

**A comparative study on the principles of equal
pay for equal work in South Africa in the
context of gender discrimination**

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ABSTRACT

In 1995, the South African apartheid system came to an end. After a lengthy period of discussions between the blacks and whites, certain celebrated legal measures were introduced. Some of the legal developments which were introduced include the *Constitution of the Republic of South Africa*, 1996 and the *Employment Equity Act 55 of 1998*. These two pieces of legislation seek to eradicate discrimination of any form in South Africa. In this regard, section 9 of the Constitution entitles everyone in South Africa to equal treatment and equal benefits of the law, whilst the *Employment Equity Act* aims to achieve the same, but in the employment arena.

The *Employment Equity Act*, together with the *Employment Equity Regulations* 2014 and the *Code of Good Practice/Remuneration for work of equal value* on equal pay regulate the principle of equal pay for equal work. The aim of regulating this principle is to ensure that males and females who perform the same work or work of equal value are remunerated equally. On plant level however, males seem to be paid higher wages than women. Statistically it is estimated that women lag behind by 15% – 17% in comparison to men in terms of remuneration packages. This is so even when women are performing the same work as men or perform work that is rated equal in value to their male counterparts. This clearly constitutes discrimination against women as there are no valid reasons why women should be paid less than men.

At an international level, the ILO has developed a number of standards regarding equal pay for equal work. These standards are found in the Convention on Equal Remuneration and Equal Remuneration Recommendation. In a nutshell, the above conventions oblige members states to introduce measures which will eventually put to bed pay disparities between males and females. To effectively achieve this, member states are among other aspects required to introduce job evaluations in the workplace. As a member state to the ILO, the paper measured the level of South Africa's compliance with the ILO equal pay standards. Briefly, South Africa is

substantially, but seemingly just theoretically, compliant with the ILO standards which relates to equal pay for equal work as it regulates the matter in legislation. Nevertheless, there is a concern that disparities still prevail and that equal pay is not regulated in the public sector. Whilst the South African government has promulgated the *Employment Equity Act*, *Employment Equity Regulations* and the *Code of Good Practice*, employees are still exposed to wage disparities with reference to gender. Furthermore, whilst the terms and conditions of the employees in the public sector are regulated by the *Public Service Act of 2005*, the Act does not provide guiding factors to constitute work of equal value. This is against the provisions of the Equal Remuneration Convention, which *inter alia* requires that member states should ensure that the equal pay principle is applied to everyone.

The aim of this paper is to discuss the legislative provisions pertaining to equal pay for equal work in South Africa. The paper therefore seeks to investigate the existing wage gaps in South Africa. Furthermore, the paper discusses the legislative provisions on equal pay for equal work in the United Kingdom, particularly with a view to determine how South African legislation may be improved to close the existing wage gaps.

Keywords: Equal pay for equal work, wages gaps EEA, ILO, United Kingdom

OPSOMMING

Die Suid-Afrikaanse apartheidsisteem het in 1995 tot 'n einde gekom. Na uitgerekte samesprekings tussen swart en wit is sekere wetlike maatsawwe in plek gestel. Sommige van die wetlike ontwikkelings het die Grondwet van die Republiek van Suid-Afrika, 1996, en die Wet op Gelyke Indiensneming 55 van 1998 is bekendgestel. Hierdie twee dokumente se doel is om enige vorm van diskriminasie in Suid-Afrika uit te wis. In lyn hiermee gee hoofstuk 9 van die Grondwet almal in Suid-Afrika die reg op gelyke behandeling en gelyke voordele van die Wet, terwyl die Wet op Gelyke Indiensneming dieselfde ten doel het, maar op arbeidsgebied.

Die Wet op Gelyke Indiensneming, tesame met die Gelyke Indiensnemingsregulasies 2014 en die Goeie Praktykkode/Vergoeding vir werk van gelyke waarde, reguleer die beginsel van gelyke vergoeding vir gelyke werk. Die regulering van hierdie beginsel het ten doel om te verseker dat mans en vroue wat dieselfde werk of werk van gelyke waarde doen, gelyke vergoeding daarvoor ontvang. Op grondvlak blyk dit egter dat mans hoër salarisse as vroue verdien. Dit is statisties geraam dat vroue 15% - 17% minder as mans verdien as dit kom by vergoedingspakkette. Dit is so, selfs wanneer vroue dieselfde werk as mans doen, of werk van gelyke waarde doen. Dit is 'n bewys van diskriminasie teen vroue, want daar is geen geldige redes waarom vroue minder as mans betaal moet word nie. Op internasionale vlak het die Internasionale Arbeidsorganisasie (IAO) standarde ontwikkel betreffende gelyke vergoeding vir gelyke werk. Hierdie standarde is vervat in die Konvensie oor Gelyke Betaling en Aanbevelings vir Gelyke Betaling. Kortliks, die bovermelde konvensies verplig lidlande om maatstawwe in plek te stel wat uiteindelik ongelykhede tussen mans en vroue sal uitwis. Om dit te effektief te bereik, word daar onder meer van lidlande verwag om werkevaluasies in die werkplek in plek te stel. As 'n lid van die IAO het hierdie studie die vlak van Suid-Afrika se nakoming van die IAO se standarde gemeet. Dit blyk Suid-Afrika kom slegs die IAO se standarde vir gelyke betaling vir gelyke werk in teorie na, want dit reguleer die kwessie slegs in wetgewing. Daar bestaan

kommer oor die ongelykhede wat steeds heers en dat gelyke betaling nie in die openbare sektor gereguleer word nie. Hoewel die Suid-Afrikaanse regering die Wet op Gelyke Indiensneming, Gelyke Indiensnemingsregulasies en Goeie Praktykkode promulgeer, word werkers steeds blootgestel aan salarisdiskriminasie ten opsigte van geslag. Terwyl die terme en voorwaardes van werkers in die openbare sektor deur die Staatsdienswet van 2005 gereguleer word, verskaf dié Wet nie leiding in terme van werk van gelyke waarde nie. Dit gaan die aanbevelings in die Konvensie oor Gelyke Betaling teë, wat *inter alia* vereis dat lidlande die beginsel van gelyke betaling op alle werkers sal toepas. Die doel van hierdie studie is om die wetlike bepaling van toepassing op gelyke betaling vir gelyke werk in Suid-Afrika te bespreek. Die studie bespreek ook die wetlike bepaling vir gelyke betaling vir gelyke werk in die Verenigde Koninkryk, met die besonderse doel om te bepaal hoe Suid-Afrikaanse wetgewing verbeter kan word om bestaande gapings in betaling uit te wis.

Sleutelwoorde: Gelyke betaling vir gelyke werk, Salarisgapings, Wet op Gelyke Indiensneming, IAO, Verenigde Koninkryk

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LIST OF ABBREVIATIONS

BCEA.....	Basic Conditions of Employment Act
CEDAW.....	Convention on the Elimination of All forms of Discrimination against Women
COSATU.....	Congress of South African Trade Unions
EA.....	Equality Act
EEA.....	Employment Equity Act
EEAA.....	European Equality Amendment Act
EEC.....	European Economic Community
EPA.....	Equal Pay Act
EU.....	European Union
ILO.....	International Labour Organisation
ILJ.....	Industrial Law Journal
LRA.....	Labour Relations Act
PELJ.....	Potchefstroom Electronic Law Journal
PEPUDA.....	Promotion of Equality and Prevention of Unfair Discrimination Act
SADC.....	Southern African Development Community
UDHR.....	Universal Declaration of Human Rights

Chapter 1 - Introduction

1.1 Problem statement

Discrimination indubitably has a long history in South African labour law. Du Toit¹ provides that under the previous legal regime discrimination against workers on grounds such as race and gender was not only permitted; it was legally enforced. Economic imbalance has likewise been an issue in South Africa for many decades.² McGregor³ opines that economic imbalance between men and women came as a result of women's family responsibilities. This is because, traditionally, women did not work, but took care of their families. Some say that women are adversely impacted. They are sustained by their spouses who are the breadwinners, hence it is said that there is no need for an increase in salary.⁴ In *Association of Professional Teachers and Principals v Minister of Education*,⁵ the female applicant applied for a housing allowance. The employer declined the application on the basis that the applicant was married and that her husband was employed permanently. The Court held that a policy which differentiates on the basis of sex amounts to an unfair labour practice as it unfairly discriminates against women. The Court noted that the respondent's policy was motivated by the idea that married men are sole breadwinners.⁶ This case illustrates the fact that women are sometimes denied equal treatment on grounds that men are considered to be the natural breadwinners.

Hills⁷ submits that one of the underlying reasons for pay disparities between men and women is the perceived lack of adequate skills and talent of women to survive in the corporate world. McGregor⁸ argues in a similar vein, stating that differences in remuneration between men and women could be attributed to women's "softer

1 Du Toit 2006 *Industrial Law Journal* 2.

2 Maree 2011 *South African Journal of Labour Relations* 11.

3 McGregor 2011 *South African Mercantile Law Journal* 490.

4 Hills 2015 *Deakin Law Review* 180.

5 *Association of Professional Teachers v Minister of Education* 1995 16 ILJ 1048 (IC).

6 *Association of Professional Teachers v Minister of Education* 1995 16 ILJ 1048 (IC) para A-C.

7 Hills 2015 *Deakin Law Review* 180.

8 McGregor 2011 *South African Mercantile Law Journal* 490.

skills and lack of necessary experience" to perform the same duties than men.⁹ Van Niekerk *et al.*¹⁰ provide that the composition of women in lower paying jobs as a result of lack of skills is another contributing factor to economic imbalance.

In 1998, the South African Parliament introduced the Employment Equity Act¹¹ (hereafter the EEA) to address the issues of discrimination in the workplace which may arise on an array of grounds – inclusive of gender. It is important to note at this stage that the EEA did not at inception explicitly regulate income differentials solely based on gender. However, the courts acknowledged the existence of principles relevant to equal pay for equal work. In *Louw v Golden Arrow Bus Services*¹² the Court commented that the principles relating to equal pay have not been enshrined as principles of law. The Labour Court further commented that the principles of justice, equity and logic may thus be considered when deciding whether an unfair labour practice relating to equal remuneration has been committed.¹³

As a result of criticism levelled against the EEA for lack of express provision dealing with equal remuneration for equal work,¹⁴ the EEA was amended by the Employment Equity Amendment Act.¹⁵ Equal remuneration for equal work is since regulated by the provisions of section 6.¹⁶ It provides in subsection (4) as follows:

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

From the above it is clear that unequal remuneration for persons performing the same work, substantially similar work and work of equal value constitutes unfair

9 McGregor 2011 *South African Mercantile Law Journal* 490.

10 Van Niekerk and Smit *Law @ work* 222.

11 *Employment Equity Act* 55 of 1998.

12 *Louw v Golden Arrow Bus Services* 2000 21 ILJ (LC) 188 para 23.

13 *Louw v Golden Arrow Bus Services* 2000 21 ILJ (LC) 188 para 23.

14 Benjamin 2010 *Industrial Law Journal* 866.

15 *Employment Equity Amendment Act* 47 of 2013.

16 Section 6 of the *Employment Equity Act* 47 of 2013.

discrimination. It is important to note that recognising the performance of the same work is much easier than recognising the performance of work of equal value. In *Mangena and Others v Fila South Africa (Pty) Ltd and Others*¹⁷ the Labour Court remarked that in the context of "equal pay for work of equal value" it does not have the necessary expertise in job grading and in the allocation of value to particular occupations. The Minister of Labour later drafted guidelines in the form of regulations¹⁸ and a code of good practice¹⁹ to assist employers, employees and presiding officers by providing factors which would constitute work of equal value.²⁰

In terms of Regulation 6 of the Code,²¹ the following factors may be taken into consideration when assessing work of equal value: a) the responsibility demanded by the work, b) the skill, qualifications, including prior learning and experience required to perform the work, whether formal or informal, c) the physical, mental and emotional effort required to perform the work, and d) the physical environment, psychological conditions, the time when and the geographic location where work is performed.

While the aforesaid provides a measure of guidance in determining work of equal value, it is submitted that it is not enough. In *SANDU v Minister of Defence and others*²² the Constitutional Court stated *obiter dictum* that labour law issues are difficult and controversial, and that to require the courts, as in that matter, to intervene by way of compelling parties to a dispute to engage in collective bargaining is not ideal. From the foregoing, it is evident that there are circumstances in which the labour courts will leave certain issues to be determined by the disputants themselves. Ebrahim²³ submits that even in matters of equal pay

17 *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 11.

18 GN R595 in GG 37873 of 1 August 2014 (*Employment Equity Regulations*).

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

20 Item 1 of the Code.

21 GN R595 in GG 37873 of 1 August 2014 (*Employment Equity Regulations*).

22 *SANDU v Minister of Defence* 2007 2 BLLR 785 (CC) at para 55.

23 Ebrahim 2016 *PELJ* 22.

for work of equal value, courts should litigate over a dispute but over and above that, an independent expert should be brought in to assist in the determination of equal pay for equal value of work. It is consequently necessary to investigate whether the additional legal requirement of an independent expert can be of any assistance in South Africa.

Despite the existence of the above provisions, a report on the status of women in the economy in South Africa²⁴ provides statistics that indicates a huge gap between male and female employees in terms of remuneration. Men are generally far ahead of women in this respect. Bosch²⁵ provides that the gender pay gap is estimated to be on average 15% to 17%. Steyn and Jackson²⁶ further opined that this is due to the fact that men are more academically qualified than women. It is submitted that this is not the case. Statistics²⁷ indicate that women no longer stay at home to raise children, but form a great part of the economically active population. According to the above report, economically active women in South Africa have higher levels of education than their male counterparts. In terms of the said report, 7.1% of economically active women have degrees, whilst 12.6% have diplomas or certificates, as opposed to 5.8% and 9.8% of men respectively.²⁸

It is therefore evident that the reasons provided above are not adequate for paying women less than men. It is submitted that there is a need to ensure women with experience, skills and knowledge equal to those of male colleagues are aligned in terms of remuneration. Measures should, however, be taken to ensure that the equality of the work performed - which would justify equal pay - is calculated accurately.

24 Gov.za/sites/www.gov.za/files/status of women in SA economy_PDF.

25 Bosch 2017 Mail and Guardian <https://mg.co.za/article/2015-08-11-women-are-still-paid-less-than-men-in-sa-companies>.

26 Steyn and Jackson 2015 *South African Journal of Economic Management* 198.

27 Gov.za/sites/www.go.za/files/status of women _in SA economy_PDF.

28 Gov.za/sites/www.go.za/files/status of women _in SA economy_PDF.

South Africa is a member to the ILO and therefore is obliged to implement its standards for domestic law.²⁹ Convention no. 100³⁰ of the ILO establishes the principle of equal pay between men and women.³¹ Article 2 of the Convention provides as follows:

Each member state shall by means appropriate to the methods in operation for determining rates of remuneration, promote and in so far as is consistent with such methods ensure one application to all workers of the principles of equal remuneration for men and women for work of equal value.³²

As already noted, South Africa has responded positively by incorporating the above article into the EEA. Nonetheless, in terms of Article 4(a) of the ILO Recommendation³³ concerning equal pay for equal value of work, members are inclined to ensure that wage gaps between men and women are reduced. Also, in June 2004, the ILO³⁴ adopted a resolution that requires member states to address the wage gap between men and women. The EEA does not stipulate the time frame within which the wage gap should have been diminished and as of yet, wage gaps still persists. An inference drawn from the above is that South Africa might be in violation of both the recommendation and the resolution.

In the United Kingdom (hereafter UK), equal pay for work of equal value is regulated by the Equality Act (hereafter EA).³⁵ The EA provides for three causes of action, namely: discrimination against persons performing like work, people performing like related work and work of equal value.³⁶ It is important to mention that the EA provides yet another claim on the basis of the equality sex clause.³⁷ This cause of action means that if a man's terms and conditions are more

29 See Section 39 of the *Constitution of South Africa* 1996.

30 Article 2 of the *Equal Remuneration Convention* 100 (1951).

31 South Africa ratified the *Equal Remuneration Convention* on 3rd March 2000. It is therefore obliged to incorporate this convention into domestic law.

32 Article 2 of the *Equal Remuneration Convention* 100 (1951).

33 *Equal Remuneration Recommendation* 90 (1951).

34 ILO.org/declaration/events/wcms.099523/lang-en/index.htm.

35 Equality Act 2010.

36 In terms of section 65(1) (a) – (c): Like work refers to a situation in which two employees performs the same work, whilst like related work refers to instances in which the work being performed by different employees has been rated equivalent using job evaluation systems. Work of equal value refers to an instance where the jobs being performed are not necessarily similar but their value is the same.

37 In terms of section 66 (2).

favourable than those of a woman (but performing similar work), a woman can rely on the difference to claim equal terms and conditions similar to those of a man.

The effect of this provision is to align benefits which may have been included in a particular male employee's contract but excluded in a certain female employee's contract. For instance, if there is a favourable condition of employment in one employee's contract, but in the other such a term is omitted, the equality sex clause will be used to interpret the terms as equal. By considering the above it is submitted that the situation in the UK is of utmost importance for the purposes of this study, as it can teach some valuable lessons. Hence, an investigation into the situation in the UK will be undertaken. Ebrahim³⁸ also submits that it is necessary for South Africa to consider the addition of this provision in the EEA. He provides as follows:

A fourth cause of action should be added in the form of the sex equality clause, which allows a woman's contract to be brought in line with her male counterpart's contract where there is/are provisions in the male contract that is/are not contained in the female contract or not in the same beneficial manner. The female's contract should then be modified to include such a term.

It is submitted that the incorporation of the sex equality clause into the EEA may be one of the ways to eradicate the wage gap between men and women. This clause would require the courts of law to align the terms and conditions of women to those of men in instances where they are remunerated differently, but doing work of equal value.

What is more, in terms of section 131 of the EA³⁹ a Labour Tribunal can appoint the services of an independent expert to evaluate the job that the applicant alleges is of equal value with that of the comparator. The expert, after performing the duty called upon, issues a report. The report assists the Court to make an informed decision regarding the value of work. It is submitted that this is a very important provision which is currently lacking in the EEA. In light of the above it is

38 Ebrahim 2015 *PELJ* 22.

39 Equality Act 2010.

consequently necessary to consider to what extent South Africa complies with its international obligations regarding equal pay for work of equal value among genders and to consider the position in the UK so that lessons may be learned in this regard. It is further submitted that by learning from the UK, South Africa can improve its efficiency in the relevant matter.

1.2 Research question

How sufficient is the South African labour laws in considering the United Kingdom and international law standards in its response to pay gaps between genders in the context of the principle of equal pay for equal work?

1.3 Framework of the study

Chapter 1: Introduction and problem statement

This chapter will introduce the issue of equal pay for work of equal value and will describe the problem that needs to be addressed and the ultimate purpose of this study.

Chapter 2: An overview of equal pay for work of equal value in South Africa

This chapter will consider matters such as a brief historical overview of the issue in South Africa, how the principle of equal pay for work of equal value is currently regulated and how courts are currently dealing with claims of equal pay for work of equal value. The position of the ILO on the issue will also be critically investigated so as to determine to what extent South Africa presently complies with its obligations.

