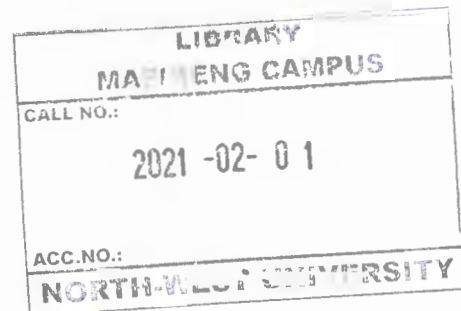


**EQUAL PAY FOR EQUAL WORK AS A COMPONENT OF THE SOCIO-ECONOMIC
RIGHTS OF EMPLOYEES**



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**Mini-dissertation submitted in partial fulfilment of the requirements for the degree
of Master of Laws (Labour Law) at the Mafikeng Campus of the North-West
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CANDIDATE'S DECLARATION

I, Samson Leshilo, hereby declare that this mini-dissertation is original and has never been presented in any other institution before. I further declare that any secondary information has been duly acknowledged in this mini-dissertation.

Student: Samson Leshilo

Student No: 21045747

Signature: _____

Date: _____

DEDICATION

This mini-dissertation is dedicated to my mother (Russia Ramogohlo Leshilo) and my late stepfather (Jeffrey Mkhwanazi) as well as my siblings (Nozipho Leshilo, Joseph Leshilo and Ellen Leshilo) who gave me their undivided support throughout the process of my education, despite trying times. It is further dedicated to employees who are victims of unequal pay and related injustices, and whose relentless endeavour is to overcome such injustices.

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The support of my family has been vital in growing me into the person I am today. My mother (Russia Ramogohlo Leshilo) has been the pillar of strength throughout my studies, she has been strong despite how hard things were in the family. I also acknowledge the moral support of my younger brother (Joseph Leshilo) and two little sisters (Nozipho and Ellen Leshilo).

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LIST OF ABBREVIATIONS

| | |
|--------|--|
| BCEA | Basic Conditions of Employment Act. |
| CBASSE | Commission on Behavioural and Social Sciences and Education. |
| CCMA | Commission for Conciliation, Mediation and Arbitration. |
| CEE | Conditions of Employment for Employees. |
| COSATU | Congress of South African Trade Unions |
| CHRA | Canadian Human Rights Act. |
| EEA | Employment Equity Act. |
| ECC | Employment Conditions Commission. |
| ESC | Europe Social Charter. |
| EU | European Union. |
| HIV | Human Immunodeficiency Virus. |
| HRC | Human Rights Commission. |
| ICESCR | International Convent on Economic, Social and Cultural Rights. |
| ILJ | Industrial Law Journal. |
| ILJ | Interdisciplinary Law Journal. |
| ILJ | International Law Journal. |
| ILO | International Labour Organisation. |
| LRA | Labour Relations Act. |
| NUMSA | National Union of Metalworkers of South Africa. |

| | |
|--------|---|
| PEPUDA | Promotion of Equality and Prevention of Unfair Discrimination Act. |
| PSA | Public Service Act. |
| SAJHR | South African Journal on Human Rights. |
| SAMJL | South African Mercantile Law Journal. |
| SERs | Socio-Economic Rights. |
| THRHR | <i>TydskrifvirHedendaagsRomeins- Hollandse Reg.</i> |
| TSAR | <i>TydskrifVir Die Suid-Afrikaanse Reg.</i> |
| UN | United Nations. |
| UNDP | United Nations Development Programme. |
| UDHR | Universal Declaration of Human Rights. |

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| 1961 | South African Constitution. |
| 1983 | Republic of South Africa Constitution. |
| 1993 | Republic of South Africa Constitution. |
| 1996 | Constitution of the Republic of South Africa. |

Statutes

| | |
|------|--|
| 1983 | Basic Conditions of Employment Act. |
| 1994 | Public Service Act Proclamation. |
| 1995 | Labour Relations Act. |
| 1995 | National Unity Act. |
| 1996 | Minimum Standards Directorate Policy Proposals for a New Employment Standards Statute. |
| 1997 | Basic Conditions of Employment Act. |
| 1998 | Employment Equity Act. |
| 1998 | Labour Relations Act. |
| 2000 | Promotion of Equality and Prevention of Unfair Discrimination Act. |

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- 1945 United Nations.
- 1948 Universal Declaration of Human Rights.
- 1951 Equal Remuneration Convention.
- 1958 Discrimination (Employment and Occupation) Convention.
- 1966 International Convent on Economic, Social and Cultural Rights.
- 1990 United Nations Development Programme.

