a claim under section 6(4) – the difference does not need to be 'material' or 'substantial' or 'on the whole less favourable'.⁵⁹

Although section 6(4) is drafted in broad terms to include all terms and conditions of employment, the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value⁶⁰ (hereinafter 'Code') specifically refers to 'pay/remuneration'. It seeks to provide practical guidance to employers and employees on how the principle of equal pay/remuneration for work of equal value should be applied in their workplaces.⁶¹ It promotes the implementation of 'pay/remuneration' equity in the workplace⁶² and the elimination of unfair discrimination in respect of 'pay/remuneration' for work of equal value.⁶³ As regards the term 'remuneration', the Code makes specific reference to the manner in which this term is defined⁶⁴ in the Basic Conditions of Employment Act⁶⁵ and, more specifically, the Schedule on Calculation of Employee's Remuneration⁶⁶ (hereinafter 'Schedule'). In terms of this Schedule, the following payments are included in an employee's remuneration:

- housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind;
- car allowance or the provision of a car, except to the extent that the car is provided to enable the employee to work;
- any cash payments made to an employee, except those that are expressly

⁵⁹ See a contrary view in Landman AA, *The Anatomy of Disputes about Equal Pay for Equal Work*, South African Mercantile Law Journal 352 (2002) where it is argued that it might be a defence for an employer to prove that the total package paid to the complainant and the comparator "is so close as to make no difference". Landman does, however, acknowledge that other jurisdictions have considered this approach and have rejected it.

⁶⁰ The Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN448 in GG38837 of 1 June 2015.

⁶¹ Par 1.1 of the Code.

⁶² Par 1.2 of the Code.

⁶³ Par 2.3 of the Code.

⁶⁴ S. 1 of the Basic Conditions of Employment Act provides that 'remuneration' means 'any payment in money or kind, or both in money and kind, made or owing to any person in return for that person working for any other person, including the State'.

⁶⁵ Act 75 of 1997.

⁶⁶ Calculation of Employee's Remuneration in terms of Section 35(5) GN691 in GG 24889 of 23 May 2003.

excluded;⁶⁷

- any other payment in kind received by an employee, except those that are expressly excluded;⁶⁸
- the employer's contributions towards a medical aid, retirement or similar fund;
- the employer's contributions towards funeral or death benefit schemes.⁶⁹

While the Schedule may be helpful to determine the elements of remuneration to which the complainant and the comparator might be entitled, two points of caution are appropriate: first, the purpose of the Schedule is to determine which payments must be included in an employee's remuneration when calculating accrued annual leave pay, notice pay in lieu of notice and statutory severance pay. The Schedule expressly provides that it only applies to the minimum payments⁷⁰ that an employer is required to make in terms of the Basic Conditions of Employment Act.⁷¹ Unfair pay discrimination may well concern benefits or elements of remuneration that are not included in the Schedule and the fact that they are not listed in the Schedule would not of their own be a defence to an unfair discrimination claim under section 6(4).

Second, as stated above, section 6(4) applies not only to pay/remuneration, but to all terms and conditions of employment. The fact that a benefit or term and condition of employment could therefore not strictly be regarded as 'pay' or 'remuneration' would not avoid the application of section 6(4).

⁶⁷ In terms of the Schedule, the following payments are expressly excluded from the definition of 'remuneration': (a) any cash payment or payment in kind provided to enable the employee to work (for example a tool allowance or transport allowance to allow the employee to transport to and from work); (b) a relocation allowance; (c) gratuities (such as tips received from customers); (d) share incentive schemes; (e) discretionary payments not related to an employee's hours of work or performance; (f) an entertainment allowance; and (g) an education or schooling allowance.

⁶⁸ In terms of the Schedule, the value of payments in kind is determined with reference to (a) the value agreed to in a contract of employment or collective agreement, provided that this is not less than the cost to the employer of providing the payment in kind; or (b) the cost to the employer of providing the payment in kind.

⁶⁹ Section 11(7) of the Canadian Human Rights Act contains a similar list of items that form part of an employee's "wages". In terms of this section, 'wages' means any form of remuneration payable for work formed by an individual and includes (a) salaries, commissions, vacation pay, dismissal wages and bonuses; (b) reasonable value for board, rent, housing and lodging; (c) payments in kind; (d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and (e) any other advantage received directly or indirectly from the individual's employers.

⁷⁰ Item 8 of the Schedule.

⁷¹ Act 75 of 1997. These minimum payments include annual leave pay in terms of s. 21, payment in lieu of notice in terms of s.38 and severance pay in terms of s. 41.

4.2 *Between employees of the same employer*

The use of the phrase 'between employees of the same employer' indicates that a comparison must be made between the complainant and a comparator.⁷² If the basis for alleged unfair discrimination is race, the complainant and the comparator would be of different race groups; if the basis for alleged unfair discrimination is religion, the complainant and the comparator would be of different religious faiths; if the basis for alleged unfair discrimination is sex, the complainant and the comparator would be of different sexes.

In order to bring a claim in terms of section 6(4), the complainant must show that s/he is an 'employee',⁷³ that the comparator is an 'employee'⁷⁴ and that the complainant and the comparator are employed by 'the same employer'. Individuals engaged as 'independent contractors' are not entitled to the protection of Chapter II of the Employment Equity Act⁷⁵ - only 'employees' are.⁷⁶ Certain employees are, however, excluded⁷⁷ from the protection of the Act and they would have to rely on the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act⁷⁸ and section 9 of the Constitution⁷⁹ should they want to pursue a claim of equal

⁷² *Mangena & Others v Fila South Africa (Pty) Limited and others* 12 BLLR 1224 (LC) at par. 6.

⁷³ Landman AA, *The Anatomy of Disputes about Equal Pay for Equal Work*, South African Mercantile Law Journal 343 (2002). S. 9 of the Employment Equity Act 55 of 1998 provides that for purposes of ss 6, 7 and 8, the term 'employee' includes applicants for employment. See also *Mias v Minister of Justice & Others* [2001] JOL 9132 (LAC) at par 28.

⁷⁴ This is because s. 6(4) uses the phrase 'between employees' of the same employer.

⁷⁵ Chapter II contains the prohibition on unfair discrimination and section 6 forms part of this chapter.

⁷⁶ S.4(1) of the Employment Equity Act provides that Chapter II 'applies to all employees and employers', and s.1 defines an 'employee' as any person other than an independent contractor who (a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employer' have corresponding meanings. Further guidance on whether an individual should be regarded as an employee can be obtained from the Code of Good Practice: Who is an Employee GN 1774 in GG 29445 of 1 December 2006.

⁷⁷ In terms of s4(3) of the Employment Equity Act the following employees are excluded: members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and the directors and staff of Comsec, i.e. Electronic Communications Security Limited, which was established in terms of the Electronic Communication Security (Pty) Limited Act, 2002 for the purpose of ensuring that the economic communications infrastructure of all organs of state is protected and secure.

⁷⁸ Act 4 of 2000.

⁷⁹ Act 108 of 1996.

pay for equal work or work of equal value.⁸⁰

In choosing a comparator, Landman⁸¹ states that the comparator must actually exist – a comparison with a hypothetical employee is not permissible. In addition, the comparison must generally be ‘contemporaneous’ – the comparator should accordingly perform the same or similar work or work of equal value to the work performed by the complainant at the same time.⁸² This is not a requirement under the UK Equality Act⁸³ and comparisons with a predecessor⁸⁴ and an immediate successor⁸⁵ have accordingly been permitted. Such claims must, however, be approached with caution because the disparity in pay between the complainant and the comparator may well be explained by the operation of factors unconnected with unfair discrimination.⁸⁶

It is possible for a complainant to compare herself/himself with more than one comparator. Palmer, Moon & Cox⁸⁷ point out that it would generally be in the complainant’s interest to compare her-/himself with several employees as this might increase her/his chances of being awarded equal pay with at least one of them.

The complainant and the comparator should, in terms of section 6(4), be employees of ‘the same employer’. On the face of it, this phrase requires the complainant and the comparator to be employed by the same legal entity. A comparison between employees employed by different legal entities, albeit in the same industry or even

⁸⁰ Landman AA, *The Anatomy of Disputes about Equal Pay for Equal Work*, South African Mercantile Law Journal 343 (2002).

⁸¹ *Ibid* at p.346 (2002). See also OC Dupper, C Garbers, AA Landman, M Christianson, AC Basson, EML Strydom ed, *Essential Employment Discrimination Law*, Juta & Co Ltd, 2004 at p143.

⁸² Landman AA, *The Anatomy of Disputes about Equal Pay for Equal Work*, South African Mercantile Law Journal 346 (2002).

⁸³ S. 64(2) of the UK Equality Act, 2010 expressly provides that the work done by the comparator is ‘not restricted to work done contemporaneously’ with the work done by the complainant.

⁸⁴ *MaCarthys Ltd v Smith* [1980] IRLR 210, ECJ as cited in Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p365.

⁸⁵ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p366 where reference is made to *Dennehy v Sealink UK* [1987] IRLR 120 and *Diocese of Hallam Trustees v Connaughton* [1996] IRLR 505. In the latter case, the applicant contended that a man was appointed at a considerably higher salary than what she earned in the role. The UK Employment Appeal Tribunal held that the scope of art. 119 (of the Treaty of Rome) included complaints based on the use of an immediate successor as a notional contemporaneous comparator.

⁸⁶ Bourne C & Whitmore J, *Anti-discrimination Law in Britain*, 3rd Ed, Sweet & Maxwell 1996, at p213.

⁸⁷ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p368.

separate entities in the same corporate group of companies, would therefore, strictly speaking, not be permitted.

Having said this, our courts do not hesitate to recognise a party as the true employer despite the labels that the parties have attached to their relationship and despite the confines of any contracts between them.⁸⁸ The case of *Unitrans Supply Chain Solutions (Pty) Limited & Another v Nampak Glass (Pty) Limited and Others*⁸⁹ illustrates this principle. In this case, the Labour Court was asked to consider the application of section 197 of the Labour Relations Act⁹⁰ to the expiry of the warehousing agreement between Unitrans Supply Chain Solutions and Nampak Glass and the subsequent appointment of TMS Group Industrial Services to henceforth perform these services to Nampak Glass.⁹¹ While Unitrans Supply Chain Solutions was the entity that held the contractual right to perform the services, the employees who were utilised in the performance of the service were all employed by a wholly-owned subsidiary, namely Unitrans Household Goods Logistics (Pty) Limited.⁹² TMS Group Industrial Services opposed the application for a declarator that section 197 applied to the expiry of the contract and its appointment to perform the services *inter alia* on the basis that the employees were not employed by the entity that held the contractual right to perform the service; it argued that TMS Group Industrial Services was not obtaining any business or part thereof of Unitrans Household Goods Logistics, i.e. the employer of the employees, when it assumed performance of the services to Nampak Glass. The Labour Court, per Van Niekerk J, held *inter alia* as follows:

[24] It should be recalled that this court has not hesitated to recognise and give effect to an employment relationship, and specifically, to recognise a party as the true employer despite the labels that the parties have attached to their relationship and despite the confines of any contracts between them. This is particularly so in relation

⁸⁸ *Unitrans Supply Chain Solutions (Pty) Limited & Another v Nampak Glass (Pty) Limited & Others* (2014) 35 ILJ 2888 (LC) at par 24.

⁸⁹ (2014) 35 ILJ 2888 (LC).

⁹⁰ Act 66 of 1995.

⁹¹ Section 197 of the Labour Relations Act, 1995 regulates the employment consequences of a transfer of a business (which includes the whole or part of a business and a service) as a going concern. In essence, where there is a going concern transfer, the new employer steps into the shoes of the old employer in respect of all the employment contracts of the employees assigned to the business being transferred.