Chapter 3:

This chapter will focus on the ILO international and other standards regulating equal pay for equal. This chapter will determine the extent to which South Africa

is compliant with its international standards, as far as equal pay for equal work is concerned.

Chapter 4:

This chapter will focus on the regulation of equal pay for work of equal value in the United Kingdom. The chapter will discuss the UK's best practices in relation to the regulation of equal pay for equal work.

Chapter 5: Conclusions and recommendations based on the important lessons that South Africa can learn from the UK. As indicated, the EA contains a provision which empowers the Court to appoint an independent expert to express opinion on the value of the jobs in dispute. The paper will advocate for the inclusion of this requirement in the EEA, with the hope that the problem noted by the Court in *Mangena*⁴⁰ will be resolved.

1.4 Research methodology

The study is characterised by a literature study whereby primary sources (including legislation and case law) as well as secondary sources (including law journals, books and electronic sources) were consulted. Furthermore, a legal comparative study was undertaken to compare the position in South Africa to the position in UK as regarding the regulation of equal pay for equal work. As noted above, the UK position is rather sophisticated; hence it might be extremely useful in assisting South Africa going forward.

Having briefly provided an exposition on the introduction of this paper, next chapter will deal with the regulation of equal pay for equal work in South Africa. Before doing so, the chapter will briefly articulate the historical background relating to the subject and thereafter move on to the current regulation of equal pay for equal work.

40 *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 15.

Chapter 2 – An overview of equal pay for work of equal value in South Africa

2.1 Introduction

This chapter provides an overview of the issue of equal pay for work of equal value in the South African workplace. The chapter will commence with a brief examination of the history of gender equality in the South African labour market, particularly with reference to the access to employment and remuneration disparities. Thereafter, the current legal framework applicable to equal pay for equal value of work will be considered. Finally, some concluding remarks are made.

2.2 Historical background: the pre-1994 era

Despite the fact that it has been loudly proclaimed since the beginning of the twentieth century that there must be gender equality for workers, and despite the almost universal acceptance of gender equality as a fundamental human right, women remain substantially disadvantaged in the workforce, significant pay disparities between men and women persist and women are generally segregated into low-status or marginal forms of work. We have to ask why there is such a glaring anomaly.⁴¹

In order to be in a better position to fully comprehend the relevance of the study, this discussion will commence with an exposition of the labour market regulation during the colonial and apartheid era to illustrate where gender segregation originated. Gender-based discrimination has a long history in South Africa.⁴² When they came to South Africa, European colonialists and settlers maintained their own "internal gender inequalities and discrimination against white women while reinforcing and exacerbating gender inequalities and discrimination against and among black communities".⁴³ Irrespective of race, women have shared many common attributes. They were treated as dependants of their husbands and fathers, and their contribution to domestic life was paramount.⁴⁴ This meant that

41 Loveday 1997 *Journal of South African Law* 100.

42 Vittori 2014 *South African Mercantile Law Journal* 476.

43 Gutto *Equality and non-discrimination in South Africa* 159.

44 "Gender inequality is created by a system that restricts women's access to the public sphere by burdening and isolating them with private sphere responsibilities, such as home

their role in the economy was limited.⁴⁵ Gender discrimination, irrespective of race, has its roots "in the socio-cultural dictates of all groups".⁴⁶ Therefore, women were impeded by gender stereotypes and cultural restraints.

Although it was already in place at the beginning of the twentieth century,⁴⁷ apartheid was officially introduced by the National Party government of the time in 1948.⁴⁸ Apartheid in particular has been described as "an exclusionary white form of socialism, or affirmative action programme for white workers".⁴⁹ In this era (before and after 1948), discrimination was perpetuated through the establishment of practices and laws which resulted in systematic and structural discrimination and inequality for the black majority, other non-white minorities and women.⁵⁰

Black men and women were denied access to employment.⁵¹ For example, the *Mines and Work Act*⁵² (also known as the *Colour Bar Act*) prioritised jobs for white people. It did so by prohibiting or preventing blacks from obtaining certificates of competency. The Act also specifically excluded females from working in underground jobs.⁵³ Section 8(1) thereof provided that "no person shall employ underground on any mine a boy apparently under the age of sixteen years or any female".⁵⁴ In this regard McGregor asserts that "policies of job reservation for whites and little training (if any) offered to black and female employees placed

responsibilities and childcare". See Masango and Mfene 2015 *Journal of Public Administration* 628.

45 Berger *Threads of Solidarity: Women in South African Industry 1920-1980* 17.

46 Vittori 2014 *South African Mercantile Law Journal* 476.

47 Deane 2005 *Fundamina* 5. See also Lowenberg 2014 *Economic History Society of Southern Africa* 149, where he says "Although apartheid itself was a phenomenon of the post-1948 era of National Party rule, the era of classical apartheid was in fact preceded by a long history of segregationist policies brought about through the medium of an interventionist, statist polity characterized by a racially limited franchise".

48 Lowenberg and Kaempfer *The Origins and Demise of South African Apartheid* 2; Deane 2005 *Fundamina* 5.

49 Lowenberg and Kaempfer *The Origins and Demise of South African Apartheid* 1.

50 McGregor 2006 *Fundamina* 87.

51 Nolde 1991 *Third World Legal Studies* 16.

52 *Mines and Works Act* 12 of 1911.

53 Section 11(2) of the *Mines and Work Act* 12 of 1911.

54 See section 8(1) of the *Mines and Works Act* 12 of 1911.

them at a disadvantage where skills were concerned".⁵⁵ Moreover, the *Wage Act*⁵⁶ sanctioned pay inequality on the basis of race and sex.⁵⁷ Similarly, the *Public Service Act*⁵⁸ also endorsed pay inequality on the basis of race and sex.⁵⁹

While white women were generally treated in a fairly better manner compared to women of other racial groups, it is crucial to mention that they were similarly not allowed to enter into employment, albeit for different reasons.⁶⁰ According to Hutson, "during apartheid in South Africa, the country was a collaboration of racism and sexism with the government striving day in and day out to keep the country in such a state".⁶¹ Unfortunately, when compared with racial discrimination, discrimination on the basis of sex in South Africa has not received as much attention and or attracted as much condemnation:

Although discrimination on the grounds of sex in South Africa has not been as visible and widely condemned as discrimination on the basis of race, it has nevertheless resulted in patterns of significant disadvantage.⁶²

Since one of the primary objectives of apartheid was to keep the different races apart, the then government ensured that women of other racial groups lived in areas where the economic activity was non-existent.⁶³ Therefore, as a direct consequence of this restriction, black women could not relocate to the cities to find jobs.⁶⁴ The *Groups Areas Act*⁶⁵ in particular was one law which denied black women mobility to seek employment in the cities.⁶⁶ The Act introduced two separate geographical settings. On the one hand, the whites were allocated land urban areas whilst persons of other racial groups were given land in the reserves.

55 McGregor 2006 *Fundamina* 93.

56 *Wage Act* 27 of 1925 (as amended).

57 Deane 2005 *Fundamina* 7; McGregor 2006 *Fundamina* 93.

58 *Public Service Act* 54 of 1957 (as amended).

59 See McGregor 2006 *Fundamina* 93.

60 Sheppard 2008//<http://core.ac.uk/download/pdf/6318447.pdf>.

61 Huston 2007 *ESSAI* 83.

62 McGregor 2006 *Fundamina* 87. See also *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at para 44.

63 McGregor 2011 *South African Mercantile Law Journal* 489.

64 Lalthapersad 2003 *South African Journal of Economic and Sciences* 263. See Wilson *Labour in the South African Gold Mines* 105.

65 *Groups Areas Act* 41 of 1950.

66 McGregor 2011 *South African Mercantile Law Journal* 489.

According to Lalthapersad,⁶⁷ this geographical setting restricted women's ability to seek employment.

As a result of rapid industrialisation in South Africa, the quest for cheap labour by most employers, and the shortage of labour brought by the aftermath of the war, women were employed in high numbers, more especially in the retail sector and in the factories.⁶⁸ Thus, although women did eventually gain access to employment, they were given clerical work, such as being cashiers in the retail shops, working as domestic workers, and working as shop assistants.⁶⁹ While this is a fact, men contrariwise occupied higher positions such as sales assistants and managers.⁷⁰

As women were mostly employed in positions requiring little to no skills, they were subsequently subjected to poor remuneration.⁷¹ However, it is crucial to note that the men, who performed similar duties which did not require skill, were remunerated differently from women.⁷² They had better working conditions and were paid significantly higher wages than their female counterparts. Moreover, the amount of wages paid to female employees fluctuated from workplace to workplace; put simply, there was no minimum wage for women.⁷³ Tshoaedi⁷⁴ points out that in most cases, employers unilaterally decided to reduce women's wages for whatever reason. Gender bias ran rampant, fuelled by the subjective opinion of employers regarding the appropriate place of women in society.⁷⁵ The principal reason for this pay disparity was based on the employers' belief that "women were not heads of households and therefore did not have similar financial obligations to their families".⁷⁶ It has been said that although women were subjected to wage discrimination, their performance in the workplace was still

67 Lalthapersad 2003 *South African Journal of Economic and Economic Sciences* 263.

68 Kenny 2008 *African Studies* 371.

69 Kenny 2008 *African Studies* 371.

70 Kenny 2008 *African Studies* 371.

71 Tshoaedi 2012 *Labour Capital and Society* 65.

72 Tshoaedi 2012 *Labour Capital and Society* 66.

73 Tshoaedi 2012 *Labour Capital and Society* 64.

74 Tshoaedi 2012 *Labour Capital and Society* 64.

75 Sadie and Aardt 1995 *Africa Insight* 82.

76 Tshoaedi 2012 *Labour Capital and Society* 66.

impeccable.⁷⁷ From the above it is apparent that relevant factors such as the similarities of the duties performed were not considered.

It was not until after the report of the Wiehahn Commission⁷⁸ in 1979 that major reforms were introduced; primarily through amendments to the *Industrial Conciliation Act 28* of 1956 (as amended), which was later renamed⁷⁹ the *Labour Relations Act* (hereafter the 1956 LRA).⁸⁰ The Wiehahn Commission was established by the government as a response to the violent strikes which occurred in 1973 in Natal.⁸¹

The recommendations of the Commission gave birth to the *Labour Relations Amendment Act 94* of 1979. Amongst other legal aspects, this Act introduced the concept of unfair labour practices into South Africa. Landman⁸² expresses that unfortunately for women, although a focal point at one time for union activities, gender equality was no longer a priority for unions by the time that the unfair labour practice came into being; fighting for democracy in South Africa was the main priority. Although it did not specifically address the concept of equal pay for work of equal value, the concept of unfair labour practices was adequately wide to encompass equal pay for work of equal value. Therefore, given its wide scope, the concept of unfair labour practice provided a remedy for unequal pay for work of equal value.⁸³ In 1988, the meaning of the term 'unfair labour practice' was amended: unfair discrimination by an employer against an employee solely on the ground of sex, amongst others, constituted an unfair labour practice.⁸⁴

Also, one of the most fundamental reforms recommended by the Wiehahn Commission was the creation of the Industrial Court.⁸⁵ In the exercise of its unfair

77 Tshoaedi 2012 *Labour Capital and Society* 66.

78 The Commission was appointed in 1977 and completed its report in 1979. See Grogan *Collective Labour Law* 6.

79 Section 1(c) of the *Industrial Conciliation Amendment Act 95* of 1980 changed the name of the statute from *Industrial Conciliation Act* to *Labour Relations Act*.

80 Todd *Collective Bargaining Law* 1.

81 Godfrey *et al Collective Bargaining in South Africa* 18.

82 Landman 2002 *South African Mercantile Law Journal* 341.

83 Landman 2002 *South African Mercantile Law Journal* 341.

84 See McGregor 2006 *Fundamina* 96.

85 Grogan *Collective Labour Law* 5; Godfrey *et al Collective Bargaining in South Africa* 18.

labour practice jurisdiction, the impact which the Industrial Court had on South African labour law was immense. As Grogan⁸⁶ explains:

The advent of the unfair labour practice jurisdiction of the industrial court presaged a revolution in South African labour law. Initially, the industrial court was given a free hand to determine what constituted an unfair labour practice, and what did not. Staffed by a body of fulltime and part-time members, the industrial court set about its task with some vigour and quickly established the basic principles from which labour law was subsequently to develop. *Under its unfair labour practice jurisdiction, the industrial court began eroding the foundation of practices that had long been regarded as part of the natural order in South Africa, such as discrimination on the basis of race and gender.* (Own emphasis added)

The next part of this paper addresses the transition from the apartheid system to democracy, and the regulation of equal pay for work of equal value in South Africa's post apartheid era.

2.2 The regulation of equal pay for equal work or work of equal value in South Africa: the new democratic era

2.2.1 The Constitutional framework

The 1990s marked the end of the apartheid regime in South Africa. Apart from abolishing apartheid in particular, innovative measures were taken by the South African government in an attempt to eradicate all forms of inequality, inclusive of gender discrimination.⁸⁷ The *Constitution of the Republic of South Africa, 1996*⁸⁸ has equality as one of its core values to be promoted by the State and individuals alike.⁸⁹ Closely linked to equality is the additional value of dignity which also needs to be strictly upheld. The enactment of the *Constitution* thus represented a new democratic constitutional order where all were equally worthy in the eyes of the law.⁹⁰

86 Grogan *Collective Labour Law* 5.

87 Collier *et al South African Journal of Labour Relations* 86.

88 Hereafter the *Constitution*.

89 Van Niekerk *et al Law @ Work* 12.

90 McGregor 2011 *South African Mercantile Law Journal* 489.

In the Bill of Rights the *Constitution* entrenches the fundamental rights of all its citizens and affirms the democratic values of human dignity, equality and freedom.⁹¹ With reference to equality in particular, the *Constitution* provides that everyone in South Africa is entitled to equality and equal protection and benefits of the law.⁹² This right to equality is fortified by sections 9(3) and 9(4), stating that the State or any other person may not unfairly discriminate directly or indirectly against any person on an array of grounds, inclusive of sex and gender.⁹³

Moreover, the *Constitution* obliges the State to enact laws prohibiting discrimination.⁹⁴ The leading case on what discrimination means for the purposes of section 9 of the *Constitution* is the Constitutional Court's decision in *Harksen v Lane*.⁹⁵ The court laid down the following test:

- (a) Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground 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.
- (b) If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination of the discrimination on the complainant and others in his or her situation.⁹⁶

In terms of section 9(5) of the *Constitution*, discrimination based on one or more grounds listed in section 9(3) – such as sex or gender – is presumed to be unfair.⁹⁷ However, restitutionary measures (in other words affirmative action measures) provided for under section 9(2) do not attract a presumption of unfairness.⁹⁸ From the above it is apparent that in the new South African regime discrimination is not

91 Section 7(1) of the *Constitution*.

92 Section 9 of the *Constitution*.

93 Section 9(3) of the *Constitution*.

94 Section 9(3) of the *Constitution*.

95 *Harksen v Lane* 1997 11 BCLR 1489 (CC).

96 *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 50.

97 *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 28.

98 *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) paras 32-33.

only prohibited, but the State must act positively to eradicate discrimination. Therefore, even in issues pertaining to equal pay for work of equal value in the context of gender differentiation, it is submitted that unfair discrimination should not take place and that specific measures ought to be taken by the government to prevent it.

The gender wage gap is not unique to South Africa, as the *Report on the Status of Women in the South African Economy*⁹⁹ rightfully acknowledged, a few years ago.¹⁰⁰ The report identified two factors which influence the gender wage gap in South Africa, namely occupational segregation and gender discrimination in the workplace. Moreover, it also identified social and cultural contexts, education and career choice as other such factors.¹⁰¹ The report highlighted the fact that South African women earned less than men on average. In 2001, women earned 18% less. In 2005 this figure stood at 20%.¹⁰² It bears emphasis that the aforementioned statistics covered years in the post-apartheid era; where the *Constitution* proclaims that everyone in South Africa is entitled to equality and equal protection and benefits of the law.¹⁰³ Clearly, there was a problem which had to be addressed. As will be seen in the subsequent section of this study, the EEA pays particular attention to gender equality and the concept of equal pay for equal work or work of equal value. The part below, therefore, unpacks how these concepts are currently regulated in South Africa.

2.2.2 The Employment Equity Act

On 12 October 1998, the South African parliament enacted the EEA.¹⁰⁴ The primary objective of the EEA is "to achieve equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair

99 The Department of Women *The Report on the Status of Women in the South African Economy* at 68.

100 The Report was published August 2015.

101 The Department of Women *The Report on the Status of Women in the South African Economy* at 68.

102 The Department of Women *The Report on the Status of Women in the South African Economy* at 69.

103 Section 9 of the *Constitution*.

104 Employment Equity Act 55 1998.

discrimination".¹⁰⁵ The EEA gives effect to the provisions of section 9 of the *Constitution*. Therefore, an employee alleging unfair discrimination must bring his or her case within the regulatory framework of the EEA and may not rely directly on the *Constitution*. This is generally regarded as constitutional avoidance. The exception to this general principle is where a statute fails to protect a basic right.¹⁰⁶

Chapter II of the EEA is applicable to all employees and employers¹⁰⁷ while Chapter III only applies to designated employers.¹⁰⁸ The *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter PEPUDA) covers persons who are excluded from the ambit of the EEA.¹⁰⁹ In terms of section 5(3) thereof, PEPUDA does not apply to persons covered by the EEA.

In terms of section 6(1) of the EEA, no employee may be discriminated against, whether directly or indirectly, in any employment policy or practice on grounds such as race, gender, sex, or any other arbitrary ground.¹¹⁰ Although this provision does not explicitly regulate equality with reference to pay, it is submitted that, on its own, this provision is broad enough to encompass the regulation of equal pay for equal work or work of equal value.¹¹¹

105 In terms of section 2 (a) of the EEA.

106 Du Toit 2009 *Law Democracy and Development* 68.

107 In terms of section 4 of the EEA, the Act does not apply to members of the security services i.e. the National Defence Force, National Intelligence Agency, the South African Secret Service or South African National Academy of intelligence. Whereas the EEA is applicable in the workplace, PEPUDA is applicable to all spheres of social activity. See sections 2, 6-12 and 14 of PEPUDA.

108 The term 'designated employers' is defined in section 1 of the Act.

109 *Du Preez v Minister of Justice* 2006 27 ILJ 1811 (LC) provides a good example on how PEPUDA is to be interpreted and applied. See also Brickhill 2006 *ILJ* 2004-2014.

110 For an in depth discussion on discrimination on the basis of race, see *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1998 19 ILJ 285 (LC). See also the Barnard cases, namely *Solidarity obo Barnard v SA Police Service* 2010 31 ILJ 742 (LC); *Solidarity obo Barnard v SA Police Service* 2014 2 SA 1 (SCA); *SA Police Service v Solidarity obo Barnard* 2014 35 ILJ 2981 (CC).