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- 1996 Workplace Relations Act 1996.

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- 1977 Canadian Human Rights Act.
- 1986 Canadian Equal Wages Guidelines.
- 1993 Ontario Pay Equity Act.

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- 1957 Treaty of Rome.
- 1961 European Social Charter.
- 1975 Equal Pay Act.
- 1993 European Union.
- 1995 Council of Europe Directorate of Human Rights.

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| | |
|------|---|
| 1990 | Americans with Disabilities Act. |
| 1957 | Wage Act. |
| 1963 | Fair Pay Act. |
| 1963 | Equal Pay Act. |
| 1964 | Civil Rights Act. |
| 1964 | United States Civil Rights Act. |
| 1967 | Age Discrimination in Employment Act. |
| 1970 | Equal Pay Act. |
| 1973 | Age Discrimination in Employment Act |
| 1975 | Sex Discrimination Act. |
| 1978 | Age Discrimination in Employment Act. |
| 1978 | Pregnancy Discrimination Act. |
| 1994 | Sex Discrimination Act Amendment. |
| 1995 | Equal provisions Act. |
| 1998 | North American Agreement of Labour Cooperation and Corporate Codes of Conduct. |
| 2012 | Fair Pay Act. |

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United Kingdom Statutes

| | |
|------|---------------------------------|
| 1970 | United Kingdom's Equal Pay Act. |
| 2010 | Equality Act. |

ABSTRACT

This study intended to add value to the research work previously undertaken on equal pay for equal work as a component of socio-economic right of employees. The study examines the extent and impact of inequalities where employees perform work of comparable worth or equal value whilst pay differences cannot be justified as great disparities exist.

The study intended to narrow the gap between theory and practice in the workplaces, to establish whether employee's rights to equal pay for equal work are enforced in accordance with the statutes provided and the Constitution, and to investigate whether employees in workplaces comprehend their rights and knows when and how to exercise them.

Another major focus of the study was to demonstrate that although there are rules and regulations in the workplaces, the rights of employees are still being violated and/or overlooked. The extent to which poor implementation of enforcement mechanisms affects this state of things is investigated.

Common law perspectives were considered on the specified rights, taking into account other jurisdictions where these rights are implemented and well monitored. The comparison accentuates the aims and objectives of this study.

From all the qualitative data collected, I have drawn conclusions on how to improve protection of employee's rights and ultimately their working conditions through an efficient system that assists in monitoring outcomes.

CHAPTER 1: INTRODUCTION

Before 1997, statutes such as Basic Conditions of Employment Act¹ and Wage Act² regulated minimum labour standards. Between the period of 1920 and 1940, the Industrial Conciliation Act³ was introduced as a statute with frameworks that were not flexible enough to adequately regulate working hours, equal pay for equal work and equality in general looking at matters related to working conditions. As a result, Basic Conditions of employment Act was later promulgated to address what Industrial Conciliation Act failed to address effectively.⁴ Historical background on South African employment law informs us that, prior to the constitutional dispensation, there were policy directives in place to ensure that women and black people in general who were previous disadvantaged, remained continuous victims of economic inferiority as they had less employment opportunities.⁵

In this era of constitutional dispensation, the concept of equal pay for equal work is governed by the Constitution, the EEA⁶ and the LRA,⁷ all in the pursuit of promoting and upholding equality at the workplace in South Africa. However, it must be noted that with all this positive developments into the South African employment law, the current provisions only prohibits work related discriminatory conduct by employers against employees and also unfair discrimination between employees, they do not in essence address equal pay for equal work, they are only concerned with prohibiting discriminatory conducts, conducts like unequal pay based on the discriminatory grounds as stipulated by the EEA.⁸ Therefore, South Africa is in urgent need for implementation of legislation governing equal pay for equal work.

Unfair discrimination in the working environment remains part of a broader pattern of inequality and discrimination which has marked the social, political and economic

¹ No 75 of 1997.

² No 5 of 1977.

³ Act of 1924.

⁴ Thompson B and Benjamin P, *South African Labour Law, volume one*, Juta Law 2001.