⁹² Unitrans Household Goods Logistics (Pty) Limited was the second applicant in this matter.

to unfair dismissal claims, where employers have relied on a variety of agreements and constructions that seek to avoid designating a person contracted to provide services as an 'employee'. In these circumstances, the courts look beyond the label to the substantial relationship between the parties, and have always given effect to substance over form. In the present instance, it is not disputed that the affected employees were engaged by the second applicant for the sole purpose of providing services in terms of the agreement between the first applicant and Nampak. It is also not disputed that the reason for their employment by the second applicant was related to considerations relevant to the group structure, and that at all material times, they were assigned by the second applicant to work under the supervision and control of the first applicant. Further, the second applicant was the entity listed on the invoices provided to Nampak for work performed in terms of the warehousing agreement. There is therefore support on the undisputed evidence for the conclusion that the first and second applicants ought for present purposes to be as a single entity (sic).

[25] I do not for a moment suggest that the purpose of the second applicant employing the affected employees was to circumvent s 197 (indeed, the applicants seek to enforce the section). But as the decision in Duncan Webb Offset illustrates, if the court were to adopt a more rigid interpretation, the protections of s 197 might easily be avoided by the creation of distinct legal entities established for that purpose. Employers might simply ensure that employees are always employed by an entity different to the entity in which the assets and activities that form a particular business are housed. It seems to me that the identity of the 'old employer' for the purposes of s 197 ought to be determined in a manner that gives effect to substance rather than form, and that regards the de facto employer as the transferor or 'old employer'.

This decision was confirmed on appeal.⁹³ In particular, the Labour Appeal Court held that if TMS Group Industrial Services' argument were to be upheld, 'it would create a simple escape device for employers who wish to evade the legitimate scope of s 197 by the creation of a group structure in which employees were formally

⁹³ TMS Group Industrial Services (Pty) Limited t/a Vericon v Unitrans Supply Chain Solutions (Pty) Limited [2014] 10 BLLR 974 (LAC).

employed by company B, albeit that it was company A for whom they in reality performed exclusive services’.

These cases illustrate that our courts would not, in appropriate circumstances, hesitate to look beyond the employing legal entity. The mere fact that employees who perform the same or similar work, or work of equal value, are employed in separate legal entities would therefore not necessarily be sufficient to avoid liability under section 6(4), particularly where the employing entities form part of the same corporate group of companies.

In both Canada⁹⁴ and the UK⁹⁵ reference is made to the ‘establishment’ where the employees are performing work, rather than to the ‘employer’. While it may be useful to consider the manner in which these jurisdictions permit the identification of a comparator, these statutory differences must be kept in mind. In terms of section 79 of the UK Equality Act, a comparator may be employed by the same employer, or an associate of the complainant’s employer, or at an establishment in respect of which common terms apply.⁹⁶ Employers would be ‘associates’ if either is a company of which the other has direct or indirect control, or both are companies of which a third person has control.⁹⁷ Comparisons across separate entities in the same corporate group of companies are therefore expressly permitted in the UK⁹⁸ and it goes even further to permit comparisons between employees employed in different entities but who are subject to common terms and conditions of employment.

As regards the position in Canada, the Canadian Human Rights Act refers to employees ‘employed in the same establishment’ performing work of equal value.⁹⁹ Section 11(3) of the Canadian Human Rights Act makes comparison across establishments possible where separate establishments are established or maintained

⁹⁴ S.11(1) of the Canadian Human Rights Act.

⁹⁵ S. 79 of the UK Equality Act, 2010.

⁹⁶ S. 79(3) and (4) of the UK Equality Act, 2010.

⁹⁷ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p362.

⁹⁸ See also Bourne C & Whitmore J, *Anti-discrimination Law in Britain*, 3rd Ed, Sweet & Maxwell 1996, at p213-216 and the cases cited there.

⁹⁹ S.11(1) of the Canadian Human Rights Act.

by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees, and in such circumstances, such separate establishments are deemed to be the same establishment.

4.3 *Performing the same or substantially the same work or work of equal value*

In order to be successful with a claim in terms of section 6(4) the complainant and the comparator must perform 'the same' or 'substantially the same' work or 'work of equal value'.

Work is 'the same' if the work is identical or interchangeable.¹⁰⁰ This was the case in *Ntai & Others v South African Breweries Limited*¹⁰¹ where three black employees, Messrs Ntai, Radebe and Boekhouer, compared themselves to two white employees, Messrs Wyer and Tellis. All the employees were training officers at the employer's Training Institute.¹⁰² The applicants alleged that they earned significantly less than the comparators and that the reason for the difference in pay was the fact that they are black. The employer denied that the difference was based on or caused by race.¹⁰³ The difference in pay was explained by factors other than race and the court accordingly dismissed the applicants' claim – this is discussed in more detail below.

In *Mangena & Others v Fila South Africa (Pty) Limited and Others*¹⁰⁴ Mr Shabalala, a warehouse manager, alleged that he performed identical work to that performed by Ms McMullin, who was responsible for the company's Sale or Return (SOR) programme.¹⁰⁵ Mr Shabalala contended that the difference in pay between him and Ms McMullin was because of race and gender. The court carefully assessed the respective jobs and noted, *inter alia*, that Ms McMullin's role required her to do

¹⁰⁰ Regulation 4(1) of the Employment Equity Regulations, 2014 GN R595 in GG 37873 of 1 August 2014.
¹⁰¹ (2001) 22 ILJ 214 (LC).

¹⁰² *Ntai & Others v South African Breweries Limited* (2001) 22 ILJ 214 (LC) at par 1-5.

¹⁰³ *Ibid* at par 7.

¹⁰⁴ [2009] 12 BLLR 1224 (LC).

¹⁰⁵ *Mangena & Others v Fila South Africa (Pty) Limited* [2009] 12 BLLR 1224 (LC) at par 10-11.

regular stock-takes at the customers' premises and to reconcile the accounts, i.e. to ensure that the company was being paid within the agreed period for goods sold on consignment by the customer. She was also responsible for distribution in relation to the Fila brand, which entailed receiving orders from sales representatives, scrutinising orders, determining whether the customer concerned was a 'priority' customer, checking the customer's credit record to determine whether goods should be supplied, checking available stock and if no stock was available, liaising with the customer to determine whether the order could be partially filled or held over, producing the picking slip and sticker, and forwarding completed documentation for invoicing. She later undertook the same function also in relation to the Soviet brand. With a view to becoming a brand manager, she underwent brand manager training and took on the role of an assisted brand manager, which entailed a range of tasks, including monitoring new developments, maintaining an awareness of fashion trends, administering buying budgets, budget control, taking purchase orders, submitting orders to suppliers, dealing with suppliers on a daily basis, and pricing the goods concerned.¹⁰⁶ Ms McMullin's work was accordingly non-mechanical, in the sense that it required the exercise of judgement and decision-making.¹⁰⁷ On the other hand, Mr Shabalala's work was limited to elementary, mechanical work in that he was responsible for producing price stickers and carton stickers, and occasionally he prepared internal delivery notes, which were manually produced.¹⁰⁸

In the circumstances, the court held that Mr Shabalala had failed to establish that he performed the same work as was performed by Ms McMullin, and that the factual foundation that is necessary to sustain a claim of equal pay for equal work simply did not exist.¹⁰⁹

Work is 'substantially the same' as the work of another employee if the work performed by the employees is substantially similar to the extent that they can reasonably be considered to be performing the same work, even if their work is not

¹⁰⁶ *Ibid* at par 11.

¹⁰⁷ *Ibid* at par 15.

¹⁰⁸ *Ibid* at par 13.

¹⁰⁹ *Ibid* at par 14.

identical or interchangeable.¹¹⁰ In *Mangena & Others v Fila South Africa (Pty) Limited & Others*¹¹¹ the Labour Court observed that it would be 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'. This is also the position in the UK where work is regarded as 'like work' where the work is the same or broadly similar, and the differences are not of practical importance in relation to the terms of the work.¹¹² In these circumstances, there is no significant or relevant difference in the tasks performed by the employees.¹¹³ Bourne & Whitmore¹¹⁴ caution that in considering whether work is 'of a broadly similar nature' a broad approach should be adopted and courts should not make 'too minute an examination', nor 'place emphasis upon trivial distinctions which in the real world are not likely to be reflected in the [employees'] terms and conditions of employment'. Therefore, consideration should be given to whether the differences are of practical importance, and how frequently these differences occur.¹¹⁵ For example, in the UK case *Shields v Coomes Holdings Limited*,¹¹⁶ the male comparator had a special responsibility for security which the female complainant did not have. The court held, however, that this responsibility was not frequently exercised in practice; the male comparator also did not possess any special skills nor had he undergone any special training in dealing with security matters. The contractual difference between the female complainant and the male comparator was accordingly not of practical importance. Likewise, the mere willingness on the part of the comparator to take on additional responsibilities or to work at a different time of the day to the complainant would not be 'of practical importance'.¹¹⁷

¹¹⁰ Regulation 4(2) of the Employment Equity Regulations, 2014 GN R595 in GG 37873 of 1 August 2014.

¹¹¹ [2009] 12 BLLR 1224 (LC) at par 9.

¹¹² S. 65(2) of the UK Equality Act, 2010.

¹¹³ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p371.

¹¹⁴ Bourne C & Whitmore J, *Anti-discrimination Law in Britain*, 3rd Ed, Sweet & Maxwell 1996, at p216.

¹¹⁵ *Ibid.*

¹¹⁶ [1978] IRLR 263 cited in Bourne C & Whitmore J, *Anti-discrimination Law in Britain*, 3rd Ed, Sweet & Maxwell 1996, at p217.

¹¹⁷ Bourne C & Whitmore J, *Anti-discrimination Law in Britain*, 3rd Ed, Sweet & Maxwell 1996, at p217.

In order to determine whether the work is 'the same' or 'substantially the same', the actual duties performed by the complainant and the comparator must be considered; reliance on job title or the contract of employment alone would not be sufficient.¹¹⁸

In terms of regulation 4(3) of the Employment Equity Regulations, work is of 'equal value' as the work of another employee in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7. In terms of regulation 6(1), in considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria:¹¹⁹

- the responsibility demanded of the work, including responsibility for people, finances and material;¹²⁰
- the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;¹²¹
- physical, mental and emotional effort required to perform the work;¹²² and
- to the extent that it is relevant, the conditions under which the work is performed, including the physical environment, psychological conditions,¹²³ time when and geographic location¹²⁴ where the work is performed.¹²⁵

¹¹⁸ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p392.

¹¹⁹ In terms of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 in GG 38837 of 1 June 2015 (Code), the weighting attached to each of the various factors that are used to indicate the value of the jobs may vary depending on the sector, employer and the job concerned.

¹²⁰ In terms of the Code, this includes consideration of who is accountable for delivery of the organisation's goals, for example, its profitability, financial soundness, market coverage and the health and safety of its clients. The Code cautions that it is important to consider the various types of responsibility associated with the organisation's goals independently from the hierarchical level of the job or the number of employees reporting to it.

¹²¹ In terms of the Code what is important here is not how these skills may have been acquired but the fact that they are objectively necessary in order to perform the work. The Code states that qualifications and skills can be acquired in various ways including academic or vocational training certified by a diploma, paid work experience in the labour market, formal and informal training in the workplace as well as volunteer work.

¹²² In terms of the Code this refers to the difficulty related to and the fatigue and tension caused by performing the job. Not only physical effort is important, but also mental and psychological effort.

¹²³ In terms of the Code noise levels and frequent interruptions associated with office jobs may be relevant in considering the conditions under which the work is performed.

¹²⁴ In terms of the Canadian Equal Wages Guidelines SOR/86-1082, regional wage rates may also be relevant at the stage of the inquiry where the individuals performing the work are compared.

¹²⁵ These criteria echo to a large extent the criteria used in Canada for determining the relative value of different positions. In terms of the Canadian Equal Wages Guidelines, 1986 jobs are evaluated with reference to (a) skill, including intellectual and physical qualifications acquired by experience, training, education or natural ability; (b) intellectual and physical effort; (c) responsibility for technical, financial and human resources; and (d) working conditions, including the physical and psychological work

These criteria for the evaluation of the work are not a closed list and any other factor indicating the value of the work may be taken into account in evaluating the work, provided the employer shows that the factor is relevant to assessing the value of the work.¹²⁶ What is important is an objective assessment of the value of the job of the complainant on the one hand and the value of the job of the comparator on the other hand. At this stage of the inquiry, the focus is on the respective jobs – not the individuals performing them. It must therefore be determined, objectively, whether the jobs are in fact of equal value – if not, the section 6(4) inquiry will stop here and no finding of unfair discrimination will be made.