111 See *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 5, where the court held that 'Employment policy or practice' is defined by s 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment. To pay an employee less for performing the same or similar work on a listed or an analogous ground clearly constitutes less favourable treatment on a prohibited ground, and any claim for equal pay for work that is the same or similar falls to be determined in terms of the EEA. Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the

At this juncture, it must be emphasised that the EEA "does not prohibit discrimination, only unfair discrimination".¹¹² The existence of differentiation is a precondition for discrimination,¹¹³ and differentiation in itself is not necessarily discrimination.¹¹⁴ In the employment context, the term "differentiation" has been described as meaning "that an employer treats employees or applicants for employment differently or that the employer uses policies or practices that exclude certain groups of people".¹¹⁵ Differentiation is said to occur frequently at the workplace, for example, when employees apply for promotion.¹¹⁶ This form of differentiation will be acceptable if it serves a valid purpose and is based on valid grounds.¹¹⁷ Therefore, it is permissible to treat employees differently. However, differentiation becomes discriminatory "only if it is unjustifiably prejudicial or demeaning".¹¹⁸

Surprisingly, the EEA prohibits "unfair discrimination", but does not define the term "discrimination". Section 3(1)(d) of the EEA provides that the Act must be interpreted in compliance with the international law obligations of South Africa, in particular those contained in the International Labour Organisation's *Convention Concerning Discrimination in Respect of Employment and Occupation* No. 111 (hereafter the ILO *Discrimination Convention*). Thus, the term "discrimination" in section 6(1) of the EEA must be given the same meaning as that in the ILO's

prohibition against unfair discrimination established by s 6 are sufficiently broad to incorporate claims of this nature". AS a matter of note: this decision was delivered before express provisions pertaining to equal pay for work of equal value were included in the EEA in 2014. See also McGregor 2011 *South African Mercantile Law Journal* 494.

112 Van der Walt *et al Labour Law in Context* 54.

113 Van der Walt *et al Labour Law in Context* 55.

114 *Mthembu v Claude Neon Lights* 1992 13 ILJ 422 (IC) at 423F.

115 Van der Walt *et al Labour Law in Context* 55.

116 Grogan *Dismissal, Discrimination and Unfair Labour Practices* 105. See also *Prinsloov Van der Linde* 1997 3 SA 1012 (CC) at para 24, where the Constitutional Court acknowledged that in order to govern a modern country effectively "it would be impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently".

117 McGregor *et al Labour Law Rules* 55.

118 Du Toit *et al Labour Relations Law* 548.

Discrimination Convention.¹¹⁹ The ILO is discussed in Chapter 3 below. For the purposes of the EEA, unfair discrimination has been defined as:

(a) A distinction, exclusion or preference (b) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation and (c) is based on any of the grounds listed in section 6(1) of the EEA.¹²⁰

As the *Memorandum of Objects of Employment Equity Amendment Bill 2012* acknowledged, South Africa had been criticised by the ILO for the lack of a provision dealing expressly with wage discrimination on the basis of sex.¹²¹ This criticism has been summed up as follows:

...the ILO has criticised South Africa for the omission of express mechanisms to deal with wage discrepancies on the basis of race and gender (CEE Annual Report at 3). This apparently happened after the Congress of South African Trade Unions (hereafter 'COSATU') has laid a complaint to this effect at the ILO's Committee of Experts on the Application of Conventions and Recommendations. The ILO has subsequently recommended that the country explicitly include a right to equal pay for work of equal value on grounds of race and gender...¹²²

Therefore, in response to the aforementioned criticism, the EEA was finally amended in 2013 *inter alia* to remedy this defect.¹²³ Amongst other things, the amendment introduced section 6(4) and section 6(5). In terms of the former:

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 or more of the grounds listed in subsections (1), is unfair discrimination.

One of the grounds listed in section 6(1) of the EEA is sex. In simple terms, the above provision outlaws discrimination in the terms and conditions of employment between workers of the same employer who perform similar work, substantially similar work and work of equal value. The EEA itself did not provide more guidance on this concept. Thus, in accordance with section 6(4) of the EEA, in

119 Du Toit and Potgieter *Unfair Discrimination in the Workplace* 17-18.

120 Du Toit and Potgieter *Unfair Discrimination in the Workplace* 18.

121 See *Memorandum on Objects of Employment Equity Amendment Bill 2012* at para 3.3.3. See also *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 5, where Van Niekerk J acknowledged that the EEA did not address equal pay claims (this judgment was delivered before the amendment of section of the EEA in 2014).

122 McGregor 2011 *South African Mercantile Law Journal* 497.

123 The EEA was amended by the *Employment Equity Amendment Act 47 of 2013* (hereafter the EEAA).

2014, the Minister published the *Employment Equity Regulations*.¹²⁴ When interpreting and applying the provisions of section 6(4) of the EEA, the following methodology which is laid down in the *Employment Equity Regulations* must be used:

- (1) (a) Whether the work concerned is of equal value in accordance with regulation 6; and
- (b) Whether there is a difference in terms and conditions of employment, including remuneration.
- (2) It must then be established whether any difference in terms of sub-regulation (1) (b) constitutes unfair discrimination, applying the provisions of section 11 of the Act.¹²⁵

It is apparent that the EEAA (when read together with the *Employment Equity Regulations* of 2014) laid down three requirements which a complainant must satisfy in an unequal pay discrimination case, in order to be successful. These are: (1) that there is a difference in wages; (2) between employees of the same employer performing the same or substantially the same work or work of equal value; and (3) the reason is based on a ground listed in section 6(1), for example gender. It is subsequently imperative to individually dissect these three requirements.

2.2.2.1 The difference in wages

A complainant will not be able to succeed in a claim for equal pay if it cannot be proven that there is an actual discrepancy between the complainant's wages and that of the chosen comparator.¹²⁶ The comparator must be a suitable one, and must be identified by the claimant. In this regard, the applicable principles have been summed up as follows:

To claim equal remuneration for work that is the same or similar, the claimant must: identify an appropriate, better paid comparator (the precise nature and functions of the comparator must be factually established and not assumed); indicate the relevant period for which the comparison is to be drawn; and lay a factual foundation that the work done by the comparator is equal or similar in nature (though not necessarily identical or interchangeable) than that done by the claimant (such a comparison does

¹²⁴ GN R595 in GG 37873 of 1 August 2014.

¹²⁵ See *Employment Equity Regulations* of 2014, regulation 5 thereof.

¹²⁶ In terms of section 6(4) of the EEA (as amended). See also Laubscher 2016 *Industrial Law Journal* 9.

not have to be over-fastidious: differences that are infrequent or of negligible significance in relation to the job as a whole may be ignored).¹²⁷

According to Laubscher,¹²⁸ the difference in wages mentioned above need not be significant or material as this will not affect the question whether unfair gender discrimination occurred or not. In this respect it will suffice for the complainant simply to prove that there is in fact a difference in wages. However, it should be noted that the mere existence of a difference between the wages of the complainant and the comparator does not automatically result in a finding that discrimination occurred.¹²⁹ It has been expressly stated by academics that the difference in wages (or any differential treatment in any employment policy or practice for that matter) will constitute discrimination if it is based on the grounds listed in section 6(1) or any other arbitrary ground.¹³⁰ This seems to be in line with the general test for discrimination as laid down by the Constitutional Court in *Harksen v Lane*¹³¹ (quoted verbatim above).

It is apparent that in order for women to claim unfair discrimination based on unequal remuneration for performing the same or similar work as men, it is necessary to prove that a difference in wages in fact occurred and secondly, that it is based on their gender and no other legitimate reason. Expressed in a different manner, women must establish that they are paid significantly lower than men because of the fact that they are women.

2.2.2.2 Equal pay for work of equal value and equal pay for the same work or substantially the same work

The *Employment Equity Regulations* of 2014 set out the factors which may be taken into account in determining the meaning of work of equal value. These are: the work-

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

127 McGregor 2011 *South African Mercantile Law Journal* 495. See also *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 6.

128 Laubscher 2016 *Industrial Law Journal* 810.

129 Hlongwane 2007 *Law Democracy and Development* 75.

130 Du Toit *et al Labour Relations Law: A comprehensive Guide* 705.

131 *Harksen v Lane* 1997 11 BCLR 1489 (CC).

- (2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;
- (3) Is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7.¹³²

Obviously, there is no discrimination if the complainant and the comparator do not perform the same, similar or work of equal value.¹³³ Prior to 2014, there were no guidelines for assessing whether work is of equal value. The *Employment Equity Regulations* of 2014 have been drafted to assist the litigants as well as the courts and other tribunals in the assessment of the value of work being performed. These factors are as follows: a) the responsibility required to perform the work, b) the skills, qualifications, work experience required to perform the job, c) the physical, mental and emotional input needed to perform the job and d) the conditions under which the job is undertaken, including the physical environment, physical conditions, as well as the geographical location at which the job is performed.¹³⁴ Interestingly, in South Africa, unlike in other jurisdictions, the law is silent on the deployment of the independent expert to perform an evaluation of the value of work being disputed. The importance of this legal requirement will be dealt with in the subsequent chapter.

Recently, in *Pioneer Foods (Pty) Ltd v Workers Against Regression*,¹³⁵ the Labour Court dealt with the issues of 'equal pay for equal value of work'. In this case, Pioneer Foods had a collective agreement with FAWU, in terms of which newly appointed employees were to be paid at the rate of 80% to its longer serving employees for the initial period of two years. The union alleged that this constituted unfair discrimination because the work performed by the applicants was the same or constituted work of equal value. The court held that:

...the application of a rule that employees entering the employment of the employer start off on the lower rate (e.g. 80%) on the basis that they are "new

132 See regulation 4 of the *Employment Equity Regulations* of 2014.

133 See Item 4.3 of the *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*.

134 See regulation 6 of the *Employment Equity Regulations* of 2014.

135 *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* 2016 37 ILJ 2872 (LC).

entrants” or new employees does not constitute differentiation on an unlisted arbitrary ground and therefore does not constitute discrimination at all. There is nothing arbitrary or irrational about the uniform application of a rule which sets different pay levels for employees of the employer concerned...there is no legal obligation to make an exception in every instance where newly employed employee has experience which is comparable to that of the employer’s long serving employees.¹³⁶

For the purposes of this study, the above decision indicates that notwithstanding whether or not the value of the work is equal, the employer may still differentiate on the basis of any rational decision. As will be seen later, the employer can in fact raise a defence that the differentiation is based on the length of service or seniority.

The criteria for the assessment of the value of work performed by the complainant and comparator are not a closed list.¹³⁷ It is said that any ground which shows the value of the work may be taken into consideration in assessing the work, provided that the employer indicates that the ground is relevant to assessing the value of the work.¹³⁸ Importantly, what matters is the objective assessment of the respective jobs of the complainant and the comparator.¹³⁹ Therefore, if the employer has performed the assessed value of the jobs in dispute, and the results reveal that the jobs are not of equal value, then the issue of discrimination in pay is negated. In *Louw v Golden Arrow Bus Services (Pty) Ltd*¹⁴⁰ the Court was called upon to determine the issue of equal pay for work of equal value.¹⁴¹ The facts are briefly as follows: the applicants alleged that they performed duties which were equal in value with the comparator but they were differently remunerated. They complained that they were being discriminated against. In response the employer admitted that there was a difference in salaries, but argued that the difference was not an act of discrimination.¹⁴² The employer further argued that an objective system was used to determine the value of work between the applicant and the

136 *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* 2016 37 ILJ 2872 (LC) para 30.

137 Laubscher 2016 *Industrial Law Journal* 818.

138 In terms of regulation 6(2) of the *Employment Equity Regulations* of 2014.

139 Laubscher 2016 *Industrial Law Journal* 818.

140 *Louw v Golden Arrow Bus Services* 2001 22 ILJ 2628 (LC).

141 See *Louw v Golden Arrow Bus Services* 2001 22 ILJ 2628 (LC) para 4.

142 See *Louw v Golden Arrow Bus Services* 2001 22 ILJ 2628 (LC) paras 5-7.

comparator. To wit, the following were considered: problem solving, consequences of judgements, pressure of work, knowledge, job impact, understanding, educational certificates and experience.¹⁴³ In the light of the above considerations, the court found that the applicant's job was not of equal value to the comparator's job, and that therefore the issue of discrimination fell away. The Court (per Landman J) put it as follows:

I conclude that the applicant has not succeeded in demonstrating that the two jobs, on an objective evaluation, are jobs of equal value. It is therefore unnecessary to delve into the reasons, causes or motivation for the difference in wages. It does not mean that the difference is not attributable to race discrimination. It does mean that racial discrimination has not been proven.¹⁴⁴

This case demonstrates that over and above the guidelines provided for by the regulations, the employer may rely on the objective assessment undertaken to grade the jobs.

The idea of equal pay for performing the same work implies that employees with the same qualifications and experience should be remunerated equally when performing exactly indistinguishable work.¹⁴⁵ In this regard, it has been said that negligible differences does not automatically make the jobs being compared dissimilar.¹⁴⁶ As Van Niekerk J explained in *Mangena's case*:

An essential element of a claim for equal pay for equal work is a factual foundation to be laid by the claimant that the work performed by the comparator is equal. By this is not meant only that the work must be identical or interchangeable - it is sufficient that the work is similar in nature where any differences are infrequent or of negligible significance in relation to the work as a whole.¹⁴⁷

To sum up, in a claim for equal pay for work of equal value, firstly, the complainant must show that there is in fact a disparity in pay between her and the comparator. Secondly, the complaint must show that the value of her work is equal to that of the chosen comparator. As *Louw v Golden Arrow Bus Services*

143 See *Louw v Golden Arrow Bus Services* 2001 22 ILJ 2628 (LC) paras 72-76.

144 See *Louw v Golden Arrow Bus Services* 2001 22 ILJ 2628 (LC) para 103.

145 Van der Walt 1998 *Industrial Law Journal* 23.

146 Laubscher 2016 *Industrial Law Journal* 816.

147 *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para9. See also Landman *Essential Employment Discrimination Law* 142.

(Pty) Ltd demonstrates, the failure to prove that the complainant's job is of equal value to the comparator's job will be fatal to the claim.

2.2.2.3 The differentiation is based on gender (a ground listed in section 6(1))

Section 6(4) of the EEA was introduced to address wage discrimination on the basis of gender, among other grounds.¹⁴⁸ For a woman to claim unfair discrimination based on unequal remuneration for performing the work of equal value as men, it is necessary to prove that a difference in wages in fact occurred and secondly, that it is based on her gender and no other legitimate reason.

An important principle which was noted by the Labour Court in *Louw v Golden Arrow Bus Services*¹⁴⁹ was that it is not an unfair labour practice to pay different rates for equal work or for work of equal value. However, as the Court further explained, it is "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 e.g. race or ethnic origin".¹⁵⁰ Although the court was referring to unfair labour practices as provided for under the now repealed Item 2(1) (a) of Schedule 7 of the *Labour Relations Act*,¹⁵¹ the same principle is still applicable for equal pay claims under the EEA. Put differently, it is not discriminatory to pay different wages for equal work or for work of equal value. However, it is discriminatory to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is based or linked to a listed ground under section 6(1) of the EEA, for instance gender. In *Ntai v SA Breweries*,¹⁵² where the issue was unequal pay for work of equal value, the Court explained this concept as follows:

...if an employer pays employees unequally on the basis of their race [or sex], this would clearly constitute 'discrimination' on the grounds of race [or sex]. However, it also means that a mere differentiation in pay between employees who do similar work or work of equal value does not mean, in itself, that an act of discrimination is being perpetrated. It is only when such differentiation

148 See *Memorandum on Objects of Employment Equity Amendment Bill* 2012 at para 3.3.3.

149 *Louw v Golden Arrow Bus Services* 2001 21 ILJ 188 (LC) at para 23.

150 *Louw v Golden Arrow Bus Services* 2001 21 ILJ188 (LC) at para 23.

151 Item 2(1)(a) of Schedule 7 of the *Labour Relations Act* was repealed by section 64 of the EEA.

152 *Ntai v SA Breweries* 2001 22 ILJ 214 (LC).

is based on or linked to an unacceptable ground that it becomes discrimination...¹⁵³

If a woman alleges discrimination in pay based on gender, she (as the complainant) must establish a link or nexus between the differentiation (in other words the difference in pay between herself and the comparator) and her gender.¹⁵⁴ In terms of section 11 of the EEA, the complainant has the burden of proving that (a) the conduct complained of is not rational; (b) the conduct complained of amounts to discrimination; and (c) the discrimination is unfair.¹⁵⁵ The issue of burden of proof is discussed in more detail next.

2.2.2.4 The EEA and the burden of proof

The well-established principle regarding the onus of proof in civil cases is that "if one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it".¹⁵⁶ The onus of proof under the EEA is governed by the provisions of section 11.¹⁵⁷ It is two-fold in nature. On one hand, if there is an allegation of unfair discrimination based on a ground listed in section 6(1), the employer is obliged to prove that the alleged act of discrimination did not take place or did take place but is not unfair or is justified.¹⁵⁸ On the other hand, the complainant employee is bound to prove that the conduct of the employer is not rational, the conduct amounts to discrimination and that discrimination is unfair.¹⁵⁹

Section 11 of the EEA clearly places a "significant burden on the complainant".¹⁶⁰ The claimant is required to only establish a *prima facie* case of discrimination, calling upon the respondent employer to then justify its actions.¹⁶¹

153 *Ntai v SA Breweries* 2001 22 ILJ 214 (LC) para 17.

154 McGregor 2011 *South African Mercantile Law Journal* 490

155 In terms of section 11 of the EEA (as amended).

156 See *Pillay v Krishna* 1946 AD 946 at 951-952.

157 Section 6 of the EEAA amended section 11 of the EEA.

158 In terms of section 11(1) of the EEA (as amended).

159 In terms of section 11(2) of the EEA (as amended).

160 *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 7.

161 *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 7 (relying on *Ntai v SA Breweries* 2001 22 ILJ 214 (LC) at paras 12-13). See also *Ex parte Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 at 478, where it was held "*Prima facie* evidence in its usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving

However, a mere allegation of discrimination will not suffice to establish a *prima facie* case.¹⁶²

If the complainant establishes a *prima facie* case of discrimination regarding pay on the basis of gender, section 11 of the EEA gives the employer two statutory defences, namely that (1) the alleged act of discrimination did not take place and or (2) did take place but is not unfair or justified.¹⁶³ Both the *Employment Equity Regulations*¹⁶⁴ and the *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*¹⁶⁵ reinforce the aforementioned by clearly listing the factors which may render the impugned differentiation not unfair discrimination. The *Code of Good Practice* lists factors such as seniority or length of service; academic qualifications; the individual's respective performance *etcetera*.¹⁶⁶ Any one or a combination of these factors may justify a disparity in pay between employees who are doing equal work of equal value.

When read together (section 11 of the EEA, the *Employment Equity Regulations* and the *Code of Good Practice*) these provisions are an acknowledgment of the fact that differentiation occurs frequently in the workplace, and may be justifiable under certain circumstances. However, it is difficult to imagine a scenario where an employer can legitimately justify paying women, who are performing the same or substantially the same work or work of equal value, less than men, simply because they are females. This is what is expressly forbidden by section 6(4) of the EEA.

2.3 Concluding remarks

The purpose of this chapter was to provide a critical analysis of the issue of equal pay for work of equal value in the South African workplace, with the focus on

that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his onus".

162 *Ntai v SA Breweries* 2001 22 ILJ 214 (LC) at paras 12-13 (cited with approval in *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 7).