⁵ Lewis R "Summary of economics of the colour bar by Hutt W H" in Lewis R et al (eds) *Apartheid - capitalism or socialism?* (1986); Grogan says "discrepancy in salary may arise from past discrimination" in J Grogan (ed) *Workplace law* (2003) 263; Seftel L the Department of Labour's Chief Director for Labour Relations, commented that "the large wage gap experienced in South Africa has furthermore been exacerbated by the apartheid system" in "Massive wage gap in South Africa" *Mail & Guardian* 26 April 2001 4.

⁶ No 55 of 1998.

⁷ No 66 of 1995.

⁸ See section 6 of the Employment Equity Act of 1998.

landscape of South Africa.⁹ The country's transition to a constitutional state in 1996¹⁰ with the passing of the final Constitution¹⁰ has had a major impact on the development of the law, as well as on practices and attitudes throughout society, including the workplace.¹¹ The constitutional provisions bestowed powers to its citizens in ensuring transparent governance and that democracy prevails based on justice, fairness, equal opportunities and freedom.¹² It is significant to note the fact that the constitutional provisions and rights enshrined in the Constitution are universally recognised,¹³ and as such South African law aligns itself with the international standards when coming to issues of democratic importance, of importance is the right to equality in workplaces, for example, weighing of rights between employer and employee within the labour context.¹⁴

Since section 8(2) prohibits unfair discrimination in its entirety,¹⁵ the inference that can be drawn is that fair discrimination is just and admissible, same was acknowledged in the famous judgment of Ray CJ in the Indian Supreme Court case of *State of Kerala & Anr v N M Thomas & Ors*,¹⁶ where the said court decided that a preference for a back-ward class was compatible with the constitutionally enshrined right of equality as contained in the Indian Constitution.¹⁷ In this, regard, Davis observes that the Indian Supreme Court exhibited a commendable commitment to a genuine egalitarian society, in which, as was discerningly noted by the court in *Pradeep Jain v Union*,¹⁸ "equality must not remain a mere idle incantation but must become a living reality for the large masses of people".¹⁹

⁹ Section 9 and 23 of the Constitution Act of 1996.

¹⁰ Constitution of the Republic of South Africa Act of 1996.

¹¹ See the unfair discrimination provision in s 6 reads: "(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. (2) it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act; or distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

¹² See section 9 of the Constitution of Republic of South Africa of 1996.

¹³ See the United Nations Conventions on Equality.

¹⁴ *S v Makwanyane and Other* [1995] (3) SA 391 (CC) at para 262.

¹⁵ See section 8, Constitution of the Republic of South Africa, 1996.

¹⁶ [1976] SCR (1) 906.

¹⁷ See Article 14 of the Indian Constitution of 1950.

¹⁸ [1984] AIR 1420, [1984] SCR (3) 942. See also the recent South African Constitutional Court decision in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23.

¹⁹ *Dr Pradeep Jain & Others v Union of India & others Civil Appeal NO. 6392 of 1983* 13 8.

1.1. Background of the study

During the process of developing South African law, the Constitution gave birth to the Bill of rights which entrenched socio-economic rights.²⁰ The first Constitution was adopted after the formation of the South African Union in 1910,²¹ the subsequent one was adopted in 1961,²² the third in 1983²³ and the last two in 1993²⁴ and 1996²⁵ respectively. Three constitutions prior to the 1993 Interim Constitution were silent on issues pertaining to the Bill of Rights, consequently, discussions on human rights, let alone socio-economic rights held no probative value.²⁶

The consideration and introduction of the concept of socio-economic rights in the interim Constitution of 1993 and the final Constitution of 1996 came as a result of the multi-party negotiations which led to the new constitutional dispensation.²⁷

After the inclusion of socio-economic rights, implementation of these rights proved to be a more difficult task than anticipated to both the legislature and executive.²⁸ The issue of socio-economic rights brought conflict and great threat to the principle of separation of powers amongst the three arms of government, in that once that these rights were entrenched in the Constitution, it implied that protection of these rights will vest in the judiciary which also lacks necessary democratic recognition to make decisions to allocate state resources, precisely social and economic resources.²⁹

In the debate following the inclusion of socio-economic rights in the *First Certification Judgement* case,³⁰ Constitutional Court noted that:

Although socio-economic rights are not universally accepted as fundamental rights, they “are, at least to some extent justiciable; and at

²⁰ Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Claremont Juta 2010).

²¹ See the Formation of the *South African Union* of 1910.

²² See *the Republic of South Africa Constitution*, 1961.