In order for a court to declare that the work performed by a complainant and her/his chosen comparator is ‘of equal value’ the applicant must lay a proper factual foundation that would enable the court to make an assessment, as best it can, on what value should be attributed to the work in question and the tasks associated with it.¹²⁷

The South African Labour Court considered an equal value claim in *Louw v Golden Arrow Bus Service (Pty) Limited*.¹²⁸ In this case, two coloured males employed as buyers, contended, *inter alia*, that they performed work of equal value to the work performed by Mr Beneke, a white warehouse supervisor. The wage gap between the complainants and Mr Beneke increased from 53.3% in 1990 to 61.8% in 1998.¹²⁹

Golden Arrow Bus Services explained that it had evaluated the jobs concerned by using the Peromnes job evaluation method. In accordance with this method, various factors were analysed, such as problem solving, consequences of judgements, pressure of work, knowledge, job impact, comprehension, educational qualification and training experience.¹³⁰ For each factor a range of points was allocated and the

environments, such as noise, temperature, isolation, physical danger, health hazards and stress under which the work is performed.

¹²⁶ Regulation 6(2) of the Employment Equity Regulations.

¹²⁷ *Mangena & Others v Fila South Africa (Pty) Limited* [20009] 12 BLLR 1224 (LC) at par 15.

¹²⁸ [2000] 3 BLLR 311 (LC).

¹²⁹ *Ibid* at par 64.

¹³⁰ *Ibid* at par 71.

jobs were graded. The jobs of buyer and warehouse supervisor were graded two grades apart.¹³¹ The job of warehouse supervisor was accordingly found to be 'larger than a job of buyer' as it involved supervisory and management functions.¹³² In the circumstances, the jobs were not of equal value and it was accordingly unnecessary for the court to delve into the reasons, causes or motivation for the difference in wages.¹³³

Can an applicant plead that s/he performs 'the same' work to the work performed by a comparator, and, in the alternative, contend that the work is 'of equal value'? The Labour Court considered this question in *Mangena & Others v Fila South Africa (Pty) Limited*¹³⁴. As summarised above, Mr Shabalala contended that his work as warehouse manager was the same as the work performed by Ms McMullin, who performed the Sale or Return function for the company. Having found that the two positions were not 'the same', the court observed that the manner in which the issue was framed was sufficiently broad to encompass an equal value claim.¹³⁵ The court held, however, that it is incongruous to claim equal pay for the same (in the sense of 'identical') work and to claim in the alternative, as the applicants effectively did, that should the court find that the work performed is different, then equal value should be attributed to the positions concerned. The court acknowledged that this strategy may be appropriate where there is some doubt as to the nature and content of the jobs concerned – in other words, if a claimant asserts that work done by a comparator is similar work because there is some doubt as to precisely what work the comparator performed, the basis for an alternative equal value claim can be appreciated. However, it is disingenuous for a complainant to ask a court to find that the work performed by the complainant and the comparator is of equal value where the complainant asserts that he performed *identical* work to the work performed by the comparator.¹³⁶ The manner in which an equal pay claim is framed is therefore of

¹³¹ *Ibid* at par 74.

¹³² *Ibid* at par 102.

¹³³ *Ibid* at par 105.

¹³⁴ [2009] 12 BLLR 1224 (LC).

¹³⁵ *Mangena & Others v Fila South Africa (Pty) Limited* [2009] 12 BLLR 1224 (LC) at par 15.

¹³⁶ *Ibid* at par 15.

the utmost importance and litigants must ensure that they draft their pleadings appropriately.

As illustrated by the *Louw*¹³⁷ case, formal job evaluation may greatly assist in defending equal pay claims.¹³⁸ A formal, analytical, objective job evaluation study is also arguably the most effective way to ascertain the worth of work.¹³⁹ Job evaluation studies typically consist of a detailed analysis of the responsibilities, skills and effort required of the role and the conditions under which the work is to be performed. Jobs rated equally under such job evaluation systems should in principle be remunerated equally.¹⁴⁰ What is important is that the job evaluation must be conducted in a manner that is free from bias¹⁴¹ on grounds of race, gender, disability or any other prohibited ground listed in section 6(1) of the Employment Equity Act, or any other arbitrary ground.¹⁴² This is crucial because, in terms of section 1 of the Employment Equity Act job evaluation is included in the definition of an ‘employment policy or practice’ and the job evaluation itself could therefore potentially be attacked under section 6.

The Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value¹⁴³ (Code) contains useful guidance in the evaluation of jobs and it makes specific reference to the guidelines issued by the International Labour Organisation in this regard.¹⁴⁴ In terms of par 6.2 of the Code, the use of job evaluation does not, in itself, ensure that there is an absence of unfair discrimination. It is expressly acknowledged that traditional job evaluation methods were designed on the basis of male-

¹³⁷ *Louw v Golden Arrow Bus Services (Pty) Limited* (2000) 21 ILJ 188.

¹³⁸ See also the UK case of *Thomson v Diageo plc* [2004] All ER (d) 86 (Jun) in which the Employment Appeal Tribunal rejected reliance on an *ad hoc* job evaluation system and ordered a proper objective evaluation to be conducted.

¹³⁹ JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at p8-108.

¹⁴⁰ *Ibid* at p8-108(2).

¹⁴¹ This is also a requirement in Canada. In terms of the Canadian Equal Wages Guidelines, a system for the assessment of the value of work must operate without any sexual bias and must be capable of measuring the relative value of work of all jobs in the establishment.

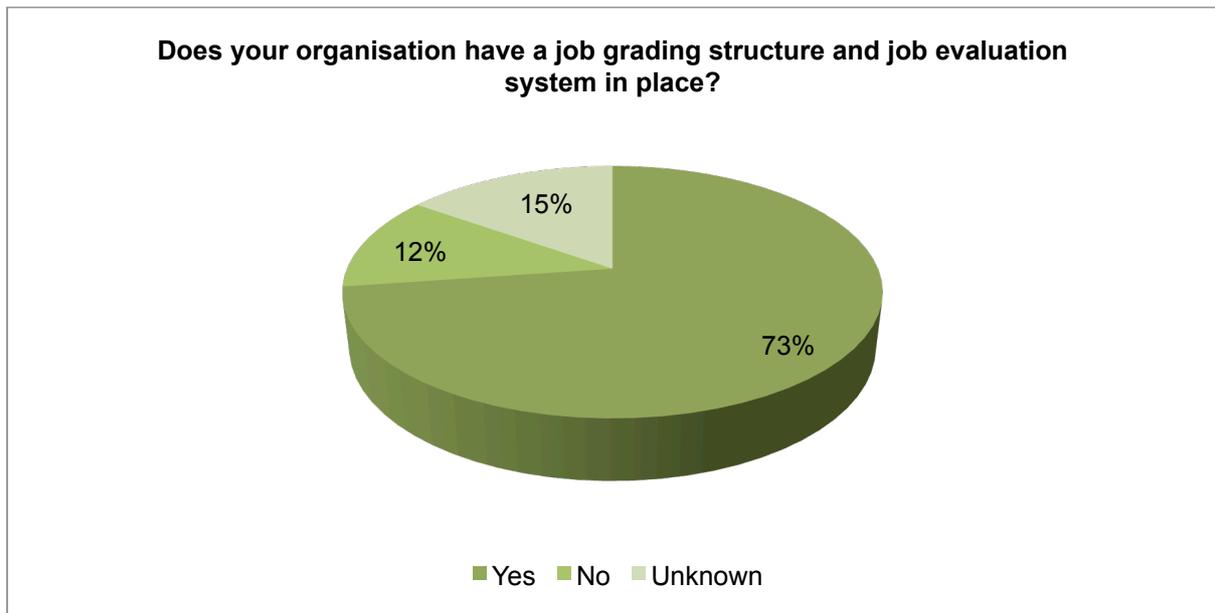
¹⁴² Regulation 6(3) of the Employment Equity Regulations, 2014 GN R595 in GG 37873 of 1 August 2014.

¹⁴³ GN 448 in GG 38837 of 1 June 2015.

¹⁴⁴ See for example *Promoting Equity Gender-Neutral Job Evaluation: A Step-by-Step Guide* (ILO, Geneva, 2008) and *Equal Pay: An Introductory Guide* (ILO, Geneva, 2013).

dominated jobs,¹⁴⁵ and predominantly female jobs often involve different requirements from those of predominantly male jobs. It is accordingly important to be vigilant when selecting the method of job evaluation and to ensure that its contents are equally tailored to both female-dominated and male-dominated jobs.¹⁴⁶

As can be seen from the graph below, employers may be of the view that they have job grading structures and job evaluation systems in place.¹⁴⁷ However, it is worth noting that although 73% of respondents indicated that they had a job grading and job evaluation system in place, a number of these systems have subsequently been shown in fact not to be analytical systems and to have been developed with little regard to all the factors that are relevant to job evaluation.¹⁴⁸



¹⁴⁵ Par 6.2.4 and 6.2.5 of the Code state, for example, that responsibility for money and equipment is often valued more than other forms of responsibility, and jobs involving caring for others or cleaning are often undervalued because of the erroneous assumption that the skills involved in those jobs are intrinsic to the nature of women and not acquired through learning and experience.

¹⁴⁶ Par 6 of the Code. See also the guidelines listed by JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at p8-109. For example, the tendency to undervalue skills and conditions associated with female job classes when rating the levels of different job categories should be avoided. For example, when assessing working conditions, employers must guard against concentrating on the dirt and grime involved in manual labour while ignoring the repetitiveness and constant concentration required of secretarial work; care should be taken not to undervalue skills learnt at home or in an unpaid environment; and the impact of lingering inequalities resulting from systemic discrimination on the grounds of gender, race, disability, etc. on the attainability of certain skills, qualifications and experience should be taken into account.

¹⁴⁷ This graph reflects responses from 70 clients who attended a seminar on Equal Pay which were presented jointly by Bowman Gilfillan Inc and The HayGroup® in about October 2014.

¹⁴⁸ Shaun Barnes, The HayGroup®, interview on 7 July 2015.

The HayGroup® points out that in order for an employer to rely on job evaluation and job grading as a defence to an unequal pay claim, the job evaluation study must be a) thorough in analysis and b) capable of impartial application.¹⁴⁹ But this is not enough. As was found in *Thomson v Diageo plc*¹⁵⁰ the job evaluation system must be kept up to date and it will therefore not be sufficient to rely on an *ad hoc* evaluation that is loosely based on a recognised analytical job evaluation system.

4.4 *Directly or indirectly based on one or more of the grounds listed in section 6(1)*

Once it is determined that a) there is in fact a ‘difference’ in the terms and conditions of employment between the complainant and the comparator and b) that the complainant and the comparator perform the same work, substantially the same work, or work of equal value, it must be determined whether the reason for the difference is a prohibited reason in terms of section 6(1). If so, the difference would be regarded as unfair discrimination.

Section 6(1) lists the following grounds: 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.¹⁵¹ The Employment Equity Amendment Act¹⁵² extended the prohibition of unfair discrimination to “any arbitrary ground” – more about this later. What is immediately apparent is that the grounds on which an equal pay claim can be brought in South Africa is significantly wider than what is permitted in other jurisdictions, such as the UK, Canada and the US, where the prohibited grounds are broadly limited to sex and race.

¹⁴⁹ This is the test as formulated in *Eaton Limited v Nuttal* [1977] IRLR 71. See also *Ruff v Hannant Cleaning Services* (ET/1501271/01 of 29 April 2002) in which a female cleaner was paid less than a male cleaner under ‘an unsupportable grading system’; and *Bateman v Hull & East Riding Community Health NHS Trust* (ET/1807708/00 of 19 October 2001) in which it was held that the job evaluation study was not objectively carried out.

¹⁵⁰ [2004] All ER (D) 86 (Jun) EAT.