163 See section 11(1) of the EEA.

164 See regulation 7 thereof.

165 See item 7.3 thereof.

166 See item 7.3 thereof.

unequal pay on the basis of sex or gender. It was shown that discrimination was rampant in the apartheid era, and that such discrimination was not limited to race but extended to gender as well. It will be recalled that the *Wage Act*¹⁶⁷ sanctioned pay inequality on the basis of race and sex.¹⁶⁸

The end of apartheid in 1994 ushered in a new era wherein the right to equality is enshrined in the *Constitution*.¹⁶⁹ In the context of the workplace, the EEA was enacted to give effect to section 9 of the *Constitution*. Given the lack of a provision dealing expressly with wage discrimination on the basis of sex, the EEA was amended by the EEAA to remedy this defect.

However, as was noted in Chapter 1 of this study, despite the existence of the above provisions, recent statistics still show that there is still a huge gap between male and female employees in terms of remuneration.¹⁷⁰ Men are generally far ahead of women in this respect. Bosch¹⁷¹ provides that the gender pay gap is estimated to be on average 15% to 17%. Given the fact that South Africa has ratified the *Equal Remuneration Convention* (No. 100) of 1951, the following question must be answered: is South Africa compliant with its obligations under this convention? The answer to this question and the position of the ILO regarding equal pay for equal work are considered in the next chapter, namely chapter 3.

167 *Wage Act* 27 of 1925 (as amended).

168 Deane 2005 *Fundamina* 7; McGregor 2006 *Fundamina* 93.

169 See section 9 of the *Constitution*.

170 Gov.za/sites/www.gov.za/files/status of women_in SA economy_PDF.

171 Bosch 2017 Mail and Guardian <https://mg.co.za/article/2015-08-11-women-are-still-paid-less-than-men-in-sa-companies>.

Chapter 3 – Standards of the International Labour Organisation on equal pay

3.1 Introduction

This chapter considers the position of the International Labour Organisation on equal pay for work of equal value, especially as far as gender is concerned. Firstly, the chapter provides a brief overview of the origins and purpose of the ILO. Secondly, the applicability and binding nature of the ILO instruments will be explained. Thirdly, ILO instruments relevant to the topic at hand will be critically analysed. The main objective of this chapter is ultimately to determine whether South Africa currently complies with its international obligations regarding equal pay.

3.2 The origins and purpose of the ILO: an overview

The ILO came into existence after the First World War in 1919¹⁷² through the Treaty of Versailles.¹⁷³ Van Staden¹⁷⁴ states that the real reason for the establishment of the ILO was to achieve social justice and avert the revolutions that plagued the labour market in the early 1900s.¹⁷⁵ The ultimate goal for the establishment of the ILO was subsequently to ensure the long term embedment of social peace.¹⁷⁶ Rodgers¹⁷⁷ formulated a neat summary of the reasons for the ILO's establishment and it deserves reproduction here:

The ILO was created in 1919 as a means to promote social progress and overcome social and economic conflicts of interest through dialogue and cooperation. In contrast to the revolutionary movements of the time, it brought together workers, employers and governments at the international

172 South Africa was one of the founding members of the ILO but was later expelled due to its Apartheid policies.

173 Van Niekerk *et al Law@ Work* 21.

174 Van Staden 2012 *TSAR* 96. See also Phelan 1949 *International Labour Review* 609.

175 During the 19th Century, there was a great industrial revolution in Countries such as France and Britain. The industrial revolution spread through to other parts of Europe and negatively affected the economic and social landscape in Europe.

176 Preamble to *ILO Constitution* of 1919; Rodgers *et al The ILO and the Quest for Social Justice* 2. See also Van Staden 2012 *TSAR* 96.

177 Rodgers *et al The ILO and the Quest for Social Justice* 2.

level – not in confrontation, but in a search for common rules, policies and behaviours from which all could benefit.¹⁷⁸

In order to achieve social peace and justice, the ILO took it upon itself to improve the workers' conditions of employment across all Member States.¹⁷⁹ In 1944, the ILO adopted the *Declaration of Philadelphia* at its 26th Conference. The declaration provides four fundamental principles which includes the protection of labour rights through legislation, protection of expression and freedom of association, eradication of poverty through any means necessary and finally, international tripartism through co-operation of all stakeholders such as employer representatives, employees and government representatives.¹⁸⁰

Over a period of nearly a century, the International Labour Conference of the ILO has adopted a plethora of conventions, recommendations and resolutions dealing with the protection of workers' rights in the workplace, in particularly with reference to the four fundamental principles mentioned previously. These are commonly referred to as ILO standards, which have to be ratified and adhered to by Member States on a global scale. By mid 2014 the ILO had adopted 189 conventions.¹⁸¹

Since its inception in 1919, the ILO has acknowledged the principle of equal pay for work of equal value as a key element of social justice.¹⁸² In order to affirm the principle of equal pay for work of equal value, the ILO adopted a convention¹⁸³ in 1951 that specifically deals with this issue, namely the *Equal Remuneration Convention* (No. 100) of 1951 (hereafter the *Equal Remuneration Convention*). It is apposite at this juncture to note that there are eight conventions which are regarded by the governing body of the ILO as being "core conventions". One of these, which is very relevant to this study, is the *Discrimination (Employment and*

178 Rodgers *et al The ILO and the Quest for Social Justice* 2.

179 Servais *International Labour Law* 19.

180 Servais *International Labour Law* 22.

181 See Van Niekerk and Smit *Law @ Work* 23.

182 See the preamble of the ILO's Constitution. See also Olez *et al Equal Pay: An Introductory Guide* 1.

183 Ratified by South Africa on 30 March 2000.

Occupation) Convention (No. 111) of 1958¹⁸⁴ (hereafter the *Discrimination in Employment Convention*).¹⁸⁵ This convention prohibits discrimination based *inter alia* on sex in the field of employment and occupation¹⁸⁶ and should thus for purposes of equal pay be read with the *Equal Remuneration Convention*.

In 2017, the ILO published a report titled *Towards a better future for women and work: Voices of women and men*.¹⁸⁷ The findings of the report had been based on interviews that were conducted in 2016 with nearly 150 000 adults in 142 countries.¹⁸⁸ Amongst other questions, men and women were asked to identify in their opinion the top challenge facing working women in their countries.¹⁸⁹ The study showed that women with a university education "are more likely than those with less education to mention unequal pay".¹⁹⁰ It is disconcerting that, despite the fact that more than 90 countries worldwide have ratified the aforementioned *Equal Remuneration Convention* and *Discrimination in Employment Convention*, the study estimated the wage gap to be 23% globally in 2016. In other words, on average, women earned roughly 77% of what men earned.¹⁹¹ The report noted:

The gender wage gap is unrelated to a country's level of economic development, as some of the countries with high per-capita levels are among those with the highest gender wage gaps. It cannot be described solely by differences in education, experience, age or even career breaks, which can all be explained. *The remaining and more significant part, the 'unexplained' portion of the pay gap, is attributable to pervasive discrimination – conscious or unconscious – against women.* If current trends prevail, it will take more than 70 years before gender wage gaps completely close.¹⁹² (Emphasis added)

Nevertheless, many academic authors agree¹⁹³ on the significant role that the ILO has played in protecting workers' rights through international standards. However,

184 Ratified by South Africa on 05 March 1997.

185 ILO *The International Labour Organization's Fundamental Conventions* 7.

186 Article 3 of *Discrimination in Employment Convention* 1958 (111).

187 ILO *Towards a better future for women and work: Voices of women and men*.

188 ILO *Towards a better future for women and work: Voices of women and men* 9.

189 ILO *Towards a better future for women and work: Voices of women and men* 39

190 ILO *Towards a better future for women and work: Voices of women and men* 47.

191 ILO *Towards a better future for women and work: Voices of women and men* 46.

192 ILO *Towards a better future for women and work: Voices of women and men* 46.

193 For instance Philip Alston argues that the ILO system of monitoring or supervising standards has been held up as the most successful example of appraisal in the international system as a whole. Therefore when there is a system that monitors compliance with international standards,

it is crucial to note that other authors do not *in toto* agree with the above mentioned position. For instance, Langille¹⁹⁴ points out that although the ILO has since its inception established various international standards; the rate at which those international standards are ratified is overwhelmingly low. Similarly, Dahan¹⁹⁵ expressed that one of the challenges facing the ILO is inadequate enforcement of international labour standards. Notwithstanding the above criticisms levelled against the ILO, it is submitted that the ILO has played and continues to play a fundamental role in protecting and improving workers' rights.

3.3 The binding nature of the ILO's instruments

International standards in the form of conventions, recommendations and resolutions are not automatically binding on Member States. In order for a convention to have binding effect upon a Member State, it must both be signed and ratified by that State.¹⁹⁶ The *Vienna Convention on the Law of Treaties* 1969 defines the term 'ratification' as "an act whereby a state establishes on the international plane its consent to be bound by an international treaty".¹⁹⁷ Should a convention therefore be ratified, the particular Member State has the obligation to incorporate the relevant standards within its national laws. On the other hand, recommendations by their very nature do not have a binding effect on Member States; they are just instruments used as guidance when Members States domestically establish policy, legislation and/or practice on that matter.¹⁹⁸

As noted earlier in this chapter, South Africa is one of the founding members of the ILO. However, on 8 July 1964, the ILO resolved to suspend South Africa's membership due to its apartheid policies.¹⁹⁹ Upon the demise of the apartheid

the workers rights are better protected because can direct a state to comply. See Alson 2004 *European Journal of Internal Law* 511. See also McDougal et al *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* 310.

194 Langille 2005 *European Journal of International Law* 425.

195 Dahan 2013 *Michigan Journal of International Law* 685.

196 Tully *Business & Economics* 93.

197 In terms of Article 2(b) thereof. See also *Government of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 34.

198 Tully *Business & Economics* 93.

199 International Labour Office Special Report of the Director-General on the review of the Declaration Concerning Action Against Apartheid in South Africa 3.

regime, South Africa was re-admitted into the organisation.²⁰⁰ A new Constitution was adopted in 1996 which out rooted most of the apartheid policies, particularly discrimination. It is essential to note two important provisions of the *Constitution* with reference to South Africa's obligations²⁰¹ under the ILO; section 39 and section 233 respectively. These sections provide interpretive guidance.²⁰² In terms of section 39, South African courts are bound to have regard to international law when construing the Bills of Rights.²⁰³ In simple terms, the provisions of "section 39 places an obvious premium on the value of international law in relation to the interpretation of the Bill of Rights".²⁰⁴ In *S v Makwanyane*,²⁰⁵ one of the leading cases on the interpretation of the Bill of Rights, the Constitutional Court noted that:

In the context of *section* 35(1) [now section 39(1) under the 1996 *Constitution*], public international law would include non-binding as well as binding law. They may both be used under the *section* as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three [now Chapter Two under the 1996 *Constitution*] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments...and in appropriate cases, reports of specialised agencies such as the International

200 International Labour Office Special Report of the Director-General on the review of the Declaration Concerning Action Against Apartheid in South Africa 4.

201 It should also be noted that section 231 of the Constitution provides for how and when international treaties become legally binding on South Africa. In *Glenister v The President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 89, the court noted that "The constitutional scheme of s 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements. But an international agreement signed by the executive does not automatically bind the Republic, unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament. The approval of an agreement by Parliament does not, however, make it law in the Republic, unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval, unless it is inconsistent with the Constitution or an Act of Parliament. Otherwise, and third, an international agreement becomes law in the Republic when it is enacted into law by national legislation".

202 See *SANDU v Minister of Defence* 2006 (27) ILJ 2276 (SCA) at para 6.

203 See section 39 of the *Constitution*; Van Niekerk *et al Law@ Work* 29; *S v Makwanyane* 1995 6 BCLR 66 (CC) at para 35; *Glenister v President of RSA* 2011 3 SA 347 (CC) at para 96. See also Olivier *LAWSA: International Instruments* 106.

204 Van Niekerk *et al Law @ Work* 29.

205 *S v Makwanyane* 1995 6 BCLR 66 (CC).

Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.²⁰⁶

With respect to the interpretation of legislation, section 233 of the *Constitution* provides that South African courts must interpret any legislation in accordance with international law.²⁰⁷ It dictates that "every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".²⁰⁸

Section 3(d) of the EEA is in line with the above constitutional principles, as it provides that the Act must be interpreted in compliance with the international law obligations of South Africa, in particular those contained in the ILO's *Discrimination in Employment Convention*.²⁰⁹ As noted above, this Convention specifically prohibits discrimination based *inter alia* on sex in the field of employment and occupation. The other relevant convention, amongst others, is the *Equal Remuneration Convention*. Since South Africa has ratified both conventions,²¹⁰ the EEA must be interpreted in line with these instruments and should give effect to the standards contained therein.

Although the focus of this chapter is on the ILO's instruments, it is important to note that the phrase "international law obligations of the Republic", as used in section 3(d) of the EEA, is broad enough to encompass non-ILO international and regional instruments. Ratified by South Africa on 15 December 1995,²¹¹ the UN *Convention on the Elimination of All Forms of Discrimination against Women* (hereafter CEDAW)²¹² requires Member States to take all appropriate measures to eliminate discrimination against women in the field of employment so to ensure

206 *S v Makwanyane* 1995 6 BCLR 66 (CC) para 35.

207 Section 233 of the *Constitution*; Van Niekerk *et al Law @ Work* 30; and *NUMSA & Others v Bader Bop* 2003 2 BLLR 103 (CC).

208 See section 233 of the *Constitution*. See also *SANDU v Minister of Defence* 2006 (27) ILJ 2276 (SCA) at para 6.

209 See section 3(d) of the EEA.

210 South Africa ratified the *Discrimination in Employment Convention* in 1997, and the *Equal Remuneration Convention* in 2000. See Hlongwane 2007 *Law Democracy and Development* 71.

211 See Hlongwane 2007 *Law Democracy and Development* 71.

212 The Convention was adopted in 1979, and came into force in 1981.

inter alia the right to equal remuneration in respect of work of equal value.²¹³ Closer to home, South Africa has also ratified the *African Charter of Human and People's Rights*.²¹⁴ Article 15 of the Charter provides that "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work". Even closer to home, the *SADC Protocol on Labour and Employment*²¹⁵ specifically provides that State Parties shall ensure compliance with the ILO's *Equal Remuneration Convention* and *Discrimination in Employment Convention*.²¹⁶

From the above it is clear that international law plays a fundamental role in the interpretation and development of South African law. Having explained the role of the ILO and the applicability of its international standards in South Africa, the subsequent part of this chapter focuses on the position of the ILO with respect to the issue of equal pay for work of equal value. Other relevant non-ILO standards will also be referenced below.

3.4 The ILO's instruments on equal pay for equal work

3.4.1 The Equal Remuneration Convention and the Discrimination in Employment Convention

The wage gap is a ghost that seems to be haunting most countries. South Africa is no exception. As has been indicated²¹⁷ the primary reason for the wage gap in most countries is historically based on the fact that women were not allowed to enter the workplace. For a long time the position of women in most societies was

213 See Article 11(d) of *CEDAW*.

214 The Charter was adopted in 1981, and came into force in 1986.

215 *SADC Protocol on Employment and Labour* (2014).

216 See Article 7 of the *SADC Protocol on Employment and Labour* (2014). South Africa is one of the members of SADC. Article 22 of the *SADC treaty* empowers SADC to promulgate various protocols. However, it is important to note that a protocol established under the treaty does not automatically apply to a member state simply because of membership. In simple terms, for a protocol to be binding and applicable to a Member State, it should be both signed and ratified by a member state. It is disconcerting to note that since passage of this protocol, not single Member State has ratified the Protocol. It is submitted that Member States, South Africa included should commit to the Protocol by ratifying it. It is further submitted that ratification of the Protocol may assist close the prevalent wage gaps, as this will impose binding obligations on Member States.

217 See Chapter 2, paragraph 2.1.

equated to performing homework, such as cleaning and taking care of the children.²¹⁸ Upon the demise of the apartheid regime in South Africa, women found themselves in unskilled and lower paying jobs as a direct result of previously being denied job opportunities, hence the high prevalence of the wage gap in South Africa.²¹⁹ Gladstone and Wheeler²²⁰ opine that the challenges in successfully achieving equal remuneration are relevantly connected to the past and present status of women and men in employment and society.²²¹

In 1948, the United Nations General Assembly adopted the *Universal Declaration of Human Rights* (hereafter UDHR). Although not legally binding, the UDHR was a historic document that affirmed the fundamental rights of all people. Everyone is entitled to the rights enshrined in the UDHR without distinction of any kind, such as sex.²²² Amongst other things, this declaration provides that "everyone, without any discrimination, has the right to equal pay for equal work".²²³ This means that every person has a right not to be discriminated against, on the basis of any arbitrary ground such as sex, with respect to pay for work of equal value.

As a United Nations agency, the ILO consequently adopted the *Convention on Equal Remuneration* in 1951: it was the first international legally binding treaty on this issue.²²⁴ South Africa ratified this Convention on 30 March 2000 and should thus comply with the relevant standards.

The main objective of the *Convention on Equal Remuneration* is to affirm the principle of equal pay between men and women for work of equal value. The Convention strongly supports gender equality and stipulates that the rates of remuneration must be established without discrimination based on sex.²²⁵ It defines the phrase "equal remuneration for men and women workers for work of equal value as standards of remuneration applied to both men and women

218 Mariotti 2012 *Economic Law Review* 110.

219 Gladstone and Wheeler *Labour Relations in a Changing Environment* 367.

220 Gladstone and Wheeler *Labour Relations in a Changing Environment* 367.

221 Gladstone and Wheeler *Labour Relations in a Changing Environment* 367.

222 See Article 1 of the *UDHR*.

223 See Article 23 of the *UDHR*.

224 Olez *et al* *Equal Pay: An Introductory Guide* 1.

225 See Article 1(b) of the *Equal Remuneration Convention*.

without discrimination".²²⁶ The Convention thus envisions that in no way may sex be the reason for differential treatment as far as remuneration is concerned. The Convention obliges Member States to:

...by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.²²⁷

Thus, the aforementioned article 2(1) places a positive obligation on Member States to not only promote, but also ensure the application of the principle of equal pay for men and women for work of equal value. Member States may fulfil their obligation of promoting and ensuring the application of the principle of equal pay for men and women for work of equal value by enacting national laws or regulations.²²⁸ In terms of the Convention, the principle of equal pay for men and women for work of equal value may also be promoted and ensured through legally established or recognised machinery for wage determination or collective agreements between employers and workers.²²⁹ The *Convention on Equal Remuneration*, therefore, recognises the important role which collective bargaining plays in the determination of the terms and conditions of workers.²³⁰ Olez *et al.* cite Singapore as an example of a country where collective bargaining has been utilised to promote and ensure the principle of equal pay for work of equal value:

In Singapore, the government and the social partners issued the Tripartite Declaration on equal remuneration for men and women performing work of equal value. A tripartite agreement was reached that equal pay clauses should be inserted in collective agreements at the company level.²³¹

When article 2(1) of the *Convention on Equal Remuneration* is read with Article 1(b)²³² it becomes evident that the Convention indirectly outlaws discrimination between men and women with reference to terms and conditions of

226 Article 1 (b) of the *Equal Remuneration Convention*.

227 See Article 2(1) of the *Equal Remuneration Convention*.

228 See Article 2(2) of the *Equal Remuneration Convention*.

229 See Article 2(2) of the *Equal Remuneration Convention*.

230 See the *Collective Bargaining Convention* (No. 154) 1981.

231 Olez *et al* *Equal Pay: An Introductory Guide* 54.

232 Article 1(b) provides that the "term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex".

employment.²³³ In an endeavour to eradicate discriminatory practices relating to wages and other employment benefits, the Convention requires each Member State to have in place methods and systems for determining the rates of remuneration:²³⁴ objective criteria free from gender bias.²³⁵ Although the Convention does not specify which job evaluation criteria should be used, article 3 thereof emphasises the need for "appropriate techniques for job evaluation".²³⁶ As the Committee of Experts has noted:

The concept of 'equal value' requires some method of measuring and comparing the relative value of different jobs. There needs to be an examination of the respective tasks involved, undertaken on the basis of entirely objective and non-discriminatory criteria to avoid the assessment being tainted by gender bias. While the Convention does not prescribe any specific method for such an examination, Article 3 presupposes the use of appropriate techniques for objective job evaluation, comparing factors such as skill, effort, responsibilities and working conditions.²³⁷

As has been noted several times in this study, discrimination against women is one of the main reasons behind the gender pay gap.²³⁸ Thus, seven years after the adoption of the *Convention on Equal Remuneration*, the ILO adopted the *Discrimination in Employment Convention*. As will be shown below, these two conventions come together to affirm, promote and ensure the principle of equal pay for work of equal value for all workers. They must be read collectively.