²³ See *the Republic of South Africa Constitution*, 1983.

²⁴ See *the Republic of South Africa Constitution*, 1993.

²⁵ See *the Constitution of the Republic of South Africa*, 1996.

²⁶ Wiseman D “Methods of Protection of Social and Economic Rights in Canada in” E Coomans (eds) *Justiciability of Economic and Social Rights* (Intersentia Antwerp 2006) 173-186.

²⁷ *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; [1996] (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

²⁸ Langa P “The Vision of the Constitution” 2003 *South African Law Journal* 120 660-670.

²⁹ See Mubangizi J C *The Protection of Human Rights in South Africa: A Legal and Political Guide* (Juta Cape Town 2004) 113-119.

³⁰ [1996] (4) SA 744 (CC).

the very minimum can be negatively protected from invasion.”³¹ The Court conceded to the fact that socio-economic rights might result in courts making orders that have direct budgetary implications, but reluctant to point out that the enforcement of certain civil and political rights would often also have such implications.³² The Court further held that, the inclusion of socio-economic rights in the South African Constitution has to be conceptualised in the context of the controversial history of the country, the past characterised by gross human rights violations,³³ denial of access to social goods and services to the majority of the people and lack of access to economic means and resources.³⁴ The historic gross inequalities and imbalances were aggravated by the fact that South Africa is a society of unprecedented diversity,³⁵ in terms of race, colour, gender, language, ethnicity, religion, culture and disability.³⁶

Reliable sources have suggested that, socio-economic rights place two important responsibilities on the Constitution.³⁷

In the first instance, the Constitution requires the state to “respect, protect, promote, uphold and fulfil the rights in the Bill of Rights.”³⁸ And that certain provisions entrenched in the Bill of Rights bestowed the state with the obligation to “take reasonable legislative and other measures” to see to it that its constitutional mandate is carried out.³⁹ On the second role, the Constitution has measures in place to carry out implementation of socio-economic rights, it creates avenues suitable enough to address past injustices and faults on the state’s part which were orchestrated in the past due to lack of resources or negligence to carry out constitutional duties as required by the mandate.⁴⁰ The socio-economic rights are not reactive but rather proactive in that they counter or pre-empt the needs of the citizen, and further, the state places resources in place that when a need arises to utilise the resources, those who are destitute and disabled are now able to access resources. However, this allocation of rights to the society’s needs will be satisfied based on the available resources.⁴¹

³¹ Mubangizi J C The Constitutional Protection of Socio-Economic Rights in selected African Countries: A Comparative Evaluation 2006 *African Journal of Legal Studies* 2(1):1-19.

³² See section 27(2).

³³ Moseneke D “Transformative Adjudication” 2002 *South African Journal on Human Rights* 18 300-309.

³⁴ Murphy T “Economic Inequality and the Constitution” in Murphy T and Twomey M (eds) *Ireland’s Evolving Constitution, 1931-1991: Collected Essays* (Oxford Hart Publishing 1998) 163, 179.

³⁵ See section 31.

³⁶ See note 33 above.

³⁷ See Brand D and Heyns C (eds) *Socio-economic Rights in South Africa* (University Law Press Pretoria 2005) 1-2.

³⁸ Section 7 (2).

³⁹ See sections 25 (5) and 26 (2).

⁴⁰ See note 19 above.

⁴¹ See section 7(2).

1.2. Problem statement

For many years employment in South Africa has remained a critical component and stepping stone in addressing socio-economic rights of employees. However, equal pay for equal work has not been implemented and interpreted to give effect to equality rights; as a result this concept has been overlooked by the legislature hence there is no express provisions on equal pay for equal work. The continuous exploitation of unequal pay for equal work is duly incited by the mere fact that attempts have not been made to establish the existing relationship between equal pay for equal work as a component of socio-economic right. The gap that has existed for years has been propelled by lack of understanding on the concept of equal pay for equal work as a human right. As a result the protection of equal pay for equal work has not been effective.

Ignorance on the part of labour law enforcers, legislatures need to be revisited so that adequate standards pertaining to the enforcement of this right can be realised. Over the years, the South African government and the international communities have identified the problem, as it adversely affect both men and women in both formal and informal workplace, however, no proper measures have been put in place to adequately address the existing inequalities of equal pay for equal work. Employees at workplace are not afforded equal opportunities as a result of unfair discrimination that is on-going at their workplace; employees are not paid equally for work of equal value.