¹⁵¹ Any prohibited ground, or an arbitrary ground, could accordingly form the basis of an equal pay claim and in South Africa, equal pay claims are not restricted to claims between men and women.

¹⁵² Act 47 of 2013.

Unequal treatment would only amount to unfair discrimination if the *reason or cause* for such unequal treatment is one of the grounds listed in section 6(1).¹⁵³ There must accordingly be a causal link between the prohibited ground and the unequal treatment;¹⁵⁴ it must be the prohibited ground that causes the difference.¹⁵⁵

Regulation 7 of the Employment Equity Regulations lists a number of grounds that could justify a difference in treatment. Accordingly, if employees perform work that is the same, substantially the same or of equal value and it is proved that the difference is based on any one of a combination of these factors, no finding of unfair discrimination will be made. At this stage of the inquiry the focus shifts away from the actual jobs¹⁵⁶ to the individuals performing them. The factors that may justify a difference in treatment include the following:

- the individuals' respective seniority or length of service;
- the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
- the individuals' respective performance, quantity or quality of work, provided that the employees are equally subject to the employer's performance evaluation system and that the performance evaluation system is consistently applied;
- where an employee is demoted as a result of organisational restructuring or for any other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;
- where an individual is employed temporarily in a position for purposes of

¹⁵³ JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at p8-93; Landman AA, *The Anatomy of Disputes about Equal Pay for Equal Work*, South African Mercantile Law Journal 349 (2002); *Louw v Golden Arrow Bus Services (Pty) Limited* (2000) 21 ILJ 188 at par 23. See also par 7.2 of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value of 1 June 2015.

¹⁵⁴ *Mangena & Others v Fila South Africa (Pty) Limited & Others* [2009] 12 BLLR 1224 (LC) at par 6.

¹⁵⁵ *Ntai v South African Breweries Limited* (2001) 22 ILJ 214 (LC) at par 8 and 17; *Transport and General Workers Union v Bayete Security Holdings* [1999] 4 BLLR 401 (LC); *Mias v Minister of Justice & Others* [2001] JOL 9133 (LAC); *Ngcobo & Others v Chester Butcherries* (2012) 33 ILJ 2932 (LC).

¹⁵⁶ This is because by this stage of the inquiry it must have been established that the jobs are the same, substantially the same or of equal value.

gaining experience or training and as a result receives different remuneration or enjoys different terms and conditions of employment;

- the existence of a shortage of relevant skill, or the market value in a particular job classification; and
- any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Employment Equity Act.¹⁵⁷

Reliance on these factors to justify a difference in treatment between the complainant and the comparator should not be biased against an employee or group of employees based on race, gender or disability or any other ground listed in section 6(1).¹⁵⁸ In addition, in order to rely on any of these factors, the employer would need to show that the factor is applied consistently and in a proportionate manner to all the employees.¹⁵⁹

In addition, an employer that relies on one of the factors set out in regulation 7 of the Employment Equity Regulations will need to establish that the factor relied upon caused the difference in pay.¹⁶⁰ The justification should therefore not be ‘an after-

¹⁵⁷ These factors echo, to a large degree, the factors set out in the Canadian Equal Wages Guidelines, 1986, which are the following: (a) different performance ratings, where employees are subject to a formal system of performance appraisal that has been brought to their attention; (b) seniority, where a system of remuneration that applies to the employees provides that they receive periodic increases in wages based on their length of service with the employer; (c) a re-evaluation and downgrading of the position of an employee, where the wages of that employee are temporarily fixed, or the increases in the wages of that employee are temporarily curtailed, until the wages appropriate to the downgraded position are equivalent to or higher than the wages of that employee; (d) a rehabilitation assignment, where an employer pays to an employee wages that are higher than justified by the value of the work performed by that employee during recuperation of limited duration from an injury or illness; (e) a demotion procedure, where the employer, without decreasing the employee’s wages, reassigns an employee to a position at a lower level as a result of the unsatisfactory work performance of the employee caused by factors beyond the employee’s control, such as the increasing complexity of the job or the impaired health or partial disability of the employee, or as a result of an internal labour force surplus that necessitates the assignment; (f) a procedure of gradually reducing wages for any of the reasons set out in (e); (g) a temporary training position, where, for the purposes of an employee development program that is equally available to male and female employees and leads to the career advancement of the employees who take part in the program, an employee temporarily assigned to the position receives wages at a different level than an employee working in such a position on a permanent basis; (h) the existence of an internal labour shortage in a particular job classification; (i) a reclassification of a position at a lower level, where the incumbent continues to receive wages on the scale established for the former higher classification; and (j) regional rates of wages, where the wage scale that applies to the employees provides for different rates of wages for the same job depending on the defined geographic area of the workplace.

¹⁵⁸ Regulation 7(2)(a) of the Employment Equity Regulations, 2014.

¹⁵⁹ Regulation 7(2)(b) of the Employment Equity Regulations, 2014. This is also the position in Canada – see par 17 of the Canadian Equal Wages Guidelines, 1986.

¹⁶⁰ See also Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p413.

thought' constructed in the face of an unfair discrimination claim. In *Glasgow City Council v Marshall*¹⁶¹ it was held that the reason for the disparity must be genuine, and not a sham or pretence, and that the fact relied upon must be the cause of the disparity.¹⁶² In *Enderby v Frenchay Health Authority*¹⁶³ the court held that where the objective factor (in that case market forces) caused a portion of the difference in pay, pay equalisation proportionate to the part not caused by the objective factor may need to be awarded.

Some of the grounds for justification deserve closer attention.

Seniority or length of service

An employer is permitted to treat employees differently on the basis of their respective seniority or length of service. Two points of caution are appropriate: first, where an employer pays longer serving employees more than shorter serving employees, this could have a disproportionate impact on female employees who are more likely to have shorter service because of breaks in their working lives caused by childbirth and dependent care responsibilities.¹⁶⁴ Similarly, the use of seniority and length of service as a factor justifying unequal treatment might perpetuate inequity where a certain section of the workforce, such as women or black people, have not had fair access to certain jobs in the past and accordingly have not been able to accumulate years of service in those jobs.¹⁶⁵ Where this is the case, reliance on seniority or length of service to justify differences in pay could potentially amount to indirect discrimination on the basis of race or sex.¹⁶⁶ Seniority and length of service as a factor justifying unequal treatment must therefore be approached with caution.

¹⁶¹ [2000] IRLR 272.

¹⁶² *Glasgow City Council v Marshall* [2000] IRLR 272 at par 18.

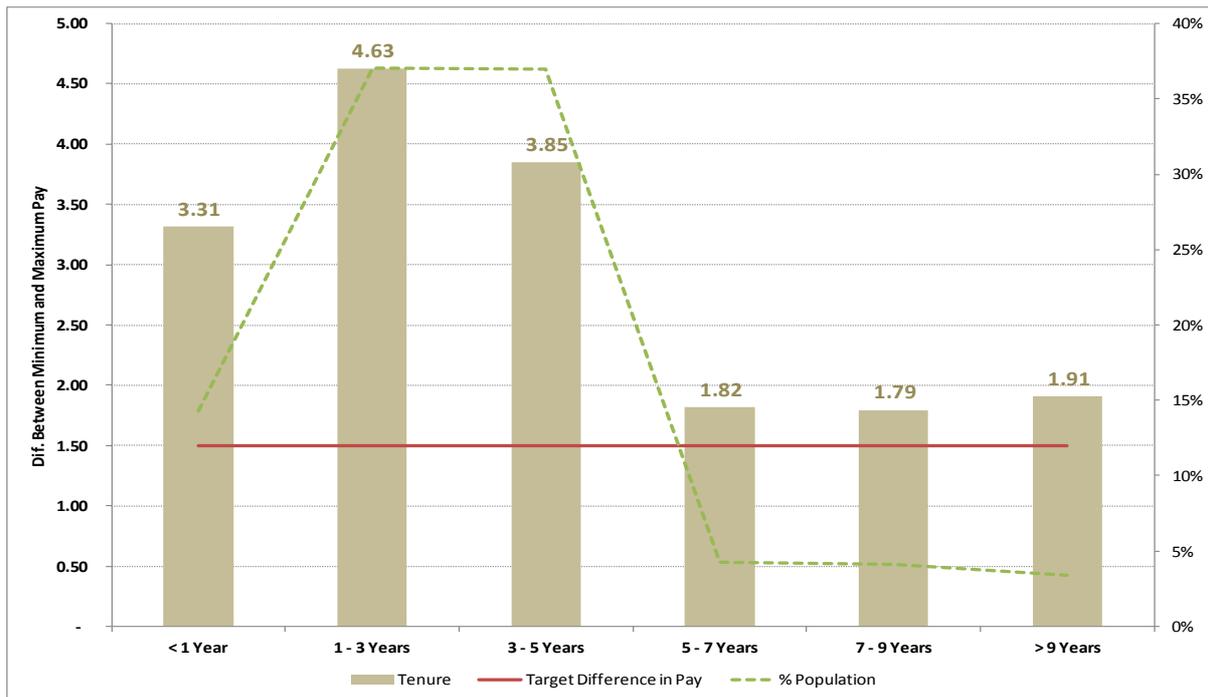
¹⁶³ [1993] IRLR 591 (ECJ) at par 26-27.

¹⁶⁴ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p405 and the cases cited there. See also the case of *Handel-og Kontonfunktionaererness Forbund i Danmark v Dansk Arbejdsgiverforening* [1989] IRLR 532 ECJ (also referred to as the *Danfoss*-case) where the European Court of Justice held that while seniority may result in less favourable treatment of women, it may impact on experience, which could warrant higher pay.

¹⁶⁵ Landman AA, *The Anatomy of Disputes about Equal Pay for Equal Work*, South African Mercantile Law Journal 354 (2002).

¹⁶⁶ Section 6(4) expressly states that a difference in terms and conditions of employment between employees performing the same or substantially the same work, or work of equal value, that is *indirectly* based on one of the prohibited grounds constitutes unfair discrimination.

Second, in South Africa, due to, *inter alia*, the shortage of certain skills, it could happen that employers may in fact reward new hires at higher salaries than longer serving employees. The graph below reflects the results of a payroll audit conducted by The HayGroup® in respect of one of its clients in 2014. What is apparent from this graph, is that the pay of new hires exceeds that of their counterparts who had been with the employer longer.



Reliance on seniority and length of service as a factor justifying differences in pay may therefore not necessarily be supported by the evidence in the particular workplace.

A case in which seniority was one of the bases for the difference in treatment was *Ntai v South African Breweries Limited*.¹⁶⁷ In this case, the complainants (three black men, Messrs Ntai, Radebe and Boekhouer) and the comparators (two white men, Messrs Wyer and Tellis) were training instructors at the SAB Training Institute.¹⁶⁸ The complainants earned about 15-17% less than the comparators. The employer admitted that there was a difference in pay between the complainants and the

¹⁶⁷ (2001) 22 ILJ 214 (LC).

¹⁶⁸ *Ntai v South African Breweries Limited* (2001) 22 ILJ 214 (LC) at par 1-5.

comparators, and that the differential was too big.¹⁶⁹ It denied, however, that the difference was caused by race and contended that three other factors had caused the difference in pay, namely the comparators' greater length of service, a series of performance-based pay increments and the comparators' greater experience.¹⁷⁰ To this end, the employer presented evidence that Tellis and Wyer were employed on 1 September 1987 and 1 November 1989 respectively. Radebe was appointed as a training officer on 1 April 1996; Ntai was appointed as a training officer on 1 July 1998; and Boekhouer was appointed on 1 September 1996.¹⁷¹ The comparators accordingly had about 9 years' longer service than the complainants.¹⁷²

The complainants' and comparators' respective 'comparatios' were important.¹⁷³ The employer presented evidence to the effect that it aimed to pay good performers at the 75th percentile of what was being paid in the market. The 75th percentile was generally taken as the employer's midpoint for that particular grade or job size, and this is what was referred to as the 'comparatio' of 1.00. Salaries varied consistently around the mid-point (or comparatio) to 20% above and below the mid-point. In order to be paid above the 1.00 comparatio, an employee had to be an excellent performer.¹⁷⁴

The employer explained the employment history of each of the comparators and the complainants. For example, by April 1990, both Tellis and Wyer were at a comparatio of about 0.93.¹⁷⁵ In October 1990, the Training Institute was relocated and Tellis and Wyer received a monthly increment of R200 each to compensate them for additional travelling expenses.¹⁷⁶ This increase took Tellis to a comparatio of 0.97 and Wyer to a comparatio of 0.95.¹⁷⁷

¹⁶⁹ *Ibid* at par 25.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid* at par 45.