The *Discrimination in Employment Convention* specifically prohibits discrimination based, *inter alia*, on sex in the field of employment and occupation.²³⁹ The Convention obliges Member States to promote "equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."²⁴⁰ According to section 1(3) of the Convention, the terms "employment" and "occupation" refers among others to

233 Article 1 (b) of the *Equal Remuneration Convention*.

234 Article 2 (1) of the *Equal Remuneration Convention*.

235 See Olez *et al* *Equal Pay: An Introductory Guide* 38.

236 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 291.

237 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 291.

238 See Olez *et al* *Equal Pay: An Introductory Guide* 46.

239 See Article 1(1) of the *Discrimination in Employment Convention*.

240 See Article 2 of the *Discrimination in Employment Convention*.

terms and conditions of employment, which would naturally include arrangements regarding remuneration.²⁴¹

Unlike the *Convention on Equal Remuneration*, which is not focused on discrimination *per se*, the *Discrimination in Employment Convention* concentrates on identifying and eliminating discrimination in the workplace. It defines the term discrimination as any distinction or exclusion made on the basis of a listed ground in article 1, for example sex and gender, which has the effect of nullifying or impairing treatment in employment or occupation.²⁴² It will be recalled from the previous chapter that the EEA in South Africa prohibits unfair discrimination, but does not define the term discrimination. However, since section 3(1)(d) of the EEA provides that the Act must be interpreted in compliance with the international law obligations of South Africa, discrimination as referred to in section 6(1) of the EEA should be understood as defined in the *Discrimination in Employment Convention*.²⁴³

3.4.2 The Equal Remuneration Recommendation and the Guidelines on Equal Pay

In addition to the above-mentioned conventions, the ILO also adopted the *Equal Remuneration Recommendation* (No. 90) of 1951 (hereafter the *Equal Remuneration Recommendation*). The purpose of the Recommendation is to "indicate certain procedures for the progressive application of the principles laid down in the Convention", referring to the *Convention on Equal Remuneration*.²⁴⁴ The scope of the Convention extends to all workers in the private and public sectors; no exclusions are permitted.²⁴⁵ According to Olez *et al.*, the gender pay gap is usually higher in the private sector than in the public sector.²⁴⁶ This is probably due to the fact that whilst salaries in the public sector are often fixed by

241 See Article 1(3) of the *Discrimination in Employment Convention*.

242 See Article 1(3) of the *Discrimination in Employment Convention*.

243 Du Toit and Potgieter *Unfair Discrimination in the Workplace* 17-18.

244 See the preamble of the *Equal Remuneration Recommendation*.

245 See Article 2(1) of the *Equal Remuneration Convention*. See also ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 275-276; Olez *et al* *Equal Pay: An Introductory Guide* 26.

246 Olez *et al* *Equal Pay: An Introductory Guide* 12.

legislation or subsidiary legislation (regulations),²⁴⁷ salaries in the private sector are normally the result of negotiations between the employer and employees. To address the gender pay gap in the public sector, the Recommendation calls on Members of the Convention to take appropriate action to ensure that the principle of equal pay for work of equal value is applicable to all employees of the State.²⁴⁸ One way of taking appropriate action is to enshrine the principle of equal pay for work of equal value in local legislation, and to effectively implement and enforce such legislation. The Recommendation therefore requires Member States to enact appropriate national laws as a means of applying the principle and maintaining the intended standard.²⁴⁹ National laws or regulations are important in "establishing a clear right to equal pay and in setting out procedures and remedies so that the right can be effectively applied".²⁵⁰

Regardless of the reason for the differentiation where a claimant is alleging that she is receiving unequal pay for work of equal value, she has to establish that in fact her work is of equal value to that of the comparator.²⁵¹ Therefore, the Recommendation underlines the importance and the need to establish objective job evaluation criteria, free from gender bias.²⁵² It is important to note that the ILO instruments discussed above do not provide much guidance regarding which job evaluation methods should be used in determining the value of work.²⁵³ This is where the Equal Pay Guidelines come into play. These guidelines were published under the auspices of the ILO, and were meant to "help Member States to better understand and implement the principle of equal pay for work of equal value as espoused in the *Equal Remuneration Convention*".²⁵⁴ The guidelines confirm that objective job evaluation methods (free from gender bias) are the best means of

247 In South Africa, Public Servants salaries are regulated by the *Public Servants Regulations of 2016 as Amended*, in particular regulations 47 thereof.

248 See Article 1(a) and (b) of the *Equal Remuneration Recommendation*.

249 See Article 3(1) of the *Equal Remuneration Recommendation*.

250 See Olez *et al* *Equal Pay: An Introductory Guide* 78.

251 Laubscher 2016 *Industrial Law Journal* 9.

252 See Article 5 of the *Equal Remuneration Recommendation*.

253 Ebrahim 2016 *PELJ* 10; ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 291.

254 Ebrahim 2016 *PELJ* 10.

determining the value of work.²⁵⁵ It identifies two job evaluation methods, namely global or ranking job evaluation methods and analytic job evaluation methods.

Global or ranking job evaluation methods:

...rank jobs on the basis of the importance of the job requirements. They examine the whole job rather than its individual components. This tends to identify the characteristics of the jobholder with the characteristics of the job itself. Ranking methods ascertain the importance of jobs within organizations, but do not determine the difference in value between them.²⁵⁶

On the other hand, analytic job evaluation methods:

...break jobs down into components or factors and sub-factors, and attribute points to them. Factors include: Skills and qualifications acquired through education, training or experience; Responsibility for equipment, money and people; Working conditions, which encompass both physical (noise, dust, temperature, and health hazards) and psychological aspects (stress, isolation, frequent interruptions, simultaneous requests and client aggression).²⁵⁷

The Recommendation and the guidelines add substance to the principles that are laid down in the *Equal Remuneration Convention*. Given that South Africa has ratified the aforementioned Conventions, to what extent does it comply with its obligations under these instruments? This question is addressed next.

3.5 South Africa: compliance with its ILO obligations

South Africa seems to comply with its obligations under the *Equal Remuneration Convention* to a large extent. In accordance with the obligation placed on the state by the *Constitution* to enact laws prohibiting discrimination,²⁵⁸ the EEA was enacted by the South African parliament on 12 October 1998.²⁵⁹ The primary objective of the EEA is "to achieve equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination".²⁶⁰ Given the criticism levelled against the legislature (prior 2014)

255 The term 'job evaluation method' is defined as "...a process that compares jobs to determine the relative position of one job to another in a wage or salary scale. Any employer who pays different wage rates for different jobs uses some form of job evaluation method, whether informal or formal". See Olez *et al* *Equal Pay: An Introductory Guide* 38.

256 Olez *et al* *Equal Pay: An Introductory Guide* 38.

257 Olez *et al* *Equal Pay: An Introductory Guide* 38.

258 Section 9(3) of the *Constitution* 1996.

259 EEA 55 1998.

260 In terms of section 2 (a) of the EEA.

for the lack of a legal provision or law expressly dealing with wage/pay discrimination on the basis of sex,²⁶¹ the EEA, in particular section 6 thereof, was amended in 2013 *inter alia* to remedy this defect.²⁶² In line with the *Equal Remuneration Convention*, section 6(4) of the EEA (as amended) now enshrines the principle of equal pay for work of equal value. In turn, and in line with the *Equal Remuneration Convention* and the *Equal Remuneration Recommendation*, the *Employment Equity Regulations* of 2014 sets out factors that ought to be taken into account in determining whether work is the same or of equal value; an objective criteria free from gender bias.²⁶³

South Africa also largely complies with its obligations under the *Discrimination in Employment Convention*. In line with the *Discrimination in Employment Convention*, section 6(1) of the EEA prohibits discrimination in the workplace based on sex and gender, amongst other things. In turn, section 6(4) of the EEA (as amended) now enshrines the principle of equal pay for work of equal value, and by implication addresses South Africa's obligation under the Convention to ensure and promote non-discrimination against any worker. National laws such as the EEA in South Africa are essential in the fulfilment of principles that are embodied in the ILO's instruments. They are also important in "establishing a clear right to equal pay and in setting out procedures and remedies so that the right can be effectively applied".²⁶⁴

Notwithstanding the above, there is, however, one important aspect in which South African law seems to fail. Article 2(1) of the *Equal Remuneration Convention* places a positive obligation on Member States to not only promote but also ensure the application to all workers of the principle of equal pay for men and women for work of equal value. The *Equal Remuneration Recommendation* also calls on Members to the Convention to take "appropriate action" to ensure that the

261 See *Memorandum on Objects of Employment Equity Amendment Bill* 2012 at para 3.3.3. See also *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 5, where Van Niekerk J acknowledged that the EEA did not address equal pay claims (this judgment was delivered before the amendment of section of the EEA in 2014).

262 The EEA was amended by the *Employment Equity Amendment Act* 47 of 2013.

263 See Regulation 6 of the *Employment Equity Regulations* 2014.

264 See Olez *et al* *Equal Pay: An Introductory Guide* 78.

principle of equal pay for work of equal value is applicable to all employees, in particular employees of the State.²⁶⁵ The scope of the Convention, therefore, extends to all workers in the private and public sectors.²⁶⁶ The EEA, though, is not applicable to all workers, as it excludes some State employees.²⁶⁷ PEPUDA covers persons who are excluded from the ambit of the EEA.²⁶⁸ However, although PEPUDA expressly states that failing to respect the principle of equal pay for work of equal value is a widespread practice that needs to be addressed, PEPUDA does not expressly establish a right to equal pay nor regulate the principle and equal remuneration claims.²⁶⁹ As McGregor explains:

PEPUDA further states that failure to respect the principle of equal pay for equal work, a 'widespread' practice, is an 'unfair practice' (s 29(1)...Section 29(2) and 4(a)oblige the state to ensure that legislative and other measures are taken to address and eliminate such practices. Though the principle of equal pay is listed as a practice 'which needs to be addressed,' *the Act itself does not regulate the principle.*²⁷⁰ (Emphasis added)

On the other hand, it is significant to note that even though both PEPUDA and the *Public Servant Act* do not expressly regulate the principles of equal pay, the *public service regulations* do to a certain extent regulate the concept. According to the *Public Service Regulations*,²⁷¹ the minister is empowered to determine the job evaluation methods applicable in the public sector. The purpose of the job evaluation systems is to ensure that employees performing work rated as equal in value are remunerated equally.²⁷² The regulations further provide that the Minister may issue directives regarding which job evaluations may be used.²⁷³ An attempt

265 See Article 1(a) and (b) of the *Equal Remuneration Recommendation*.

266 See Article 2(1) of the Equal Remuneration Convention. See also Olez *et al* *Equal Pay: An Introductory Guide* 26.

267 In terms of section 4 of the EEA, Act does not apply to members of the security services i.e. the National Defence Force, National Intelligence Agency, the South African Secret Service or South African National Academy of intelligence. The terms and conditions of public sector employees are regulated by the *Public Service Act* 103 of 1994. This Act is silent regarding the principle of equal pay for work of equal value.

268 *Du Preez v Minister of Justice* 2006 27 ILJ 1811 (LC) provides a good example on how PEPUDA is to be interpreted and applied. See also Brickhill 2006 *Industrial Law Journal* 2004-2014.

269 McGregor 2011 *South African Mercantile Law Journal* 494.

270 McGregor 2011 *South African Mercantile Law Journal* 494. See also section 29 of PEPUDA.

271 See Regulation 41(1)(a) *Public Service Regulations* 2001 (As amended in 2016).

272 See Regulation 41(1)(a) *Public Service Regulations* 2001 (As amended in 2016).

273 See Regulation 42(2)(a) *Public Service Regulations* 2001 (As amended in 2016).

was made to find out whether the minister has ever prescribed which job evaluations methods should be used in the public service but in vain. The EEA's regulations are comprehensive in terms of factors to be considered during the assessment of the value of work. Unlike the EEA, the *Public Service Regulations* do not shed light on factors that may be taken into consideration when assessing the value of work. For instance, the *Employment Equity Regulations* provide the following factors: (a) the responsibility for people finances and material, b) the skills, qualifications, including prior learning and experience required to perform the job, c) physical, mental and emotional effort required to performed, including the physical environment.²⁷⁴ It is submitted that the *Public Service Regulations* should be amended to incorporate the above mentioned factors which significantly play a pivotal role in assessing the value of work. It is further submitted that in the presence of the aforesaid factors, South Africa will be compliant with its international obligations in as far as coverage of the all the employees is concerned.

Apart from the above non-compliance issue, it is important to note that failure by employers to have in place measures which objectively evaluate jobs, may result in unjustified pay disparities. It has also been suggested that one of the reasons for pay disparities in South Africa is the result of outdated and irrational methods of job evaluations.²⁷⁵ Due to a lack of clear statistics relating to the number of employers making use of job evaluations, this study will rely substantially on the statistics provided by both Laubscher and Hay Group.

As suggested above South African a lack of objective job evaluation methods are responsible for pay gaps.²⁷⁶ It is significant to indicate at this juncture that the Hay Group conducted the Equal Pay Seminar in 2014.²⁷⁷ Relevant to the discussion at hand, Laubscher provides that a majority of the employers who participated in the seminar confirmed that they had job evaluations in place.²⁷⁸ Nevertheless, it is

274 See Regulation 6 (1) a – d of the *Employment Equity Regulations* 2014.

275 Laubscher 2016 *Industrial Law Journal* 810.

276 Laubscher 2016 *Industrial Law Journal* 810.

277 The seminar was jointly facilitated and presented by the Hay Group and Bowman Gilfillan Inc.

278 Laubscher 2016 *Industrial Law Journal* 810.

crucial to note that some employers did not, whilst some were totally ignorant of job evaluations.²⁷⁹ According to the statistics unpacked by Laubscher, 73% of employers in the seminar had job evaluations in place, while 12% did not have this system in place, and was by implication not rating the value of the work performed by their employees. It is further significant to note that some of the employers did not have job evaluation at all (15%).²⁸⁰ It should be noted that even though some employers indeed had job evaluation methods in place, most of them were not comprehensive, and some were outdated. As Laubscher argued "...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."²⁸¹

It should further be noted that the mere presence of job evaluation methods in the workplace does not automatically negate the presence of discrimination.²⁸² In order for job evaluation methods to be free from discrimination, they should be thoroughly analysed and capable of impartial application.²⁸³ It has been argued that most job evaluation methods were crafted on the idea that there are certain jobs reserved for men whilst lower jobs which typically require little to no skills belong to women.²⁸⁴ Whilst this may be historically true, some women have transitioned into positions which were previously regarded as held by men.²⁸⁵ Women who have transitioned into male dominated jobs are facing a plethora of challenges.²⁸⁶ The challenges faced by women in male dominated positions *inter alia* include lower wages as compared to their male counterparts.²⁸⁷

Based on the statistics provided above, it is submitted that one of the reasons for the persisting wage gap in South Africa is due to inadequate job evaluation methods. As stated by Laubscher, most job evaluation methods are neither

279 Laubscher 2016 *Industrial Law Journal* 810.

280 Laubscher 2016 *Industrial Law Journal* 810.

281 Laubscher 2016 *Industrial Law Journal* 812.

282 Laubscher 2016 *Industrial Law Journal* 810.

283 Laubscher 2016 *Industrial Law Journal* 822.

284 Tshoaedi 2012 *Labour Capital and Society* 65.

285 England 2010 *Gender and Society* 150.

286 Martin and Barnard *SA Journal of Industrial Psychology* 3.

287 Martin and Barnard *SA Journal of Industrial Psychology* 3.

analytical nor comprehensive.²⁸⁸ As shown above, some employers were oblivious of job evaluation methods while others did not have job evaluation systems in place at all. The inference drawn above is that some employers are not rating the value of the work performed by the employees. This is solely against the fact that; some employers do not even know of the existence of job evaluation methods. In light of the above, it is submitted that South Africa is not compliant as far as independent job evaluations is concerned.

3.6 Concluding remarks

The most important function of the ILO is to set international labour standards.²⁸⁹ These standards are to be found in conventions and recommendations adopted by the ILO. The *Equal Remuneration Convention* was adopted in 1951 in order to affirm the principle of equal pay for work of equal value. Its focus is not on discrimination *per se* but on the assessment of the value of remuneration, and it obliges Members to have in place methods and systems for determining the rates of remuneration such as²⁹⁰ objective criteria free from gender bias.²⁹¹ The *Discrimination in Employment Convention*, on the other hand, is focused on identifying and eliminating discrimination. These Conventions come together to affirm, promote and ensure the principle of equal pay for work of equal value for all workers. Thus, Member States are obliged to domesticate these international standards.

Whilst South Africa complies with its obligations under the aforementioned conventions to a large extent, it was shown that there are still some issues that need to be addressed. The next chapter examines best practices on equal pay in the UK in order to determine what lessons, if any, the former may learn from the latter.

²⁸⁸ See footnote 255 above.

²⁸⁹ Du Toit *et al* *The Labour Relations Act of 1995* 51.

²⁹⁰ Article 2 (1) of the Equal Remuneration Convention.

²⁹¹ See Olez *et al* *Equal Pay: An Introductory Guide* 38.

Chapter 4 – Equal pay for work of equal value in the United Kingdom: a comparative perspective

4.1 Introduction

Whilst South Africa introduced specific law which provides for equal pay for work of equal value only a few years ago,²⁹² the principle of equal pay has been enshrined in British law since the early 1970's.²⁹³ As will be shown in this chapter, over the past three to four decades, the UK law has been scrutinised by the courts and subsequently amended to ensure its adequacy and effectiveness.