1.3. Central question

The study seeks to address this question: the existing gap between theory and practice on equal pay as a component of socio-economic rights? Is it because of lack of express provisions or understanding on the concept of equal pay for equal work that employment is confronted with pay inequality?

1.4. The aims and objectives of the study

1.4.1. The broad aims of the study

The study aims to narrow the gap between theory and practice on equal pay for equal work discrimination, and to further demonstrate the adverse impact of

discrimination on equal pay rights. To address issues of unequal pay for the work of comparable worth or equal value, and to reiterate on the case of implementation of rights that were promulgated to give effect and protect employee's rights to equal pay for equal work.

1.4.2. Specific objectives of the study

The study intends to highlight that no efforts to cab equal pay for equal work will prosper except if express provisions regulating equal pay for equal work are implemented. To emphasize the need for a rapid change in equal pay rights transformation and suggest recommendations based on the need to reinforce the protection of worker's rights to equal pay.

1.5. Hypothesis

The researcher is of the view that if the gap between theory and practice relating to equal pay for equal work is closed, then enforceability of these rights may be achievable.

It is possible to conjecture that should express provisions regulating equal pay be placed, it is likely that unequal wage problems may be resolved.

The researcher is again of the view that if employees are treated equally for the work of comparable worth, equality and equal pay at workplace may prevail at all spheres.

Proper implementation of rights in workplaces might address cases of inequalities at workplace, the right to equal pay.

1.6. Significance of the study

In South Africa, numerous research problems in relation to equal pay for equal work remains unresolved, and so many questions raised remain unanswered in the South African context. Generally speaking, we still overlook the value and protection of employee's rights to equal payment. Now, one of the major concerns is the need to identify the causes leading to violation of rights of employees with regard to equal pay. The achievement of the aims and objectives of this study may provide valuable insights into the reduction of high levels of violation of employee's rights on equal pay.

1.7. Definition of key concepts

1.7.1. Employer

This can be a person or legal entity that offers an employment contract to an employee in order to perform specific duties and the employer's duty is to compensate the employee for the work performed by a salary or wage.⁴²

1.7.2. Employee

This refers to a person who has entered into a contract of employment with the employer (implied or express) which requires him or her to carry out duties, that is render services for the work employed for in exchange for remuneration or wage from the employer who can be the state or private entity or person.⁴³

1.7.3. Like work

Work that appears to be of similar nature in very material aspects, for instance, concerning the work description and duties to be carried out should be referred to as "like work", except where there exist material differences in relation to the terms and conditions of employment.⁴⁴

1.7.4. Pay

These are the proceeds that are usually due to an employee in a contract after they have carried out their duties or after having rendered services, compensation can be in a form of salary from an employer concerned as per the existing agreement between the parties.⁴⁵

1.7.5. Socio-economic rights⁴⁶

These are those rights that give people access to certain basic needs necessary for people to lead a dignified life. Government and, in certain circumstances, private individuals and bodies, can be held accountable if they do not respect, protect,

⁴² See Dictionary.com Unabridged www.dictionary.reference.com [date of use 20 July 2014].

⁴³ Employee is given a different and specific meaning in Section 78 in chapter V of Labour Relations Act (No. 66 of 1995) as amended by Labour Relations Act of 1998.

⁴⁴ *Capper pass v Lawton* [1976] IRLR 366 (EAT).

⁴⁵ [1990] IRLR 240 (ECJ).

⁴⁶ See Liebenberg S "The Interpretation of socio-economic rights" in Chaskalson M et al *constitutional law of South Africa* 2nd ed (Juta Cape Town 2005) 335.

promote and fulfil these rights. Socio-economic rights are especially relevant for vulnerable and disadvantaged groups in society. They are important tools for these groups, who are often most affected by poverty and who experience a number of barriers that block their access to resources, opportunities and services in society.⁴⁷

1.7.6. Workplace

This is a place, in most instances a building owned or rented by the employer in order to enable his/her employees to carry out their responsibilities as per their contract of employment. It is further a place where working equipment and resources are kept and where reports by employees are submitted and the carrying on of business is conducted there.⁴⁸

1.8. Literature Review

O'Regan points out that fair discrimination law is based on the Aristotle's theory of equality, which asserts that "like to be treated alike".⁴⁹ O'Sullivan suggested that the notion "failure to recognise equal pay for equal work constitute unfair discrimination"⁵⁰ should have been entrenched into the EEA in order to address issues of equal payment for equal work, and that there should have also been provisions or other regulations given in order to provide guidelines as to what would constitute work of equal value. Milkovich⁵¹ asserts that, persons who perform jobs which are objectively similar, should receive similar pay based on a finding that the jobs have comparable economic value to employees or comparable social worth.⁵² Comparable worth theory posits that salaries set through market demands for

⁴⁷ See Viljoen F and Scheinin M "Economic and social rights" in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural rights: A textbook* (Martinus Nijhoff Boston London 1995) 4161-4167.