¹⁷³ *Ibid* at par 26.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid* at par 46.

¹⁷⁶ *Ibid* at par 47. Two colleagues, Du Plessis, a white male, and Mashazi, a black male, received a R200 and R300 increment respectively at the time.

¹⁷⁷ *Ibid.*

In February 1992, the comparators' jobs were re-graded to the higher grade G and their job titles were changed to 'training officers'.¹⁷⁸ As a result, Tellis' comparator increased to 1.17 and Wyer's to of 1.16 (relative to the grade G midpoint).¹⁷⁹

As regards the complainants, the evidence showed that Radebe was promoted to a training officer with effect from 1 April 1996 at an annual salary of R111,500, which computed to a 1.00 comparator.¹⁸⁰ With effect from 1 September 1996, Boekhouer was on a comparator of 0.89, but it rose swiftly to 1.00 and at the time of the judgment, it exceeded that of Radebe.¹⁸¹ Ntai was appointed as a training officer with effect from 1 July 1998 on a comparator of 0.95 and his comparator had remained fairly constant.¹⁸² The comparators of the comparators had declined over time and at the time of the judgement, Wyer's comparator was 1.13 (as opposed to 1.17 in 1996). The comparators' comparators were deliberately managed downwards and SAB testified that the ideal for them was to be at about 1.08.¹⁸³

Considering this employment history, the Labour Court was satisfied that the comparators' high comparators were not caused by or based on race.¹⁸⁴ In addition, there were performance-related increases over time.¹⁸⁵ In this regard, the employer testified that it did not want to risk losing the services of the comparators as they constituted 'important intellectual capital' and their skills were needed.¹⁸⁶ The comparators accordingly continued to receive performance-related increases. Another factor was the need to retain the comparators' skills. Accordingly, although the employer recognised that the comparators of the comparators had to be managed downward, it could not do this overnight as this would have created the risk that

¹⁷⁸ *Ibid* at par 48.

¹⁷⁹ Mashazi's comparator also increased significantly as a result of the re-grading from 0.92 to 1.12.

¹⁸⁰ At the time, Wyer was at a 1.17 comparator and Tellis at a 1.16 comparator. A 17% differential accordingly existed between Radebe and the comparators at this stage.

¹⁸¹ *Ibid* at par 34.

¹⁸² *Ibid* at par 35.

¹⁸³ *Ibid* at par 37.

¹⁸⁴ *Ibid* at par 53. The court also noted that there were white training officers that were paid less than the complainants. In fact, the three lowest paid training officers were white and were remunerated well below the relevant mid-point.

¹⁸⁵ *Ibid* at par 51.

¹⁸⁶ *Ibid* at par 60.

they would resign.¹⁸⁷ In the circumstances, the court held that length of service, relative performance and employment history explained the differences in pay, and the complainants' unfair discrimination claim was dismissed.¹⁸⁸

Performance

Many employers seek to explain differences in treatment on the basis of performance. In terms of the Employment Equity Regulations this is permissible as long as the employees are equally subject to the employer's performance evaluation system and that the performance evaluation system is consistently applied.¹⁸⁹ The same applies in Canada. In terms of the Canadian Equal Wages Guidelines¹⁹⁰ a difference in pay may be justified by different performance ratings where the employees are subject to a 'formal system of performance appraisal that has been brought to their attention'.

A point of caution is needed: while employers might think that they are rewarding their high performers at a higher level, as can be seen from the graph below, there may not in fact be any correlation between performance and pay.¹⁹¹

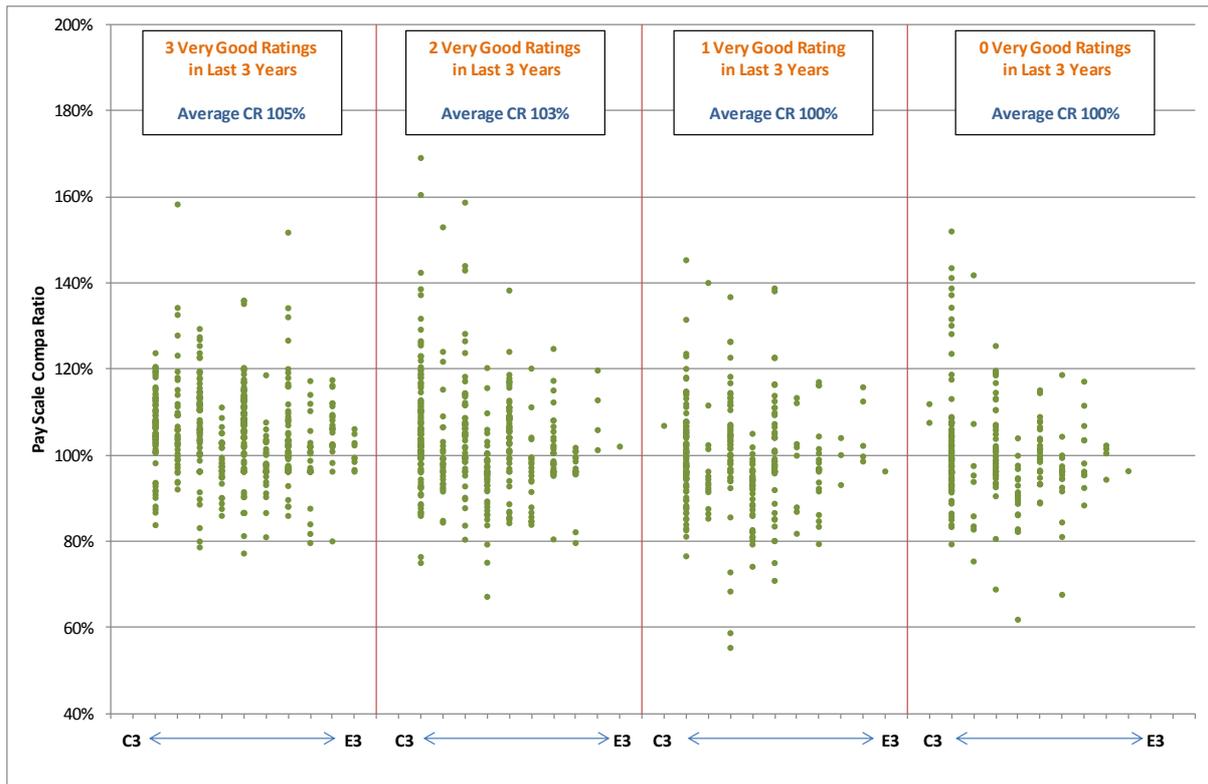
¹⁸⁷ *Ibid.* In relation to the employer's efforts in managing the comparators' salaries downward, the court noted that this was not done as a justification for a discriminatory practice, but merely as justification for addressing an anomaly in pay.

¹⁸⁸ *Ibid* at par 64 and 90.

¹⁸⁹ Regulation 7(1)(c) of the Employment Equity Regulations, 2014.

¹⁹⁰ Par 16(a) of the Canadian Equal Wages Guidelines, 1986.

¹⁹¹ The graph reflects the results of an audit by The HayGroup® of the payrolls of one of its clients in 2014.



Thus, so-called high performers and poor performers earn virtually the same. This might be attributed to the tendency of managers to moderate performance ratings and not to provide honest and accurate feedback to employees who are, in fact, not making the grade.

Employers who wish to rely on performance as justification for differences in pay must therefore ensure that proper performance appraisal processes are in place and that their managers appropriately rate their subordinates.

Red-circling

The Employment Equity Regulations recognise 'red-circling' as a justification for differences in treatment. This occurs, for example, where an employee is demoted as a result of organisational restructuring, or for any other legitimate reason,¹⁹² without

¹⁹² As expressly provided in par 16(e) of the Canadian Equal Wages Guidelines, 1986 such 'other legitimate reason' could potentially be a demotion procedure where the employer reassigns the employee to a lower level job without decreasing her/his pay, due to unsatisfactory work performance caused by factors beyond the employee's control, such as the employee's impaired health or partial disability.

a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level.

Red-circling is not, however, an absolute defence. In the UK case of *Snoxell v Vauxhall Motors*¹⁹³ the employer had a separate salary scale for men and women before the enactment of the Equal Pay Act.¹⁹⁴ These discriminatory pay scales were abolished and the scales were integrated whereafter all newly hired women and men were then engaged on the same scales. However, the men who previously received pay on the separate, higher scale, were 'red-circled' to protect their pay. Because the employer had no plan to phase out the red-circling over time, the Employment Appeal Tribunal held that this constituted a discriminatory practice. In particular, it was held that past discrimination will not be a defence to an equal pay claim.¹⁹⁵ The complainant was accordingly entitled to equal pay.

Shortage of relevant skill / market value

The Employment Equity Regulations expressly recognise 'the existence of a shortage of relevant skill, or the market value in a particular job classification' as a factor that would justify a difference in terms and conditions of employment.¹⁹⁶ This must, however, be approached with caution because 'the market' could often itself operate in a discriminatory manner.¹⁹⁷ Nevertheless, there is authority for reliance on skill shortage and market forces to justify differences in pay. In *Enderby v Frenchay Health Authority*¹⁹⁸ the European Court of Justice held that 'the state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground'. In *Rainey v Greater Glasgow Health Board*¹⁹⁹ it was accepted that market forces could justify a difference in pay, but only for so long as these market forces persisted.

¹⁹³ [1977] IRLR 123.

¹⁹⁴ The Equal Pay Act 1970 was subsequently repealed and replaced by the UK Equality Act, 2010.

¹⁹⁵ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p416.

¹⁹⁶ Regulation 7(1)(f) of The Employment Equity Regulations, 2014. See also Landman AA, *The Anatomy of Disputes about Equal Pay for Equal Work*, South African Mercantile Law Journal 352 (2002).

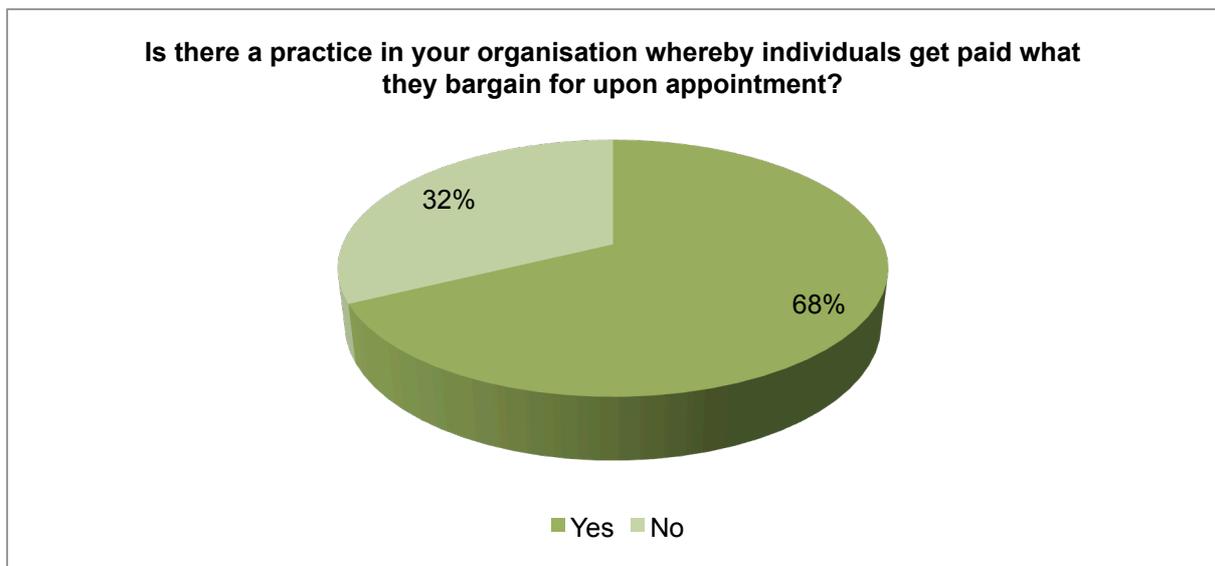
¹⁹⁷ Palmer C, Moon G & Cox S, *Discrimination At Work – The Law on Sex, Race and Disability Discrimination*, 3rd Ed, Legal Action Group 1997, at p406-407.