The main question that this study aims to answer is the following: how sufficient is the South African labour laws in comparison to the United Kingdom and international law standards in its response to pay gaps between genders in the context of the principle of equal pay for equal work? Therefore, this chapter is examines UK's best practices on equal pay for equal work. It aims to determine what lessons, if any, the former may learn from the latter.

The chapter commences with a brief historical overview pertaining to equal pay for equal work in the UK. Subsequently, the chapter will critically unpack the current regulation of equal pay for equal work in this region. Relevant jurisprudence on equal pay for work of equal value will also be considered in order to determine what lessons (if any) South Africa may learn. Finally, concluding remarks will be made.

292 From the discussion in chapter 2, it will be recalled that South Africa had been criticised for the lack of an explicit law that not only enshrined the right to equal pay for work of equal value but also prohibited unequal pay on the grounds of gender or sex. It will also be recalled that the EEA was amended – by introducing subsections 6(4) and (5) – in 2013 to address this issue.

293 The *Equal Pay Act* of 1970 enshrined the principle of equal pay in the U.K.

4.2 The development of the principal of equal pay for work of equal value in the UK

4.2.1 Contextual background: a brief overview

As is the case with most countries, women in the UK were previously denied employment access during the 1900s. The reasons for denial of employment have been thoroughly discussed throughout chapter two and thus will not be repeated in this chapter. However, it suffices to note that the current and historical causes of the gender pay gap in South Africa²⁹⁴ are similar to those in the UK. Fredman has neatly summed it up as follows:

The causes of the pay gap are complex and deeply embedded in the institutions of our society. Occupational segregation is a major factor. Women are still concentrated in lower-paying occupations, with nearly two-thirds of women employed in 12 occupation groups, most of which are related to women's traditional roles in the family-caring, cashiering, catering, cleaning and clerical occupations, as well as teaching, health associate professionals (including nurses) and 'functional' managers, such as financial managers, marketing and sales managers and personnel managers. Other structural factors include the gender skills gap, particularly for older women, because there is less access to training in the lower paid sectors where more women than men tend to work. But most important is the fact that women remain primarily responsible for child care. Taking time out of the labour market, amassing less experience, limitations in respect of travel to work and part-time working, all extract a severe wage penalty.²⁹⁵

The point that Fredman is making is that it is not an easy task to pinpoint the exact causes of the gender pay gap. Historically, as was shown in the previous chapters, work done by women was undervalued and this was largely driven by deep-rooted cultural gender stereotypes. For example, the "social conditioning and persistent view that a woman's place is in the home, more specifically, in the kitchen".²⁹⁶ In the UK, the gender pay gap was and continues to be exacerbated by occupational segregation; the isolation of women into certain lower paying

294 See chapter 2 above (paragraph 2.2) where the causes of the gender pay gap in South Africa are discussed.

295 Fredman 2008 *Industrial Law Journal* (UK) 195.

296 See Loveday 1997 *Journal of South African Law* 100.

jobs, occupations and sectors which "increases the probability that work mainly done by women is being undervalued as compared to male-dominated work".²⁹⁷ This form of occupational segregation is known as horizontal occupational segregation.²⁹⁸

The First and Second World War unfastened female employment barricades to some extent. This was done by way of replacing men who were deployed from their jobs to fight alongside women.²⁹⁹ As Gledhill and Swanson explains, "women worked in a much wider range of occupation than they had done previously, including some skilled processes previously designated men's work".³⁰⁰

Yet, although the barriers seemed to have been broken down, women were poorly remunerated in comparison to men. Pursuant to Small *et al.* British women earned half of what the male employees were earning before they were deployed to the war.³⁰¹ Women were understandably dissatisfied with the poor wages and hence they frequently embarked on strike action.³⁰² Unfortunately, their industrial actions did not garner adequate support,³⁰³ and were opposed by most trade unions.³⁰⁴ A majority of the opponents perceived women unsuitable for the industry work but much more suitable for the traditional house work. As noted above, female wages remained little despite the transition into skilled positions.

297 See also Olez *et al* *Equal Pay: An Introductory Guide* 9.

298 As Olez *et al* explain: "Women work in a smaller and lower-paying range of occupations and industries than men. This is called horizontal occupational segregation. Women work as, for example, secretaries and nurses or day care workers, which are typically paid less than jobs mostly performed by men, such as truck drivers, machinists and miners. This is often a result of stereotyped assumptions regarding what type of work is 'suitable' for women". See Olez *et al* *Equal Pay: An Introductory Guide* 16.

299 Oldfield *International Women Suffrage* 60.

300 Gledhill and Swanson *Nationalising Femininity: Culture, Sexuality and Cinema in the World War Two Britain* 55: See also Walby *Gender Transformations* 27.

301 Small *et al* *History of World War I* 750.

302 Braybon *Women workers in the First World War* 80.

303 Braybon *Women workers in the First World War* 80.

304 Braybon *Women workers in the First World War* 80.

4.2.2 *The Equal Pay Act 1970*

Notwithstanding the challenges that have briefly been identified above, female workers' struggle for equal pay eventually seemed to have come to an end.³⁰⁵ The government introduced the *Equal Pay Act 1970* (hereafter the *EPA* of 1970) in a quest to eradicate the prevailing gender discrimination in employment wages: the Act required employers to afford equal treatment to all employees irrespective of their gender.³⁰⁶ In terms of section 1 thereof, the *EPA* of 1970 provided for equal pay as follows:

- (a) Men and women employed on like work the terms and conditions of one sex are not in any respect less favourable than those of the other [check]
- (b) For men and women employed on work rated as equivalent the terms and conditions of one sex are not less favourable than those of the other in any respect in which the terms and conditions of both are determined by the rating of their work.³⁰⁷

In terms of the foregoing, it is clear that the *EPA* of 1970 established equality between men and women in terms and conditions of employment, inclusive of wages. Pursuant to the provisions of section 1(4), like work is defined as "work that is the same or of a broadly similar nature, where the differences are not of practical importance in relation to the terms and conditions of employment".³⁰⁸ Put differently, work is considered to be like when the employees perform similar duties or substantially similar duties. As Phillips J explained:

Once it is determined that work is of a broadly similar nature it shall be regarded as like work unless the differences are plainly of a level which the industrial tribunal in its experience would expect to find reflected in the terms and conditions of employment.³⁰⁹

305 Fredman *Discrimination Law* 6.

306 In terms of Section 1(1) of the *EPA* of 1970; See also Zabalza and Tzannatos *Women and Equal Pay: The Effects of Legislation on Female Employment and Wages in Britain* 2-3; and Fredman *Discrimination Law* 6.

307 See sections 1(a) and 1(b) of the *EPA* of 1970.

308 Section 1(4) of the *EPA* of 1970. See also McCrudden 1983 *Industrial Law Journal (UK)* 197.

309 *Capper Pass Ltd. v. Lawton* 1977 Q.B 857.

Moreover, the *EPA* of 1970 defined "work rated as equivalent" in the following terms:

A woman is to be regarded as employed on work rated as equivalent with that of any man, if but only if, her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the job to be done by all or any of the employees in an undertaking or group of undertakings....³¹⁰

The above definition seems to imply that the *EPA* of 1970 provided for equal pay for equal value of work.³¹¹ Unfortunately, this definition was rigorously criticised and therefore its application never saw the light of day.³¹² The above definition was accorded a very narrow construction, in terms of which courts and tribunals were obliged to match the job specifications of work done by both men and women, in order to evaluate whether the duties performed were the same or extensively akin without regard to the value.³¹³

4.2.3 The impact of EU law and the ECJ

Although the promulgation of the *EPA* of 1970 appeared to have taken the first steps to victory for equal pay for equal work in the UK, it is important to note that the *EPA* of 1970 was not implemented in 1970, but in 1975.³¹⁴ It was particularly implemented in anticipation of the UK's membership to the European Union (hereafter EU),³¹⁵ as McCrudden has noted.³¹⁶

310 Section 1(5) of the *EPA* of 1970.

311 McCrudden 1983 *Industrial Law Journal* (UK) 197.

312 McCrudden 1983 *Industrial Law Journal* (UK) 197.

313 McCrudden 1983 *Industrial Law Journal* (UK) 198.

314 Ashenfelter and Card *Handbook of Labor Economics* 1433.

315 The EU, under Article 119 of the *Treaty of Rome* 1952 required member states to implement the principle of equal for equal work. Since, the UK joined the EU in 1973, it had to ensure the implementation of the Treaty of Rome, hence the implementation of the *EPA* of 1970. As Ingerbog explains, the EU is "...the body established by the Treaty on European Union. It is a body without precedent in history whose status is still not clearly and fully defined. Though not a state in itself, it is a *supranational* body 'founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States' (Article 6(1) EU). It is vested with its own sovereignty, legislative powers, jurisdiction and law-enforcement mechanisms". See Ingeborg 1999 *International Labour Review* 383.

Article 119 of the *Treaty Establishing the European Economic Community* 1957 (hereafter EEC Treaty)³¹⁷ obliges EU Member States to "ensure that the principle of equal pay...for equal work or work of equal value is applied".³¹⁸ The reasons why article 119 (the equal pay clause) was included in the treaty were:

Though part of the Treaty's social chapter, this provision was not included with a view to promoting social justice. Rather, the reason was that some of the founding Members had already ratified the ILO's Equal Remuneration Convention, 1951 (No. 100), which calls for 'equal remuneration for work of equal value' (Article 2). Of these, France, in particular, feared a competitive disadvantage for its industries and insisted on the inclusion of such a clause.³¹⁹

When it became evident that EU Member States were slow in applying article 119, the European Commission proposed legislation to enforce and broaden the article.³²⁰ In turn, the *Equal Pay Directive* was introduced in 1975.³²¹ Whereas article 119 of the EEC Treaty only provided for the right to equal pay for equal work, article 1 of the *Equal Pay Directive* widened this concept to include equal pay for work to which equal value is ascribed.³²² Thus, the UK had to extend the scope of its domestic legislation to provide for the principle of equal pay for work of equal value.³²³

316 McCrudden 1983 *Industrial Law Journal* (UK) 197.

317 Now contained in article 157 of the Treaty of the Functioning of the European Union 1957.

318 Smith 2017 *North East Law Review* 72.

319 See Ingeborg 1999 *International Labour Review* 383. See also Gregory 1997 *Victoria University Wellington Law Review* 556, where she notes, "The history of Article 119, establishing the principle of equal pay for equal work, in many ways epitomises the relationship between the economic and social dimensions of the Community. It was France that insisted on the inclusion of Article 119 in the Treaty, demanding that other countries follow the French lead, so that they would be unable to undercut France by using women as a source of cheap labour. Article 119 was therefore conceived as an aid to fair competition in the labour market, rather than as a human rights measure; indeed, it was shifted from the economic core of the Treaty to the Title on Social Policy at a late stage in the drafting process, probably in order to boost the content of this section, which was otherwise rather thin".

320 Reddick-Martin 1994 *Florida Journal of International Law* 489.

321 Reddick-Martin 1994 *Florida Journal of International Law* 489.

322 Article 1 of the Directive provides that "The principle of equal pay for men and women outlined in Article 119 of the Treaty [EEC Treaty], hereinafter called 'equal pay', means, for the same work or for work to which equal value is attributed". See also Ingeborg 1999 *International Labour Review* 383. See also Gregory 1997 *Victoria University Wellington Law Review* 557.

323 Smith 2017 *North East Law Review* 73.

The UK was unenthusiastic to accede to the above directive. Its reluctance gave rise to litigation which paved way to the amendment of the EPA of 1970. In *Commission of the European Communities v UK*,³²⁴ the ECJ had to determine whether the UK was indeed in breach of the *Equal Pay Directive*. The Commission had approached the ECJ, *inter alia* claiming that the UK had breached the *Equal Pay Directive* by not adopting necessary legislative measures in order to comply with the directive. However, it was argued on behalf of the UK that:

The Equal Pay Directive did not require member states to adopt measures entitling any employee to insist upon some form of job evaluation being carried out in order to determine whether his or her job is equal in value to another.³²⁵

In response, the Commission argued that the provisions of article 1 of the *Equal Pay Directive* requires the member states to espouse the measures necessary to allow a female employee to contend for the purpose of fighting any discrimination premised on sex, that the two jobs, even though dissimilar, may be of equal value.³²⁶ It will be recalled that article 2(1) of the *Convention on Equal Remuneration* places a positive obligation on Member States to not only promote, but also ensure the application of the principle of equal pay for men and women for work of equal value, and that Member States may fulfil their obligation of promoting and ensuring the application of the principle of equal pay for men and women for work of equal value by enacting national laws or regulations.³²⁷ Seemingly, this was also the purpose of article 1 of the EU's *Equal Pay Directive*.

At this juncture, it should be noted that the rulings of the ECJ, like European legislation, have a supranational character.³²⁸ They are binding on EU Member states, and must be applied throughout the EU.³²⁹ It is important to mention at

324 *Commission of the European Communities v United Kingdom* 1982 ICR 578 (ECJ).

325 *Commission of the European Communities v United Kingdom* 1982 ICR 590 (ECJ) para 6.

326 *Commission of the European Communities v United Kingdom* 1982 ICR 592 (ECJ) para 8.

327 See Article 2(2) of the *Equal Remuneration Convention*.

328 Ingeborg 1999 *International Labour Review* 384. For an in-depth discussion of the ECJ's jurisprudence on equal pay claims, see Tudor 2017 *North Dakota Law Review* 416.

329 Ingeborg 1999 *International Labour Review* 383. See Gregory 1997 *Victoria University Wellington Law Review* 558, where she explains the function of the ECJ as follows: "The

this juncture that the UK has recently voted out of the ECC.³³⁰ The UK's departure from the EU ("Brexit") has a number of implications, some of which cut directly across employment law arena. As noted above, the EU laws largely influenced the development of the equal pay concept in the UK, in particular through the decisions of the ECJ. According to Ford, notwithstanding the fact that the UK has voted out of the EU, until it invokes the provisions of article 50 of the *Lisbon Treaty*,³³¹ it remains bound by the EU laws.³³² It should be noted that the UK has indeed triggered article 50 of the Lisbon Treaty.³³³ In simple terms, this means that the UK has started the process of leaving the EU. According to Ford, all EU legislations remain binding on the UK until withdrawal negotiations have been completed.³³⁴ As stipulated, Brexit will have certain implications, in particular to the UK's labour laws. The UK government will be at liberty to water down or overhaul all labour laws implemented under the EU. It remains to be seen how the UK government will deal with the equal pay concept.

Returning to *Commission of the European Communities v UK*, the ECJ, after considering both parties' arguments held in favour of the Commission. It ruled that a worker must be entitled to claim equal pay for work of equal value. The ECJ further held that the UK did not put in place pertinent mechanisms to ensure compliance with the provisions of the *Equal Pay Directive*.³³⁵ Following the foregoing ruling, the UK took steps to ensure compliance. Although extremely

European Court of Justice is composed of judges from each Member State. It hears cases against Member States who have failed to pass laws in compliance with European law (a procedure established under Article 169 of the Treaty of Rome) and also answers questions put to it by national courts, to help them decide individual cases in conformity with European law".

330 The British citizens voted in the referendum on 23 June 2016 to leave the EU. The effect of this vote means that UK government should invoke article 50 of the *Lisbon Treaty* 2007 which will initiate formal discussions on the terms of the UK's exit.

331 Article 50 of the *Lisbon Treaty* 2009.

332 Ford 2016 *International Journal of Comparative Labour Law* 474.

333 Article 50 of the *Lisbon Treaty* allows a member state to unilaterally withdraw from the EU. It also provides steps that must be followed by a member state which inter alia include a negotiation period of up to two years.

334 Ford 2016 *International Journal of Comparative Labour Law* 475.

335 *Commission of the European Communities v United Kingdom* 1982 ICR 598 (ECJ) para 11.

reluctant³³⁶ to do so,³³⁷ the UK government thus promulgated the *Equal Pay (Amendment) Regulations*³³⁸ in order to be in line with the *Equal Pay Directive*. The regulations introduced a claim for equal value of work into the EPA.³³⁹ However, as Gregory has further noted, the procedures introduced by the *Equal Pay (Amendment) Regulations* were "exceedingly complex, ensuring that litigation was expensive and time-consuming and that outcomes remained uncertain".³⁴⁰

Yet, in instances where the EPA clashed with EU law,³⁴¹ the latter took precedence over the former.³⁴² This was epitomised in *Macarthy v Smith*.³⁴³ In this case, a male employee left his job earning 60 pounds weekly. He was subsequently replaced by a female employee who was paid 50 pounds weekly. She approached the Industrial Tribunal claiming that she should be paid with the same amount as her male predecessor as the EPA of 1970 provides. Her employer's argument was that the EPA of 1970 only applied in instances where a female worker was performing similar duties than an employee who is still in the same organisation as the claimant. The case eventually went to the ECJ for determination. The ECJ held in favour of the employee and ordered the UK to harmonise the EPA with the *Treaty of Rome*.³⁴⁴

In light of the above developments and jurisprudence, the legislature, some three decades³⁴⁵ after *Macarthy v Smith*, finally enacted comprehensive equal pay

336 This is probably due to the fact to the fact that the then UK government held a view that work rated as equivalent entitled a woman to institute a claim of equal pay for equal value of work, and thus the UK considered their law to be in compliance with the directive. See Incomes Data Services Ltd *Equal Pay Law Handbook* 175.

337 The regulations were seen by the government as not being business friendly. See Gregory 1997 *Victoria University Wellington Law Review* 557.

338 *Equal Pay (Amendment) Regulations* 1983.

339 Gregory 1997 *Victoria University Wellington Law Review* 557.

340 Gregory 1997 *Victoria University Wellington Law Review* 557.

341 The Treaty of Rome 1952.

342 Jason-Lloyd and Bajwa *The Legal Framework of the European Union* 53.

343 *Macarthy Ltd v Smith* 1979/129 ECR1275.

344 *Macarthy Ltd v Smith* 1979/129 ECR1275.

345 It should be recalled that *Equal Pay (Amendment) Regulations* were introduced in 1983 an effort to bring UK law in line with the EU's *Equal Pay Directive*.

legislation that conforms to both EU and international law. This legislation is discussed next.

4.3 The Equality Act of 2010

4.3.1 Introduction

The legislature enacted the *Equality Act* of 2010 (hereafter the *Equality Act*). This act currently regulates equal pay in the UK. A year later in 2011, in an effort to provide some guidance on the interpretation and application of the Act, the Equality and Human Rights Commission³⁴⁶ published the *Equal Pay Statutory Code of Practice to the Equality Act* (hereafter the *Equal Pay Code*).³⁴⁷ Whilst the code does not impose legal obligations, it helps to explain the legal obligations under the *Equality Act*, and must be taken into consideration (by courts and tribunals) in equal pay claims.³⁴⁸ Therefore, the *Equal Pay Code* is to an extent the equivalent of South Africa's *Employment Equity Regulations*. The *Equal Pay Code* will continuously be referred to below when interpreting sections from the *Equality Act*.

The *Equality Act* repealed and replaced the *EPA* of 1970.³⁴⁹ Sections 13 to 19 of the *Equality Act* prohibit both direct and indirect discrimination on the grounds of, *inter alia*, sex or gender. In turn, section 39 provides that an employer must not discriminate against an employee as to the terms of employment.³⁵⁰ That is to say, an employer may not treat an employee less favourably, with respect to terms and conditions of employment, based on the employee's sex. Where an employee suspects that she is paid less than her colleague who is doing like work or work of equal value, the employee may "write to her employer asking for information that will help to establish whether this is the case and if so, the reasons for the pay

³⁴⁶ The Commission was established in terms of the *Equality Act* of 2006.

³⁴⁷ Item 12 of the Code explains that "The purpose of...this code is to help employers, advisers, trade union representatives, human resources departments and others who need to understand and apply the law on equal pay, and to assist courts and tribunals when interpreting the law".

³⁴⁸ See Item 16 of the *Equal Pay Code*. See also Ebrahim 2016 *PELJ* 14.

³⁴⁹ See Schedule 27 of the *Equality Act*. See also Smith 2017 *North East Law Review* 70.

³⁵⁰ As has been correctly pointed out, the *Equality Act* "makes reference to terms and conditions of work and not pay". See Ebrahim 2016 *PELJ* 12.

difference".³⁵¹ Should the employer fail to respond or respond in an evasive manner, an inference may be drawn that the employer is in breach of the equal pay provisions.³⁵² The next step, if the employee is of the view that she is indeed receiving less pay for similar work or work of equal value, she may institute an equal pay claim in the Employment Tribunal.³⁵³

Previously, discrimination in the workplace was prohibited by the *Sex Discrimination Act* of 1975 whilst equal pay was regulated by the *EPA* of 1970. Under the current dispensation, both of these issues are addressed in one Act, namely the *Equality Act*.³⁵⁴ Gow and Middlemiss have noted that:

The main aim of the Equality Act 2010 was to simplify and harmonise the existing equality legislation. It was seen by the promoters of the legislation, the previous government, as an opportunity to bring in new provisions to help tackle inequality of pay and narrow the gender pay gap. The broad objective of the Act in respect of equal pay is that: the Act's provisions on equal pay and sex discrimination are intended to ensure that pay and other employment terms are determined without sex discrimination or bias.³⁵⁵

Regulating equal pay in one comprehensive and easy to understand statute cannot be faulted. It is interesting to note that a similar approach has been adopted in South Africa; the EEA in South Africa³⁵⁶ also regulates both equal pay and discrimination. The approach in both countries is, therefore, consistent with the *Equal Pay Guidelines* that were published under the auspices of the ILO. The guidelines provide that whilst equal pay legislation may vary from country to country, such legislation should be in line with the principle of equal pay as defined in the *Equal Remuneration Convention* as well as other relevant instruments such as the *Discrimination in Employment Convention*.³⁵⁷

351 See Item 116 of the *Equal Pay Code*. See also section 138 of the *Equality Act*.

352 See section 138(4) of the *Equality Act*. See also Item 114 of the *Equal Pay Code*.

353 See section 120 of the *Equality Act* (read with chapter 3 of the Act).

354 See section 39 and Chapter 3 of the *Equality Act*, respectively.

355 Gow and Middlemiss 2011 *International Journal of Discrimination and the Law* 165.

356 See section 6 of the EEA.

357 See Olez *et al* *Equal Pay: An Introductory Guide* 79.

4.3.2 *Equal pay claims: the three causes of action and comparators*

Chapter 3 of the Act (sections 64 to 70) enshrines and regulates the principle of equal pay between men and women.³⁵⁸ Section 64 of the *Equality Act* is titled Relevant types of work and provides that:

- (1) Sections 66 to 70 apply where-
 - (a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;
 - (b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.
- (2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.

In turn, section 65 is titled "*Equal Work*" and provides that:

- (1) For the purposes of this Chapter [3], A's work is equal to that of B if it is -
 - (a) *like* B's work,
 - (b) *rated as equivalent* to B's work, or
 - (c) *of equal value* to B's work. (Emphasis added)

When the provisions quoted immediately above are read together it is evident that the *Equality Act* establishes three equal pay causes of action. A complainant (A) may allege that she is being paid less than a comparator of the opposite sex (B) even though her work is: (1) like the comparator's work; (2) it is rated as equivalent to the comparator's work; or (3) it is of equal value to the comparator's work.³⁵⁹ A complainant can only choose one of these causes of action,³⁶⁰ and the burden of proof lies with the claimant.³⁶¹ If one of these causes of action is established, it is presumed that the difference in pay is due to the difference in

358 These provisions (sections 64 to 70) should be read with section 39(2) of the *Equality Act* which provides that an employer must not discriminate against an employee as to terms of employment. See also Item 23 of the *Equal Pay Code* which explains that "The principle that women and men are entitled to equal pay for doing equal work is embedded in British law and European Union law. Eliminating discrimination in pay is crucial to achieving gender equality and dignity for women".

359 Gow and Middlemiss 2011 *International Journal of Discrimination and the Law* 172.

360 Hooten 2015 *Legal Issues* 66.

361 Hooten 2015 *Legal Issues* 78. The burden of proof is discussed in more detail below in relation to the defences that are available to an employer.

gender.³⁶² These causes of action are critically analysed below. However, before doing so, a few things will be noted about the comparator.

4.3.2.1 Choosing the right comparator

According to Steele, choosing the right comparator can very easily make or break an allegation of unequal pay for equal work performed.³⁶³ By definition, the concept of equal pay requires a claimant (a woman) to allege her pay to be unequal to that received by another individual of the opposite sex (a man) for like work conducted.³⁶⁴ Put differently, to be successful, the claimant must identify an appropriate and better paid comparator.³⁶⁵ In the context of the UK, a comparator should be:

...a higher paid employee of the opposite sex who is employed in the same establishment or by an associated employer, or by a different establishment in Great Britain at which common terms and conditions are observed generally or on an employee class basis.³⁶⁶

An important principle included in the *Equality Act* was elimination of the contemporaneity requirement that existed under the *EPA* of 1970. This requirement meant that "claimants could only claim equal pay with a male working concurrently with them".³⁶⁷ Thus, a comparison was not possible where the claimant was paid less than her male predecessor.³⁶⁸ Importantly, the contemporaneity requirement as applied in the UK was rejected by the ECJ in *Macarthy v Smith*.³⁶⁹ The effect of the ECJ's decision in *Macarthy* was that a comparison was now possible where the claimant was paid less than her male predecessor.³⁷⁰ Under the current dispensation, and keeping in line with the ECJ's

362 Smith 2017 *North East Law Review* 71.

363 Steele 2005 *Industrial Law Journal* (UK) 338.

364 Steele 2005 *Industrial Law Journal* (UK) 338.

365 Steele 2005 *Industrial Law Journal* (UK) 338; McGregor 2011 *South African Mercantile Law Journal* 495. In the South African context, see *Mangena v Fila South Africa* 2009 12 BLLR 1224 (LC) at para 6, where the Labour Court explained how an appropriate comparator should be chosen.

366 Hooten 2015 *Legal Issues* 66. See also section 64 of the *Equality Act*.

367 Smith 2017 *North East Law Review* 71.

368 Smith 2017 *North East Law Review* 71.

369 *Macarthy v Smith* 129/79 [1980] 2 CMLR 217.

370 Smith 2017 *North East Law Review* 83.

decision in *Macarthy's*, the *Equality Act* now provides that equal pay is not restricted to work done at the same time (contemporaneously) by the claimant and the comparator.³⁷¹ A simple hypothetical scenario to explain this principle will suffice: Tom (a male) is employed as a cashier, and is paid £1000 per month. He resigns, and is replaced (in the same position) by Sarah (a female). Sarah is paid £800 per month. Under the *Equality Act*, Sarah can choose Tom (her predecessor in the job) as a comparator even though she and the comparator are not doing the work at the same time (contemporaneously). However, the EEA does not embody a similar provision as the *Equality Act*. A closer reading of the provisions of section 6(4) of the EEA reveals that a claimant for equal pay may only be brought by employees if the comparator works for the same employer. This restricts employees to locate the predecessor as the comparator.³⁷² As will be seen in the subsequent chapter, the EEA should be amended to allow employees compare their wages with their predecessor.

Moreover, it is worth noting that under the *Equality Act*, a comparator may be a person who works at a different establishment. In this scenario, the complainant has to show that even though she and the comparator work at different establishments or for different employers, common terms and conditions apply.³⁷³ For example, she could show that their terms and conditions are governed by the same collective agreement.³⁷⁴

4.3.2.2 Like work: the first cause of action

Under the *Equality Act*, in an equal pay claim, the claimant may allege that she is being paid less than a male comparator despite the fact that they are doing similar work. To remove any uncertainty as to what the phrase means, section 65(2) provides that A's work is like B's work if "A's work and B's work are the same or broadly similar, and such differences as there are between their work are not of practical importance in relation to the terms of their work". This is not a strict

371 See section 64(2) of the *Equality Act*.

372 See section 6(4) of the EEA.

373 See section 79 of the *Equality Act*.

374 See items 52-54 of the *Equal Pay Code*.

definition of the phrase.³⁷⁵ If it is shown that the work is broadly similar, the question then becomes whether the differences are of practical importance.³⁷⁶

Due to the comprehensive wording used in the Act, most complainants choose this cause of action because it is the easiest to prove and will generally apply to all plausible cases.³⁷⁷ It is important to note that section 6 of the EEA in South Africa makes no reference to the phrase "like work". However, the EEA³⁷⁸ (in South Africa) and the Equality Act (in the UK) both refer to "the same work". Put differently, under both statutes, in an equal pay claim, the claimant may show that her work is the same as the comparator's work. Moreover, under both statutes, the work being compared need not be exactly the same: whilst the EEA provides that the work may be "substantially the same"³⁷⁹ the *Equality Act* provides that the work may be "broadly similar".³⁸⁰ In relation to the latter, it has been noted that:

In *Capper Pass Ltd v Lawton* the Employment Appeals Tribunal (EAT) upheld a decision that a woman working as a cook in a company directors' dining room providing meals for 10-20 people was entitled to equal pay with two male assistant chefs who worked in the factory canteen and prepared 350 meals a day. This was despite differences such as the woman working fewer hours (40 hours per week unsupervised compared with the male chefs who worked 45 hours per week under the supervision of the head chef). *It did not matter that the work was not exactly the same.*³⁸¹

If there are differences in the work performed by the claimant and the comparator, it is for the employer to show that there are differences of practical importance in the work actually performed.³⁸² Amongst others, the factors that may be relevant include: level of responsibility, qualifications and physical effort.³⁸³

375 Hooten 2015 *Legal Issues* 67.

376 See items 36-38 of the *Equal Pay Code*.

377 Hooten 2015 *Legal Issues* 67-68.

378 Section 6(4) of the EEA provides that "A difference in terms and conditions of employment between employees of the same employer performing the same...work...that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination".

379 In terms of section 6(4) thereof.

380 In terms of section 65(2) thereof.

381 Hooten 2015 *Legal Issues* 67.

382 See Item 36 of the *Equal Pay Code*.

383 The other relevant factors may include skills and the time when the work is done. See Item 36 of the *Equal Pay Code*.

4.3.2.3 Work rated as equivalent: the second cause of action

Under the *Equality Act*, a claimant may also allege that she is receiving less pay even though her work is equivalent to that of the comparator. In an effort to provide some guidance, section 65(4) of the Act provides that:

A's work is rated as equivalent to B's work if a job *evaluation study* -

- (a) Gives an equal value to A's job and B's job in terms of the demands made on a worker, or
- (b) Would give an equal value to A's job and B's job in those terms were the *evaluation not made on a sex-specific system*. (Emphasis added)

Therefore, work will be rated as equivalent if a job evaluation gives equal value to the claimant and comparator's jobs in terms of the demands made on such workers, or would have done if the evaluation was not made under a sex-specific system.³⁸⁴ In simple terms, work will be rated as equivalent if the claimant and comparator's jobs score the same points or are assessed as falling within the same grade.³⁸⁵ In turn, an equal pay claim will fail if the evaluation rates the claimant's job as being of a lower value.³⁸⁶ Section 65(5) provides that a system is sex-specific if "for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women". Amongst others, the factors which may be taken into consideration in determining whether jobs are equivalent include: skill, effort and decision-making.³⁸⁷ Drawing on case law, the *Equal Pay Code* provides that to be valid, a job evaluation study must:

- a) Encompass both the woman's job and her comparator's;
- b) Be thorough in its analysis and capable of impartial application;
- c) Take into account factors connected only with the requirements of the job rather than the person doing the job (so for example how well someone is doing the job is not relevant); and
- d) Be analytical in assessing the component parts of particular jobs, rather than their overall content on a 'whole job' basis.³⁸⁸

The above mentioned principles were epitomized in the case of *Bromley v H & J Quick Ltd*.³⁸⁹ The facts in this case are briefly as follows: a group of females were

³⁸⁴ See section 65(2) of the *Equality Act*.

³⁸⁵ See Item 39 of the *Equal Pay Code*.

³⁸⁶ See Item 42 of the *Equal Pay Code*.

³⁸⁷ See Item 39 of the *Equal Pay Code*.

³⁸⁸ See Item 41 of the *Equal Pay Code*.

employed by the respondent as clerics and they contended that their work was equal in value with that of a male manager in their workplace. Their contention was dismissed at the Industrial Tribunal and the Employment Appeal Tribunal. The respondent initiated an application for the utilization of independent management consultants to conduct a job evaluation study. The firm which was engaged by the respondent took into account factors which *inter alia* included: a) skill, b) mental demand, c) responsibility and physical environment. The Appeal Court, after considering all the issues, held that a job evaluation study as described in section 1 (5) of the *Equal Pay Act* needs the jobs of each employee to be rated in terms of the elements used in the study. In the case at hand, this was not done and thus the appeal was allowed.

4.3.2.4 Work of equal value: the third cause of action

Under the *Equality Act*, a claimant may also allege that she is receiving less pay even though her work is of equal value to that of the comparator. In terms of this cause of action, the jobs being compared are not similar or equivalent with reference to the demands on the employees, but may nevertheless turn out to be of equal value having regard to the aforementioned factors. Jobs may be of equal value if they are not rated as equivalent, but are regarded as being of equal worth, taking into consideration certain factors such as: the skills necessary to do the job; effort; decision-making and demands of the job *etcetera*.³⁹⁰

From chapter 3 of this study, it will be recalled that according to the Equal Pay Guidelines (published under the auspices of the ILO), objective job evaluation methods (free from gender bias) are the best means of determining the value of work.³⁹¹ In the UK, unlike in South Africa,³⁹² the law provides that a job evaluation

389 *Bromley v H & J Quick Ltd* 1988 LRLR 249 CA.

390 See section 65(6) of the Equality Act; Item 47 of the *Equal Pay Code*; Gow and Middlemiss 2011 *International Journal of Discrimination and the Law* 172; Ebrahim 2016 *PELJ* 14.

391 The term 'job evaluation method' is defined as "...a process that compares jobs to determine the relative position of one job to another in a wage or salary scale. Any employer who pays different wage rates for different jobs uses some form of job evaluation method, whether informal or formal". See Olez *et al Equal Pay: An Introductory Guide* 38.

study may be done by an independent expert.³⁹³ As already noted, the role of the independent expert is to compare the value of the two jobs that are in dispute. This is very important as it allows the Court to make an informed decision based on the results of the job evaluation conducted by the independent expert. As will be seen in the subsequent chapter, this is a very significant provision that may benefit South African legislation.

4.3.2.5 The Sex Equality Clause

As noted in chapter 1, the UK *Equality Act* 2010 provides yet another ground on which a claim maybe based, namely the sex equality clause. This cause of action means that if a man's terms and conditions are more favourable than those of a woman (but performing similar work) a woman can rely on the difference to claim equal terms and conditions similar to those of a man.³⁹⁴ It is crucial note that this clause is not limited to wages only. It comprehensively covers other components relating to wages such as allowances, fringe benefits, sick pay, leave, redundancy payments, severance pay, pay progression and other benefits.³⁹⁵

In essence the purpose of this provision is to bring into line the benefits which may have been incorporated in a particular male employee's contract, but excluded in a certain female employee's contract. For instance, if there is a favourable condition of employment in one employee's contract, but in the other such a term is omitted, the equality sex clause will be used to interpret the terms as equal. The importance of this clause is that Courts and or tribunals may interpret the female claimant's contract of employment to eradicate existing discrimination. It is submitted that due to the importance of this clause, the EEA should be amended to include this clause.

392 It should be noted that neither the *Employment Equity Regulations* nor the *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* in South Africa make reference to an independent expert.

393 See section 131(2) of the *Equality Act*. See also section 80(5) of the *Equality Act* which defines a "job evaluation" study as "a study is a study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skill and decision-making, the jobs to be done".

394 Section 66(2) of the *Equality Act* 2010. See also Ebrahim 2016 *PELJ* 21.

395 www.thomposontradeunion.law/media/1165/equal-pay-summary-of-the-law-thompsons-solicitors.pdf.

It is interesting to note that the law in the UK recognises "equal pay for work of greater value" as well. Under the *EPA* of 1970, a claimant could only claim equal pay where the male comparator was doing equal work.³⁹⁶ What would happen if a woman was doing work of greater value but was being paid less? In *Murphy v An Board Telecom* (hereafter *Murphy*),³⁹⁷ the British courts, although accepting the fact that the claimant did work of greater value than the male comparator, dismissed the equal pay claim because the jobs were not of equal value, that is to say, they held that a person could not claim equal pay for work of unequal value.³⁹⁸ The case was then referred to the ECJ.³⁹⁹ The ECJ held that a woman could claim equal pay for work of greater value.⁴⁰⁰

4.3.3 *The material factor defence*

The existence of differentiation is a pre-condition for discrimination,⁴⁰¹ and differentiation is not necessarily discrimination.⁴⁰² Differentiation amounts to discrimination if the reasons for discrimination are linked to gender, race or any other arbitrary reason. Differentiation is said to occur frequently at the workplace, for example when employees apply for promotion.⁴⁰³ This form of differentiation will be acceptable if it serves a valid purpose and is based on valid grounds.⁴⁰⁴ From chapter 2 of this study, it will be recalled that, in South Africa, if a complainant establishes a *prima facie* case of discrimination regarding pay on the basis of gender, section 11 of the EEA gives the employer two statutory defences,

396 Fredman 2008 *Industrial Law Journal* (U.K.) 199.

397 *Murphy v An Board Telecom* [1987] 1 CMLR 559.

398 See *Murphy* paras 6-7.

399 *Murphy v An Board Telecom* [1988] ICR 445 (ECJ).

400 In terms of Section 66 of the *Equality Act* 2010.

401 Van der Walt *et al Labour Law in Context* 55.

402 *Mthembu v Claude Neon Lights* 1992 13 ILJ 422 (IC) at 423F.

403 Grogan *Dismissal, Discrimination and Unfair Labour Practices* 105. See also *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) at para 24, where the Constitutional Court acknowledged that in order to govern a modern country effectively "it would be impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently".

404 McGregor *et al Labour Law Rules* 55.

namely that (1) the alleged act of discrimination did not take place and or (2) did take place, but is not unfair or justified.⁴⁰⁵

Similarly, the law in the UK acknowledges the fact that differentiation occurs frequently at the workplace, and that certain differentiations may be acceptable if it serves a valid purpose and or is based on valid grounds – a material factor. Thus, an employer may raise the material factor defence if the complainant's work: is like the comparator's work (like work); is equivalent; or is of equal value to the comparator's work.