¹⁹⁸ [1993] IRLR 591 (ECJ).

¹⁹⁹ [1987] IRLR 26, HL.

Comparative bargaining power on the other hand would not suffice as a defence and it was in fact held in the UK case of *Clay Cross (Quarry Services) Limited v Fletcher*²⁰⁰ that an employer is not permitted to pay a comparator more on the basis that 'he bargained for more' than the complainant 'who was prepared to come for less'.

From the graph below, it appears that paying employees what they bargain for is a fairly common practice in South Africa at present.²⁰¹



An arbitrary ground

Section 6(4) refers to the 'grounds listed in subsection (1)'.²⁰² Curiously, it does not include the phrase 'or any other arbitrary ground'. One possibility is that the scope of section 6(4) was intentionally limited to the listed grounds and accordingly, that complainants would be precluded from bringing equal treatment claims under section 6(4) where the ground complained about is 'an arbitrary ground'. The more likely scenario is, however, that the courts would permit such claims, particularly because a) section 6(1) was expressly amended to include 'any other arbitrary ground'; and b) section 11 prescribes the burden of proof where differentiation is alleged on a listed ground and 'an arbitrary ground' respectively.

²⁰⁰ *Clay Cross (Quarry Services) Limited v Fletcher* [1978] 1 WLR 1429.

²⁰¹ This graph reflects responses from 70 clients who attended a seminar on Equal Pay which were presented jointly by Bowman Gilfillan Inc and The HayGroup® in about October 2014.

²⁰² This is a reference of s. 6(1) of the Employment Equity Act, 1998.

In terms of section 11, if unfair discrimination is alleged on a listed ground, the employer must prove, on a balance of probabilities, that such discrimination did not take place as alleged, or that such discrimination is rational and not unfair, or is otherwise justifiable.²⁰³ It is arguably not sufficient for a complainant to merely 'allege' unfair discrimination on a listed ground and it is submitted that the complainant would need to establish, at least on a *prima facie* basis, that the ground complained about caused the difference in pay.²⁰⁴

If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that (a) the conduct complained of is not rational;²⁰⁵ (b) the conduct complained of amounts to discrimination; and (c) the discrimination is unfair.²⁰⁶ This distinction in the onus is largely in accordance with the test formulated in *Harksen v Lane NO & Others*.²⁰⁷ In considering what would need to be proved where discrimination on 'an arbitrary ground' is alleged, the elements set out in *Harksen* (and the cases that followed it) would therefore need to be complied with. Thus, in proving that the differentiation amounted to 'discrimination'²⁰⁸ the complainant would need to prove that the ground complained about is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.²⁰⁹ If this is established, the complainant would in addition need to prove that the discrimination is unfair.²¹⁰ This part of the inquiry focuses mainly on the impact of the discrimination on the complainant and others in her/his situation.²¹¹

²⁰³ S. 11(1) of the Employment Equity Act.

²⁰⁴ *Ntai v South African Breweries Limited* (2001) 22 ILJ 214 (LC) at par 11 and the cases cited there. See also *Louw v Golden Arrow Bus Services* [2000] 3 BLLR 311 (LC) at par 26.

²⁰⁵ The complainant would therefore need to prove that the basis for the discrimination is indeed arbitrary, and thus irrational/baseless.

²⁰⁶ S. 11(2) of the Employment Equity Act.

²⁰⁷ 1998 (1) SA 300 (CC).

²⁰⁸ See s. 11(2)(b) of the Employment Equity Act.

²⁰⁹ *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) at par 53.

²¹⁰ *Ibid.*

²¹¹ *Louw v Golden Arrow Bus Services* [2000] 3 BLLR 311 (LC) at par 19.

If one assumes that the use of the word “and” at the end of section 11(2)(b) requires a complainant to prove all three elements contained in section 11(2),²¹² this would mean that a complainant relying on ‘an arbitrary ground’ would need to identify the ground/basis upon which the employer allegedly unfairly discriminates. This is in line with the manner in which the South African Labour Court considered alleged unfair discrimination on ‘an arbitrary ground’ under item 2(1)(a) of Schedule 7 of the Labour Relations Act.²¹³ For example, in *Ntai v South African Breweries Limited*²¹⁴ the court observed as follows:

[72] The applicants, in alleging ‘arbitrary’ discrimination, failed to identify the specific (unlisted) ground upon which they alleged that they have been discriminated against. In the event, the applicants failed to cross the very first hurdle to establish discrimination on an unlisted ground. In other words, in the absence of an identified unlisted ground it is impossible to determine whether the ground that is relied upon is comparable to the listed grounds (such as race) in that it is based upon ‘characteristics which have the potential to impair the fundamental human dignity of the applicants as human beings’. In the result, the applicants have also failed to show (in terms of their burden of proof) that the differentiation in pay in casu amounted to ‘discrimination’ in terms of the provisions of item 2(1)(a) of schedule 7 to the LRA on an unlisted ground.

[73] Litigants who bring discrimination cases to the Labour Court and simply allege that there was ‘discrimination’ on some or other ‘arbitrary ground’, without identifying such ground, would be well advised to take note that the mere ‘arbitrary’ actions of an employer do not, as such, amount to ‘discrimination’ within the accepted legal definition of the concept.

²¹² S. 11(2) requires that the complainant must prove that the discrimination (a) is not rational, (b) amounts to discrimination, and (c) the discrimination is unfair.

²¹³ It will be recalled that the prohibition on unfair discrimination was included in item 2(1)(a) of Schedule 7 to the Labour Relations Act, 1995. When the Employment Equity Act, 1995 was enacted, section 6(1) did not include the phrase ‘an arbitrary ground’. The Employment Equity Amendment Act, 2014 did, however, now introduce this concept again.

²¹⁴ (2001) 22 ILJ 214 (LC).

In *NUMSA v Gabriels (Pty) Limited*²¹⁵ the court confirmed that a complainant must clearly identify the ground relied upon and illustrate that it shares the common trend of listed grounds, namely that 'it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparably serious manner'.²¹⁶

Is it accordingly a defence to an employer to state that there is no reason or basis for the difference in treatment between the complainant and the comparator; there is no ground for differentiation, it just happened? This seems to be the case given the interpretation in *Ntai* and *Gabriels* referred to above.

In order to be successful with a claim on the basis that no reason for the differentiation existed, section 11(2) would need to be interpreted to mean that if the complainant proved (or the employer admitted) that there is no reason for the discrimination, the enquiry would stop there. In such circumstances, the complainant would not be required to prove the additional elements, namely that the conduct complained about amounted to 'discrimination' and that such discrimination was 'unfair'; and the employer would not be permitted to seek to justify the difference in treatment. This would be in line with the case of *Kadiaka v Amalgamated Beverage Industries*²¹⁷ in which the Labour Court held that 'unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless'. This argument was, however, rejected in *NUMSA v Gabriels (Pty) Limited*,²¹⁸ where the complainants alleged that the employer's practice was to 'sporadically and arbitrarily' grant certain foremen increases and that the complainants were paid less 'because of the arbitrary capricious and irrational actions/practices of the respondent'. Because the complainants could not point to a particular ground for the difference in treatment, their case was dismissed. Of course, this case was determined under section 6(1) of the Employment Equity Act

²¹⁵ (2002) 23 ILJ 2088 (LC). This was a case determined under s. 6(1) of the Employment Equity Act, 1995, which, at the time, did not contain the phrase 'any other arbitrary ground'.

²¹⁶ *NUMSA v Gabriels (Pty) Limited* (2002) 23 ILJ 2088 (LC) at par 19.

²¹⁷ (1999) 20 ILJ 373 (LC).

²¹⁸ *Ibid* at par 21.

which, at the time, did not contain the phrase ‘any other arbitrary ground’. It therefore remains to be seen how our courts would deal with this issue in the future.

4.5 Remedies

Where the complainant is successful with an unfair discrimination claim, the Labour Court may make ‘any appropriate order that is just and equitable in the circumstances’.²¹⁹ This includes, for example, payment of damages²²⁰ by the employer to the employee, payment of compensation²²¹ by the employer to the employee, an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees, and publication of the court’s order.

In equal pay cases, the likely remedy that would be awarded is to order the employer to increase the complainant’s pay to the level enjoyed by the comparator. Our courts have not yet considered whether a reduction in the terms and conditions of the comparator would be ‘an appropriate order that is just and equitable in the circumstances’. Arguably, a reduction in terms and conditions would not be ‘an appropriate order’ because of the impact this might have on the comparator who, generally speaking, would have been an innocent third party apropos the discrimination perpetrated against the complainant. The Canadian Human Rights Act²²² expressly provides that an employer may not reduce wages in order to eliminate a discriminatory pay practice.²²³

5. Pressing questions in the South African context

²¹⁹ Section 50(2) of the Employment Equity Act. See also JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at pp12-18-12-40.

²²⁰ S.50(2)(b) of the Employment Equity Act. ‘Damages’ are generally awarded in respect of patrimonial losses suffered as a result of the unfair discrimination, such as, for example past and future earnings, the value of benefits lost and other quantifiable loss, such as out-of-pocket expenses and past and future medical expenses. See JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at p12-22.

²²¹ S. 50(2)(a) of the Employment Equity Act. ‘Compensation’ refers to a *solatium* which is generally awarded in respect of the infringement of the right to human dignity. See JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at pp12-18-12-32.

²²² R.S.C., 1985, c. H-6.

²²³ S. 11(6) of the Canadian Human Rights Act R.S.C., 1985, c. H-6.

Regulation 7 of the Employment Equity Regulations permits an employer to rely on 'any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Employment Equity Act' in justifying unequal pay between a complainant and a comparator. In considering what would pass muster as justification, the European Court of Justice, in *Bilka-Kaufhaus GmbH v Weber von Hartz*²²⁴ held that such factors should correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objectives pursued, and must be necessary to that end. The defence must therefore a) be based on an objective factor on economic grounds; and b) must be proportionate, i.e. must be necessary to achieve the particular objective.²²⁵ We consider below a number of potential factors that are not listed in Regulation 7 but that could arguably justify unequal treatment.

5.1 *Unequal treatment as an affirmative action measure*

Section 6(2) of the Employment Equity Act provides that it is not unfair discrimination 'to take affirmative action measures consistent with the purpose of the Act'. 'Affirmative action measures' are measures designed to ensure that suitably qualified people²²⁶ from designated groups²²⁷ have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.²²⁸

In the context of the equal pay debate, the question is whether an employer may rely on affirmative action in order to justify paying higher salaries to black or female

²²⁴ [1987] ICR 110 as cited by Cohen T, *Justifiable Discrimination – Time to Set Parameters*, SA Mercantile Law Journal, Vol 12 (2000), p 261.

²²⁵ *Ibid.*

²²⁶ In terms of s.20(3) of the Employment Equity Act, a person may be suitably qualified for a job as a result of any one or, or a combination of that person's formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job.

²²⁷ S.1 of the Employment Equity Act defines the 'designated groups' as black people, women and people with disabilities who (a) are citizens of the Republic of South Africa by birth or decent; or (b) became citizens of the Republic of South Africa by naturalization (i) before 27 April 1994; or (ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date but who were precluded by apartheid policies.

²²⁸ S. 15(1) of the Employment Equity Act. A 'designated employer' is defined in s.1 of the Employment Equity Act. In terms of s.14 of the Employment Equity Act, employers who are not 'designated employers' may voluntarily comply with the provisions of Chapter III, which are the provisions regulating affirmative action.

employees. Accordingly, may an employer attract or retain employees from designated groups by paying them higher salaries and use this as a defence in an equal pay dispute?