Under the *Equality Act*, an employer who is facing an equal pay claim can raise a number of defences, and some of these defences have been referred to (albeit indirectly as such) earlier in this chapter. It was noted that an equal pay claim will not succeed if it is shown that the complainant and the comparator are not doing like work, equivalent work or work of equal value.⁴⁰⁶ The other defence that is available to an employer is the material factor defence. Section 69 of the *Equality Act* is titled "Material factor defence" and provides that:

- (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person [employer] shows that the difference is because of *a material factor reliance* on which -
 - (a) *Does not involve treating A less favourably because of A's sex* than the responsible person treats B, and
 - (b) If the factor is within subsection (2), is *a proportionate means of achieving a legitimate aim*.
- (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage. (Emphasis added)

Thus, if it is shown that the complainant and the comparator are doing like work, equivalent work or work of equal value, the employer must show that the difference in pay between the female complainant and the better paid male comparator is due to a legitimate "material factor" which does not discriminate directly or indirectly against the female complainant because of her sex.⁴⁰⁷ In

405 See section 11(1) of the *EEA*.

406 See Item 74 of the *Equal Pay Code*.

407 Gow and Middlemiss 2011 *International Journal of Discrimination and the Law* 174; Smith 2017 *North East Law Review* 71; Hooten 2015 *Legal Issues* 75.

simple terms, this defence asks the following question: can the employer justify the difference in pay between the complainant and the better paid male comparator? In answering this question, keeping in mind the fact that the *Equality Act* prohibits discrimination as to terms of employment on the basis of sex,⁴⁰⁸ the employer must show that the differentiation is not due to the complainant's sex.

Like the EEA⁴⁰⁹ in South Africa, the *Equality Act*⁴¹⁰ in the UK does not define or provide a list of factors which may be regarded as material factors. In South Africa, factors justifying differentiation in pay or terms and conditions of employment are listed in the *Employment Equity Regulations*⁴¹¹ and the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value.⁴¹² Amongst others, these include length of service and qualifications. In the UK, the *Equal Pay Code* also identifies the aforementioned factors as examples of material factors.⁴¹³ The important point that should be made is that there is no closed list of factors (material factors) which may justify differentiation in pay or terms and conditions of employment; each case will depend on its particular circumstances. However, irrespective of which particular factor an employer chooses to rely on, the employer must show that:

- a. It is the real reason for the difference in pay and not a sham or pretence;
- b. It is causative of the difference in pay between the woman and her comparator
- c. It is material: that is, significant and relevant; and
- d. It does not involve direct or indirect sex discrimination.⁴¹⁴

Important to note at this stage is that an employee is at liberty to seek and be given access to information pertaining to pay, if he suspects that he is being paid less than employees performing the same jobs or work of equal value. In this

408 In terms of sections 4, 13 and 39 when read together.

409 See section 6 thereof.

410 See section 69 thereof.

411 See regulation 7 thereof.

412 See Item 7.3 thereof.

413 See Item 75-78 of the *Equal Pay Code*.

414 See the Item 76 *Equal Pay Code*.

regard, the *Equality Act* enhances transparency within the workplace. This is epitomized by the provisions of section 77 which in effect curbs the enforceability of "secrecy clauses " or "gagging clauses".⁴¹⁵ Furthermore, it has to be noted that, in terms of the provisions of section 138 of the Equality Act, an employee who suspects that he is paid meagre wages in comparison to another employee, yet they perform the same jobs, or their jobs are in equal in value, such an employee may approach the employer to request information in this regard. Unfortunately, the EEA does not have a similar provision relating to access to information as the EA does. Be that as it may, it should be noted that the *Basic Conditions of Employment Act* (hereafter the BCEA) regulate the terms and conditions of employees in South Africa. Important to note, the BCEA *inter alia*, provides employees with the right to discuss their terms and conditions of employment.⁴¹⁶ Pursuant to Landman J,⁴¹⁷ remuneration forms part of the terms and conditions of the employment contract and thus employees are entitled to have discussions about it. From the above it can be deduced that the BCEA protects discussions about employees' pay. Nonetheless, some employers do continue to incorporate secrecy clauses regarding salary disclosures in employees' contracts, and in certain instances some contracts do contain a clause declaring the disclosure of salaries a disciplinary offence.⁴¹⁸ Given the above, the BCEA should be amended to incorporate provisions which are similar to section 77(4)⁴¹⁹ of the Equality Act. The above provisions expressly protect disclosures which are relevant to employees' payment.⁴²⁰ Thus, it is submitted that if the BCEA could not only allow salary discussions, but also protects employees who discuss their salaries, particularly against the employers who still incorporate secrecy clauses in employees'

415 See section 77 of the *Equality Act*. See also Gow and Middlemiss 2011 *International Journal of Discrimination and the Law* 165; Item 103 of the *Equal Pay Code*. In practice, employers either through employment contract or HR regulations incorporate a clause in which employees are prohibited from disclosing their salaries. Therefore, the existence of section 77 of the UK *Equality Act* seeks to prevent the employers from using the secrecy clauses, thereby making it much easier for the employees to know salaries discrepancies and providing a foundation on which the employees may approach the employer.

416 Section 78 (2) of the *Basic Conditions of Employment Act* 1997.

417 *Schoeman and Others v Samsung Electronics SA (Pty) Ltd.*

418 [Salt//:www.labourguide.co.za/latestnews-1/1845-employees-cannot-contract-out-of-right-disclose-salary-information](http://www.labourguide.co.za/latestnews-1/1845-employees-cannot-contract-out-of-right-disclose-salary-information).

419 Section 77 of the *Equality Act* 2010.

420 Section 77 of the *Equality Act* 2010.

employment contracts, transparency will be enhanced significantly and in the end salaries may also improve.⁴²¹

From the above discussion, it is evident that South Africa and the UK share many similarities in relation to how equal pay is regulated. There are, however, some important lessons which South Africa may learn from the UK. They are identified and discussed next in chapter 5 when dealing with the recommendations.

4.4 Concluding remarks

The Equality Act regulates equal pay in the UK. The Act establishes three "equal pay" causes of action. A claimant may allege that she is being paid less than a comparator of the opposite sex even though her work is: (1) like the comparator's work; (2) it is rated as equivalent to the comparator's work; or (3) it is of equal value to the comparator's work.⁴²² If it is shown that the complainant and the comparator are doing like work, equivalent work or work of equal value, the employer must show that the difference in pay between the female complainant and the better paid male comparator is due to a legitimate "material factor".⁴²³ Although worded differently, section 6(4) of the EEA in South Africa, more or less, establishes the same equal pay causes of action.

In both countries, the law emphasises the need for objective job evaluation methods that are free from gender bias. Significantly, the law in the UK provides that an independent expert may be appointed to determine whether one person's work is of equal value to another's. This was identified as one of the lessons which South Africa may learn from the UK.

421 When there is transparency, existing wage gaps might be closed. This assumption is based on the salary gaps leaked in the Hollywood in the USA. The leaks indicated that Oscar Award Winner Jennifer Lawrence was the least paid Hollywood actor despite playing the major role in the movie called the hunger games and despite her bankable status as a Hollywood A-lister and Oscar winner. The Sony leaks caused outcry in the industry, particularly women were the loudest. Since the Sony hack leaks, Jennifer's salaries and other benefits have improved. See <https://www.theguardian.com/film/2015/oct/13/jennifer-lawrence-hollywood-guardian-pay-gaps>.

422 Gow and Middlemiss 2011 *International Journal of Discrimination and the Law* 172.

423 Gow and Middlemiss 2011 *International Journal of Discrimination and the Law* 174; Smith 2017 *North East Law Review* 71; Hooten 2015 *Legal Issues* 75.

Chapter 5 – Conclusions and Recommendations

5.1 Conclusions

South Africa has for many decades practised the apartheid system. However, the system of apartheid was replaced by a more democratic one. Some of the legal creativities brought by the democratic system were the promulgation of a *Constitution* more focused on the right to equality, dignity and non-sexism.⁴²⁴ The *Constitution* amongst others, aims to eradicate past injustices of the apartheid system.⁴²⁵ This includes uprooting the previously rife discrimination and past inequalities which were lawfully enforced by the apartheid system.⁴²⁶ In particular, the *Constitution* introduced the equality clause, in terms of which everyone is entitled to equal protection and equal benefits of the law.⁴²⁷ In simple terms, the *Constitution* requires everyone to be treated fairly and equally.

To reinforce the above mentioned equality provision, to the credit of the South African parliament, the EEA was established. The primary aim of the EEA is to achieve equality in the workplace, in particular to ensure that all employees are treated equally regarding employment benefits. As noted, the South African government was criticised by the ILO for lack of an express provision regulating equal pay for equal value of work. As a result, positive steps were taken by the South African parliament to amend the provisions of section 6 of the EEA to incorporate a right to equal pay for work of equal value.

Notwithstanding the existence of the above legislation prohibiting discrimination against everyone and the right to equal pay, one may be driven to conclude that there is still an element of discrimination in wages between men and women.

424 See Chapter 2 para 2.2.1.

425 Preamble to the *Constitution* 1996.

426 See Chapter 1 para 1.1.

427 In terms of section 9 of the *Constitution* 1996.

Pursuant to the statistics, the wage gap between men and women is estimated to be 15% to 17%.⁴²⁸ This patently unfair practice was in the past considered to be valid because of societal views which equated women's work to family work.⁴²⁹ However, this notion is archaic and times have changed as women increasingly enter the labour market to work alongside and on equal footing with men. It is thus submitted that it is not only morally speaking unfair to pay women smaller wages for work comparable to that of men, but it more importantly flies in the face of the constitutional values of equality and non-sexism and is in contravention of section 9 of the Constitution and section 6 of the EEA.

Another crucial element which was discussed is the incorporation of international standards into domestic legislation. In this regard, the investigation showed that South Africa has responded positively by incorporating the provisions of international standards, in particular the provisions of *Equal Remuneration Convention* into legislation. This has been achieved by way of incorporating into the EEA grounds on which a claimant for equal pay may rely on when instituting a claim for equal pay. However, notwithstanding the above, it is important to note that international standards require that equal pay should be applied to all employees. It is submitted that South African laws may not be compliant in this regard, especially the *Public Service Regulations*. The reasons are as follows: Firstly, the EEA is only applicable to the employees in the private sector, not public sector employees. Secondly, and importantly, although PEPUDA mentions the principle of equal pay for equal work, it does not regulate this principle. On the other hand, whilst the *Public Service Regulations* to a large extent regulate the terms and conditions of employees in the public sector, there are no guiding factors as to what constitutes the value of work. The result of this is that jobs cannot be adequately graded and hence discriminatory pay practices may be prevalent in this sector. It is submitted that this may constitute not only discrimination, but an issue of non-compliance with international standards, particularly *Equal Remuneration Convention*.

428 See para 1.1.

429 Family work as noted through the paper constitutes taking care of children at home, cooking and cleaning the house etc.

It is submitted that the EEA to some extent has adopted a balanced approach to equal pay. Furthermore, the *Employment Equity Regulations* were published in terms of the EEA to reinforce the EEA. The regulations prohibit discrimination in relation to pay (for similar work, substantially similar work and work of equal value) based on gender⁴³⁰, whilst at the same time recognising the fact that differentiation occurs frequently at the workplace and may be justified under certain circumstances.⁴³¹ It will be justified if it serves a valid purpose and is based on valid grounds. Moreover, the *Employment Equity Regulations* that were published in 2014 provide crucial guidance to courts when they are seized with equal pay claims. However, a glaring omission from the EEA and the *Employment Equity Regulations* is that they are silent on the appointment of independent experts to perform job evaluations for the purpose of determining whether complainant A and comparator B's work is of equal value. The courts may not have the necessary expertise to determine whether A and B's work are of equal value. As the Labour Court has noted, in the context of "equal pay for work of equal value" it does not have the necessary expertise in job grading and in the allocation of value to particular occupations.⁴³²

5.2 Recommendations

The purpose of chapter four of this study was to conduct a comparative analysis between South Africa and the UK's best practices as far as equal pay for equal work is concerned, and thereby determine what lessons, if any, the former may learn from the latter. It was noted that whilst South Africa introduced specific laws which provides for equal pay for work of equal value only a few years ago, the principle of equal pay has been enshrined in British law since the early 1970's,⁴³³ and that over the past three to four decades, the law has been scrutinised by the courts and subsequently amended to ensure its adequacy and effectiveness. It is evident from this study that South Africa and the UK share many similarities in

430 See Chapter 2, para 2.2.2.

431 See Chapter 2, para 2.2.2.

432 See Chapter 1, para 1.1.

433 See Chapter 4 para 4.2.2.

relation to how equal pay is regulated. There are, however, some important lessons which South Africa may learn from the UK.

5.2.1 Transparency and access to information

If an employee suspects that they are being paid less than their colleague of the opposite sex who is doing like work or work of equal value, it is crucial for such an employee to have access to relevant information. To this end, the *Equality Act* seeks to promote transparency in the workplace. Section 77 promotes and protects open discussion among colleagues in relation to pay. It does so by limiting the enforceability of "secrecy clauses" or "gagging clauses".⁴³⁴ A secrecy clause typically prohibit employees from discussing their salaries and benefits amongst themselves. More importantly, as was noted earlier, section 138 permits an employee who suspects that they are being paid less than their male colleague who is doing like work or work of equal value, to request for information from the employer through a letter to determine indeed she is paid lower and if so, the justifications for wage differences.⁴³⁵

The aforementioned provisions are important as they allow employees a chance to collect important pay-related information that may assist them to institute an equal pay claim.⁴³⁶ Unfortunately, the EEA in South Africa does not have similar provisions,⁴³⁷ and the lack of access to information caused by this omission may be a barrier to instituting an equal pay claim. It should be recalled at this point that the terms and conditions of employment are regulated by the BCEA in South Africa.⁴³⁸ As stipulated in Chapter 4,⁴³⁹ the BCEA does not prohibit employees to discuss the terms and conditions of their employment contracts. The investigation has nonetheless revealed that some employers do incorporate clauses in the

⁴³⁴ See Chapter 4 para 4.3.3.

⁴³⁵ See Chapter 4 para 4.3.3.

⁴³⁶ See Chapter 4 para 4.3.3.

⁴³⁷ As noted in Chapter 4 para 4.3.3.

⁴³⁸ See Chapter 4 para 4.3.3.

⁴³⁹ See Chapter 4 para 4.3.3.

employment contracts, which prevent the employees from discussing their remuneration amongst one another.⁴⁴⁰

Given the above, the BCEA should be amended to incorporated provisions which are similar to section 77⁴⁴¹ of the *Equality Act*. The above provisions expressly protect disclosures which are relevant to employees' pay.⁴⁴² Thus, it is submitted that if the BCEA could not only allow salary discussions, but also protect employees who discuss their salaries, particularly against the employers who still incorporate secrecy clauses in employees' employment contracts, transparency will be significantly enhanced and in the end salaries may also improve.

5.2.2 Comparators and the contemporaneity requirement

As it is currently worded, section 6(4) of the EEA in South Africa seems to restrict equal pay to work which is done contemporaneously. Put differently, section 6(4) seems to imply that a claimant may not choose her male predecessor in the job as a comparator. It will be recalled that this section 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 or more of the grounds listed in subsections (1), is unfair discrimination. (Emphasis added)

The significant difference between the EEA in South Africa and the *Equality Act* in the UK is that the latter expressly provides that equal pay is not restricted to work done contemporaneously by the claimant and the comparator. Therefore, in an equal pay claim, the chosen comparator does not have to be working simultaneously with the female applicant. In simple terms, a female applicant may choose her male predecessor as a comparator.⁴⁴³

It is submitted that the EEA in South Africa should be amended to expressly provide that the work referred to in section 6(4) is not restricted to work done contemporaneously by the comparator and the claimant. Otherwise, the

440 See Chapter 4 para 4.3.3.

441 See Chapter 4 para 4.3.3.

442 See Chapter 4 para 4.4.4.

443 See Chapter 4 para 4.3.2.1.

"stereotypical form of direct sex discrimination" whereby an employer deliberately replaces a male worker with a woman – lower-paid because she is female – might not be actionable.

5.2.3 Independent experts and job evaluations

As was noted earlier in chapter 4, in the UK, the *Equality Act* provides that an independent expert may be appointed to determine whether one person's work is of equal value to another's.⁴⁴⁴ There is no similar provision in South Africa's EEA. Whilst the *Employment Equity Regulations*⁴⁴⁵ and the *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*⁴⁴⁶ do stress the need for objective job evaluations, they make no reference to the appointment of independent experts.

As Ebrahim has noted, in an equal pay claim, a court would be in a good position to determine whether one person's work is of equal value to another's where the parties have adduced expert evidence regarding the value accorded to different jobs.⁴⁴⁷ Where there is no such evidence/report, a court might find itself in a difficult position due to the presiding officer's lack of expertise.

To address this issue, the EEA might be amended by introducing a provision similar to section 131 of the *Equality Act* in the UK; a provision that gives a court the discretion to require that a job evaluation study should be prepared and submitted by an independent expert. This would address the predicament the court in *Mangena v Fila* found itself in.⁴⁴⁸

5.2.4 The Sex Equality Clause

As can be recalled, the Equality Act provides yet another ground on which a claim for equal pay may be based by a female complainant.⁴⁴⁹ As noted, this cause of

444 See Chapter 4 para 4.3.2.4.

445 See Chapter 2 para 2.2.2.2.

446 See Chapter 2 para 2.2.2.2.

447 See Chapter 1 para 1.1.

448 See Chapter 1 para 1.1.

449 See Chapter 4 para 4.3.2.5.

action is referred to as the sex equality clause.⁴⁵⁰ This clause briefly entails that where a man's terms and conditions of employment are more favourable than those of a woman's (yet they perform similar jobs), this clause can be used to align the terms and conditions of a female and male employee.⁴⁵¹ It should be recalled at this stage this cause of action is not restricted only to remuneration.⁴⁵² It broadly applies to other pay related issues such as sick leave, fringe benefits, redundancy payments and other benefits. This clause is very important in breaching prevalent pay gaps that are not only remuneration based but include other issues relating to benefits. It is submitted that due to the significance of this clause, the EEA should be amended to incorporate a clause of this nature. This may assist to bridge the prevalent pay gaps, as more women may approach the courts based on this cause of action.

5.3 Concluding remarks

This study has shown that the gender pay gap in South Africa has existed for time immemorial. It stubbornly continues to exist notwithstanding the enactment of legislation meant to eliminate and/or reduce it. Whilst South Africa is seemingly on the right track; more can be done. In addition to the recommendations that have already been made so far in this study, it is also recommended that employers, workers and the general public should be educated on equal pay for men and women. This task would fall on the Department of Labour and other relevant government departments. This is not only a labour issue but a human rights issue, and should be treated as such. Whilst there is a clear need for legislation, perhaps, changing mind sets might prove to be more effective.

450 See Chapter 4 para 4.3.2.5.

451 See Chapter 4 para 4.3.2.5.

452 See Chapter 4 para 4.3.2.5.

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