Du Toit & Potgieter²²⁹ point out that in order to rely on affirmative action as a defence in an unfair discrimination claim, it must be shown, in the first instance, that the measure is consistent with the purpose of the Employment Equity Act. Section 2(b) of the Act states that the purpose of the Act is to 'achieve equity in the workplace' by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their 'equitable representation' in all occupational levels in the workforce.²³⁰ Similarly, section 15(1) of the Act defines affirmative action measures as measures designed to ensure that suitably qualified people from designated groups have 'equal employment opportunities' and 'are equitably represented' in the workforce of a designated employer. In achieving 'equitable representation' the employer must take measures to 'retain and develop people from designated groups' and to implement appropriate training measures.²³¹

A valid affirmative action measure is furthermore one that is 'designed' to ensure that employees from 'designated groups' have equal employment opportunities and are equitably represented in all occupational levels. The beneficiaries of affirmative action measures are accordingly 'people from designated groups'.

In order for a measure to be 'designed' means that the measure must be rational, i.e. it must 'make sense', and it may not be random, haphazard or *ad hoc*.²³² There must, accordingly, be a rational connection between the measure and the purpose (of achieving equitable representation); and the measure must as far as possible be taken

²²⁹ Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace*, First Ed, Juta, 2014, at p84.

²³⁰ *Ibid.*

²³¹ S.15(2)(d) of the Employment Equity Act.

²³² Du Toit D & Potgieter M, *Unfair Discrimination in the Workplace*, First Ed, Juta, 2014, at p86. JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at p9-19-9-25. See also *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (CC) at par 41.

in accordance with and as part of an employment equity plan.²³³ In terms of section 17 of the Employment Equity Act, designated employers must develop employment equity plans in 'consultation' with its employees.²³⁴ If the employer fails to consult meaningfully with representatives of all employees, there will have been no proper consultation in compliance with the Act.²³⁵ In addition to being rational, the measure must be proportionate to the achievement of the purpose – the measure should accordingly not go further than what is required to achieve the purpose.²³⁶

Higher pay or better terms and conditions of employment to blacks, women or people with disabilities could potentially be a measure to attract and retain employees from these categories, and it is therefore conceivable that this could support the purpose of ensuring equitable representation of people from designated groups in the workforce of a designated employer.

In theory at least, such a measure could be regarded as an affirmative action measure as defined in the Employment Equity Act. In order to rely on affirmative action in this context, an employer would, however, have to prove a) that the purpose of the measure is to ensure equitable representation; b) that this measure is rational and forms part of an employment equity plan that was properly consulted on with representatives of its entire workforce; c) that it is not applied in a haphazard, random or *ad hoc* manner and d) that it is proportionate vis-à-vis the purpose. In this regard, it would be advisable to clearly set out the circumstances in which and the positions for which this form of affirmative action measure may be

²³³ *Ibid.* See also *Gordon v Department of Health 2009* (1) BCLR 44 (SCA); *Munsamy v Minister of Safety & Security and Another* [2013] 6 BLLR 695 (LC); *Mgolozele v Gauteng Department of Finance and Another* [2015] 3 BLLR 308 (LC) where the Labour Court held that apart from the fact that the Department did not have 'a coherent, rational or defensible policy, programme or practice (let alone an employment equity plan), it also did not have a system or monitoring mechanism in place to track the level of gender representation on a regular basis as contemplated in the Employment Equity Act'. The Department's affirmative action measures, however well-intentioned they might have appeared to be, accordingly did not comply with the requirements of the Constitution and the Employment Equity Act and were impermissible. In fact, these measures were applied in an *ad hoc*, haphazard, arbitrary and random manner and they could therefore not be relied upon as a valid and lawful basis for the refusal to confirm the applicant's appointment.

²³⁴ In terms of section 16 of the Employment Equity Act, the employer must take reasonable steps to consult with all designated and non-designated groups on the preparation and implementation of the employment equity plan.

²³⁵ *Munsamy v Minister of Safety & Security and Another* [2013] 6 BLLR 695 (LC) at par 25.

²³⁶ JL Pretorius, ME Klinck & CG Ngwenya, *Employment Equity Law*, LexisNexis Service Issue 14, August 2014, at pp9-26-9-38. See also *Naidoo v Minister of Safety and Security & Another* [2013] 5 BLLR 490 (LC).

considered. In addition, a designated employer wishing to implement such measures would be well-advised to place specific time limits on their application in order to ensure proportionality, i.e. that the measure is only put in place for so long as it is indeed required to achieve the purpose.

5.2 *Expatriate employees*

Many employers in South Africa make use of expatriate employees, i.e. foreigners who work in South Africa for a limited time period and who bring with them much-required skills. Expatriate employees are often paid significantly higher salaries than their South African counter-parts, and often enjoy extraordinary benefits, such as payment of furnished accommodation, security services, electricity, private school fees for their children and car rental or the provision of a driver.²³⁷ Employers justify expat benefits *inter alia* on the basis that the expatriate employees are uprooted from their country of origin and the enhanced package is thus to compensate them and their families for the difficulties that they may encounter in adjusting to a new environment. In addition, expat benefits are often designed to ensure that the expatriate employee is not out of pocket as a result of working in another country. Cost of living indexes are therefore often used in order to adjust the expatriate employee's salary level; and employers often assist with the costs of relocation.

The question is whether local South Africans could demand equal treatment *vis-à-vis* the expatriate employees performing the same work or work of equal value.

Section 6(1) of the Employment Equity Act prohibits unfair discrimination on the basis of 'ethnic or social origin' and 'birth'. Equal pay claims between local South African employees performing the same or substantially the same work, or work of equal value, to the work performed by an expatriate employee employed by the same employer are accordingly conceivable. The need to attract key skills to our

²³⁷ According to The HayGroup, additional benefits include, for example, assistance with visas and work permits, home trips, spousal allowances, medical insurance, cultural training and language lessons.

economy together with providing an incentive to foreign workers to come and work in our country would probably suffice as justification for the unequal treatment.

We caution, however, that this would only apply for as long as the justification in fact exists. Accordingly, as soon as the expatriate employee commences a localisation process and is, for example, awarded permanent resident status in South Africa, the rationale for the difference in terms and conditions would fall away and the risk of unfair discrimination claims would increase. Employers who permit their expatriate employees to remain in South Africa to the point where they 'put down their roots' here and become permanent residents or citizens would thus be well-advised to put in place transition plans in order to ensure that those employees move across to the terms and conditions applicable to their local South African counter-parts.

5.3 *Collective agreements and discrimination in pay*

May an employer rely on collective agreements to explain differences in terms and conditions of employment between employees?

In *Jansen van Vuuren v South African Airways (Pty) Limited*,²³⁸ a case concerning alleged age discrimination, the court held that an employer may not rely on a collective agreement to justify unfair discrimination.²³⁹ In this case, the terms of the collective agreement contained discriminatory provisions. For example, simply because of their age, Van Vuuren and his colleagues over the age of 60 were treated as subordinates of those over whom they had previously had command. This detrimentally affected their dignity, sense of self-worth and morale.²⁴⁰ The fact that these conditions were contained in a collective agreement was no justification. With

²³⁸ [2013] 10 BLLR 1004 (LC).

²³⁹ The relevant collective agreement provided, *inter alia*, that pilots over the age of 60 would henceforth be remunerated at level SC20, which was significantly lower than the level the applicant was employed on at the time; they would receive general increases but not notch increases; pilots over the age of 57 would not be permitted to have a coastal base; on reaching the age of 60, all pilots would have the option of being paid in respect of a maximum of 90 days' accumulated leave provided the pilot gave 6 months' notice to this effect; accumulated leave would be paid out at the salary scale at the time. However, any leave paid out after the age of 60 would be paid at the SC20 salary scale.

²⁴⁰ *Jansen Van Vuuren v South African Airways (Pty) Limited* [2013] 10 BLLR 1004 (LC) at par 28.

reference to *Barkhuizen v Napier*,²⁴¹ the court held that a contractual term that violated the Constitution was, by definition, contrary to public policy and therefore unenforceable.²⁴² This was upheld on appeal.²⁴³

Another case that concerned the terms of a collective agreement was *Co-operative Worker Association & Another v Petroleum Oil & Gas Co-operative of SA & Others*.²⁴⁴ Here, the first respondent, Petrol SA, was formed as a result of the merger of a number of organisations.²⁴⁵ Following the merger, Petrol SA and various unions representing employees of the merged entity engaged in negotiations to consolidate and standardise terms and conditions of employment, which ultimately culminated in a collective agreement.²⁴⁶ One of the terms of the collective agreement was that the actual cost of the employees' medical aid subsidies (which were previously paid directly to the relevant medical aid schemes) would henceforth be included in the employees' total guaranteed remuneration. The employees could then choose how they wished to use that portion of their remuneration.²⁴⁷ The consequence of this term of the collective agreement was that those employees with dependent spouses and children benefited significantly more than employees without dependents. This was because an employee's total guaranteed remuneration formed the basis for calculating other terms and conditions, such as car benefits, retirement funding and group life assurance.²⁴⁸ The second applicant accordingly complained that employees doing the same work were differentiated purely on the basis of their family responsibilities, or more precisely, the absence thereof.²⁴⁹

The Labour Court held that the terms of the collective agreement did not amount to unfair discrimination. In reaching this conclusion the Court held, *inter alia*, that employees without family responsibilities were not entitled to protection under

²⁴¹ 2007 (5) SA 323 (CC).

²⁴² *Jansen van Vuuren v South African Airways (Pty) Limited* [2013] 10 BLLR 1004 (LC) at par 51.

²⁴³ *South African Airways (Pty) Limited v GJJVV* [2014] 8 BLLR 748 (LAC).

²⁴⁴ [2007] 1 BLLR 55 (LC).

²⁴⁵ The organisations were Petrol Chemical Enterprises, Mosgas, Soekor and Strategic Fuel Farms.

²⁴⁶ *Co-operative Worker Association & Another v Petroleum Oil & Gas Co-operative of SA & Others* [2007] 1 BLLR 55 (LC) at par 6.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid* at par 7. One of the merging parties, Mosgas, contributed, for example, R888 per principal member to the medical aid scheme concerned, as well as R658 per spouse and R318 per dependent child.

²⁴⁹ *Ibid* at par 8.

section 6(1) of the Employment Equity Act.²⁵⁰ Only employees with family responsibilities can claim protection. The applicants' complaint that the difference in the additional components to the basic remuneration impaired the dignity of their members was accordingly not correct.²⁵¹ Similarly, the court held that the contention that employees without family responsibility were worse off after the merger, was not correct – the employees with family responsibilities retained their total guaranteed remuneration, and so did the employees without family responsibilities. The only difference now was that it took a different form:²⁵² prior to the merger the medical aid contributions were paid to the relevant medical aid providers; and after conclusion of the collective agreement, the same amounts were now in the hands of the employees to apply as they saw fit.

This case has caused some controversy, particularly because the difference in treatment was not limited to medical aid contributions, which differed amongst the employees with reference to the number of dependents. The erstwhile subsidy towards medical aid contributions now also became a relevant factor when unrelated benefits, such as car allowances and retirement funding contributions were determined, ostensibly all in the name of family responsibility. The result reached in this case may therefore very well be revisited by our courts in due course.

As is clear from the above cases, where a collective agreement contains discriminatory provisions, it would not be a defence to an equal pay claim. But what if there are two collective agreements in place, each regulating the terms and conditions of a particular group of employees, with the result that employees across these groups are treated differently even though they are performing the same work or work of equal value? In this case, the collective agreements themselves do not introduce discriminatory terms; rather the disparity occurs a result of separate bargaining processes. Our courts have not yet considered such a scenario. However,

²⁵⁰ *Ibid* at par 36. In this regard, the court held, inter alia, at par 42, that the family is subject to the pressures of modern life and the struggle for resources, and consequently, internationally, workers with family responsibilities are regarded as a vulnerable category of people deserving special protection.

²⁵¹ *Ibid* at par 52.

²⁵² *Ibid* at par 54.

in *Enderby v Frenchay Health Authority*,²⁵³ the European Court of Justice considered a sex discrimination claim where the issue of separate collective bargaining structures arose. In this case, Dr Pamela Enderby was employed as a speech therapist by the Frenchay Health Authority. She contended that she was treated less favourably than the principal clinical psychologist and the Grade III principal pharmacist, which jobs were of equal value to hers.²⁵⁴ Both the Industrial Tribunal and the Employment Appeal Tribunal dismissed her claim because the differences in pay were the result of structures specific to each profession and in particular, the separate collective bargaining arrangements, which were not discriminatory.²⁵⁵ The Court of Appeal referred the matter to the European Court of Justice and requested the ECJ, *inter alia*, to determine whether the employer may rely on different collective bargaining processes (which, considered separately, do not discriminate) in justifying differences in treatment between men and women performing work of equal value.²⁵⁶ On this point, the European Court of Justice held as follows:

21. As is clear from Article 4 of Council Directive 75/117/EEC of 10 February 1975 ... collective agreements, like laws, regulations or administrative provisions, must observe the principle enshrined in Article 119 of the Treaty.

[22] The fact that the rates of pay at issue are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not preclude a finding of prima facie discrimination where the results of those processes show that two groups with the same employer and the same trade union are treated differently. If the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as justification for the difference in pay, he could ... easily circumvent the principle of equal pay by using separate bargaining processes.

²⁵³ [1993] IRLR 591 (ECJ).

²⁵⁴ *Enderby v Frenchay Health Authority* [1993] IRLR 591 (ECJ) at par 3.

²⁵⁵ *Ibid* at par 4.

²⁵⁶ *Ibid* at par 5.

[23] Accordingly, the answer ... is that the fact that the respective rates of pay of two jobs of equal value, one carried out exclusively by women and the other predominantly by men, were arrived at by collective bargaining processes, which, although carried out by the same parties, are distinct, and, taken separately, have in themselves no discriminatory effect, is not sufficient justification for the difference in pay between those two jobs.

In his article 'The Anatomy of Disputes About Equal Pay for Equal Work', Landman²⁵⁷ points out that in the *Dansk Industri* case, the converse was held and that rates of pay determined by collective bargaining may in fact be taken into account as a factor in the assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to unfair discrimination. It therefore remains to be seen how our courts would approach this issue.

5.4 *Acquiring a business as a going concern*

Section 197 of the Labour Relations Act²⁵⁸ regulates the employment consequences of a transfer of a business as a going concern. In essence, the new employer steps into the shoes of the old employer in respect of all contracts of employment between the old employer and the transferring employees, and the new employer is required to employ the transferring employees on the same terms, or at least terms and conditions of employment that are 'on the whole not less favourable' to what the employees enjoyed at the old employer.²⁵⁹ It often happens that an acquirer of a business inherits terms and conditions of employment that are not aligned with the terms and conditions enjoyed by its own workforce. Would this be a defence to an equal treatment claim?

²⁵⁷ Landman AA, *The Anatomy of Disputes about Equal Pay for Equal Work*, South African Mercantile Law Journal 351 (2002).

²⁵⁸ Act 66 of 1995. The corresponding legislation in the United Kingdom is the Transfer of Undertakings (Protection of Employment) Regulations, 2006, and on the European continent, the Acquired Rights Directive 77/187/ECC of 14 February 1977.

²⁵⁹ S. 197(3)(a) of the Labour Relations Act. In terms of s.197(3)(b), where the transferring employees' terms and conditions of employment are regulated by a collective agreement, the new employer is required to honour the terms of the collective agreement as they are and the new employer is not, in these circumstances, entitled to employ the employees on terms that are 'on the whole not less favourable'.

In the UK case of *Skills Development Scotland Co Ltd v Buchanan & Another*²⁶⁰ the Employment Appeal Tribunal held that an employer's compliance with the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) to preserve existing contractual terms and conditions that resulted in a disparity in pay could constitute a genuine material factor that may provide a defence to an equal pay claim. In this case, the two female complainants²⁶¹ and their comparator, Mr John Sweeny, came to be employed by the same employer, Scottish Enterprise, in April 2002. They had each been employed by different employers prior to that and their transfer to Scottish Enterprise was in accordance with TUPE. These contracts were subsequently transferred to Skills Development Scotland, again subject to TUPE.²⁶² The complainants and the comparator were employed as customer service managers, and it was agreed that their jobs were of equal value for purposes of the Equal Pay Act.²⁶³

On the transfer to Scottish Enterprise in April 2002, Ms Buchanan's salary was £33,983 and Ms Holland's salary was £32,864 per annum. They received a 4% increase on 1 April 2003. In April 2002, Mr Sweeny's salary was £42,760 per annum. Mr Sweeny's contract of employment that transferred with him provided that he was entitled to pay increases to £45,721 on 1 January 2003 and to £47,398 on 1 August 2003 (which he received), and from 2004, his salary was reviewed on an annual basis.²⁶⁴ From 1 July 2004, the complainants and the comparator received routine, across the board annual increases. The pay gap remained broadly of the order of £10,000-£12,000 per annum. When the claim was presented on 10 September 2008, Ms Buchanan earned £42,612, Ms Holland earned £42,407 and Mr Sweeny earned £54,943 per annum.²⁶⁵

The matter first came before the Employment Tribunal which held that the employer should have taken steps to have rectified the pay disparity by 'red

²⁶⁰ EATS/0042/10. This case was determined under the UK Equal Pay Act, 1970.

²⁶¹ Ms Mairi Buchanan and Ms Patricia Holland.

²⁶² *Skills Development Scotland Co Ltd v Buchanan & Another* EATS/0042/10 at par 4.

²⁶³ The UK Equal Pay Act, 1970 was subsequently repealed and replaced by the UK Equality Act, 2010.

²⁶⁴ *Skills Development Scotland Co Ltd v Buchanan & Another* EATS/0042/10 at par 5.

²⁶⁵ *Ibid* at par 6.

circling'/'freezing' Mr Sweeny's salary. The Tribunal accordingly did not regard the fact that the disparity had its source in an initial TUPE transfer sufficient so as to constitute a defence to the complainants' equal pay claim.²⁶⁶

The Employment Appeal Tribunal (EAT) disagreed. It held, *inter alia*, that there was no evidence that the pay disparity was because of the complainants' sex, or that it was 'tainted by sex'.²⁶⁷ With reference to *Strathclyde Regional Council v Wallace & others*²⁶⁸ and *Glasgow City Council v Marshall*²⁶⁹ the EAT held an employer must prove a) that the reason for the disparity is genuine, and not a sham or pretence; b) that the disparity is caused by this reason; c) that the reason is not the difference in sex; and d) that the reason relied upon is a material difference, i.e. a significant and relevant difference, between the complainant's case and the comparator's case.²⁷⁰ In this case, the employer had made out a case that the difference in pay was not caused by sex, but by the two TUPE transfers.²⁷¹ The EAT held that even though the employer did not give any thought to whether Mr Sweeny's salary could have been frozen and more could have been done to close the gap, this was not sufficient to break the causal chain - TUPE was and remained the cause of the pay disparity,²⁷² and the mere effluxion of time did not change this.

In light of this decision, even where there is a disparity in pay between employees doing work of equal value, the obligation to preserve existing contractual terms upon a going concern transfer could be sufficient to defend an equal treatment claim. However, then the employer must prove that this was in fact the genuine cause of the disparity; and the employer should be careful to ensure that the pay disparity is not 'tainted by' sex, race or any other prohibited ground and, for example, there is no statistical gender, race or other bias between the higher and lower paid groups.²⁷³

²⁶⁶ The Tribunal accordingly held that the complainants' contracts had to be deemed to include an equality clause, and their terms concerning pay and bonuses had to be modified so as to be no less favourable than the terms in the contract of the comparator.

²⁶⁷ *Skills Development Scotland Co Ltd v Buchanan & Another* EATS/0042/10 at par 16.

²⁶⁸ [1998] IRLR 146.

²⁶⁹ [2000] IRLR 272.

²⁷⁰ *Skills Development Scotland Co Ltd v Buchanan & Another* EATS/0042/10 at par 20-21. See also *Bury Metropolitan Council v Hamilton & Others* [2011] IRLR 358.

²⁷¹ See also *King's College London v Clark* EAT/1049/02.

²⁷² *Skills Development Scotland Co Ltd v Buchanan & Another* EATS/0042/10 at par 39.

²⁷³ *Ibid* at par 43.

6. Obtaining access to information about the comparator's pay

Section 78 of the Basic Conditions of Employment Act²⁷⁴ entitles employees to discuss their terms and conditions of employment with their fellow-employees, their employer or any other person. Clauses in employment contracts to the effect that the employee is prohibited from discussing her/his remuneration or other terms and conditions with fellow-employees are accordingly unenforceable.

Complainants could accordingly obtain information about the salary paid to, or terms and conditions enjoyed by, potential comparators simply by discussing the matter with the comparator. While nothing prohibits the comparator to share this information with the complainant, s/he is not obliged to do so, and where the complainant does not provide it, the complainant's remedy is to obtain the information directly from the employer. In doing so, the complainant may need to rely on the provisions of the Promotion of Access to Information Act.²⁷⁵ Where the employer is a private body,²⁷⁶ in order to obtain access to the information, the complainant must show that the information is required for the exercise or protection of any rights²⁷⁷ and the complainant would need to comply with the procedural requirements set out in the Protection of Access to Information Act.²⁷⁸ The complainant would be entitled to the information if access is not refused in terms of a ground for refusal contemplated in Chapter 4.

Section 63(1) of the Promotion of Access to Information Act provides that a request

²⁷⁴ Act 75 of 1997.

²⁷⁵ Act 2 of 2000.

²⁷⁶ S. 1 defines a 'private body' as (a) a natural person who carries on or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business or profession; and (c) any former or existing juristic body; but excludes a public body. A 'public body' means (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; (b) any other functionary or institution when (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.

²⁷⁷ The right to equal treatment for purposes of s.6 of the Employment Equity Act would probably suffice.

²⁷⁸ Where the employer is a private body, these procedural requirements are set out in Chapter 3 of Part 3 of the Promotion of Access to Information Act. In summary, in terms of s. 53, the complainant would have to make the request for the information in the prescribed form and in terms of s.54 s/he may be required to pay the prescribed fee. Slightly different requirements apply where the employer is a public body.

for access to information must be refused if its disclosure would involve 'the unreasonable disclosure of personal information about a third party'. Section 63(2) expressly provides, however, that information may not be refused insofar as it consists of information concerning the classification, salary scale or remuneration and responsibilities of the position held or services performed by the individual.²⁷⁹ Salary information pertaining to a potential comparator must therefore be disclosed, provided the complainant has complied with the requirements of the Protection of Access to Information Act.

The Protection of Personal Information Act²⁸⁰ will also in due course become relevant to obtaining information about the salary scales and terms and conditions of comparators²⁸¹ particularly in view of the fact that it includes 'information relating to the employment history' of a data subject in the definition of 'personal information'.²⁸²

7. Conclusion

Although section 6(4) did not introduce a material change in the substance of the law on unfair pay discrimination in South Africa, the fact that equal treatment is now expressly provided for will in all likelihood result in an increase in litigation.

Employers would be well-advised to do a careful analysis of the differences that may exist in the treatment of the different race groups and genders in their organisation.²⁸³ If need be, professional pay audits and job evaluation systems should be undertaken. Section 6(4) demands non-discrimination in the manner in which terms and conditions are determined. If an employer is unable to provide this, the risks of disputes, and an unhappy workforce, would be the likely result.

²⁷⁹ S. 63(2)(f)(iii) of the Promotion of Access to Information Act, 2000.

²⁸⁰ Act 4 of 2013.

²⁸¹ Only certain sections of this Act are currently in force.

²⁸² The interplay between the Protection of Personal Information Act and the Promotion of Access to Information Act falls beyond the scope of this paper and is accordingly not discussed in any further detail here.

²⁸³ The grounds for discrimination are broad, and it is conceivable that in some organisations differences in treatment might have their root in differences in language, religion, age, or whatever the distinguishing factor may be.