⁴⁸ See The American Heritage Dictionary of the English Language 4th ed (Houghton Mifflin Harcourt New York 2000) Title Index "W" 39.

⁴⁹ O'Regan C "Equality of work and the limits of law: symmetry and individualism in anti-discrimination legislation" 1994 *Acta Juridica* 64-83; Wentholt K "Formal and substantive equal treatment: the limitations and the potential of the legal concept of equality" comparative perspective (The Hague Kluwer Law International 1999) 53-64.

⁵⁰ Willborn S L Equal pay for work of equal value: Comparable Worth in the United Kingdom 1986 *American Journal of Comparative Law* 415-457.

⁵¹ Milkovich G T "The emerging debate" (eds) *comparable worth: issues and alternatives* (Routledge & Kegan Paul London 1980) 37-40.

⁵² Aldrich M and Buchele R "Does comparable worth correct for discrimination?" 1991 *New Approaches to Employment Management* 2 1-10.

particular types of jobs resulting in discrimination against women and minorities because of a history of their exclusion from higher paying jobs".⁵³

Loveday⁵⁴ submits that constitutional provisions requires the tribunals or courts to interpret all available statutes to give effect to international law standards, it is further discussed that in the interpretation of Bill of Rights international law must also be considered under section 39(1) of the Constitution. It is stated that from 1994 South African government has ratified various treaties internationally, to list but a few Convention 111 on Discrimination in Employment and International Labour Organisation.⁵⁵ Convention 111 on Discrimination in Employment expect member states to enact legislation that will give effect to the concept of equality in employment, that is, set aside any form of unfair discrimination and also protect and uphold equal treatment and equal opportunities in a working environment,⁵⁶ and the International Labour Organisation Convention 100 on Equal Remuneration, makes exceptional provisions in the case of equal pay between men and women who performs work of equal value, that no women should be discriminated on the basis of gender.⁵⁷



Universal Declaration of Human Rights under article 23, guarantees a right to equal pay for work of equal value, that for each and every person who performs some work they should also be paid equally for the job of equal value performed, while article 7(a) (i) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966,⁵⁸ this convention advocates for the notion that equal pay rights of individuals should be protected, rights to fair wages and equal remuneration for work of equal value without any form of unfair discrimination, including gender discrimination between men and women.⁵⁹ Johnson argues that it is the duty state to

⁵³ Killingsworth R "The economics of comparable worth: analytical, empirical and policy questions" 1985 *Commission on Behavioural and Social Sciences and Education* 380-384.

⁵⁴ See Loveday G "Gender Discrimination in the workplace" 1997 *Journal South African Law* 100-103.

⁵⁵ See Convention No. 111, Convention concerning Discrimination in Respect of Employment and Occupation, 1958.

⁵⁶ Article 2-3 of International Labour Organisation Convention 111.

⁵⁷ Article 2(1) of the International Labour Organisation Convention 100, see also Lim *More and better jobs for women: an acting guide* (1996) 140.

⁵⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976.

⁵⁹ The Covenant is yet to be ratified by South Africa, having signed it in 1994. Equal pay directives are also contained in art 4(3) of European Social Charter as well as in art 49 and annex 1 of the North American Agreement of Labour Cooperation. For a discussion of these

see to it that relevant steps and efforts are taken in order to implement methods in place that will efficiently deal with matters related to unfair labour practices. Item 1(c) of the schedule of Promotion of Equality and Prevention of Unfair Discrimination Act 2000 determines that,⁶⁰ the Act provides that in an instance where notion of equal pay for equal work is disrespected and unacknowledged by any institution, such will amount to unfair labour practice. Section 8 of the Act further includes the “systemic inequality of access to opportunities by women as a result of the sexual division of labour” in its comprehensive definition of unfair discrimination.⁶¹

O’Conner contends that, in fact, a trend has been set legally and by statutes in other jurisdictions which can be used in an instance where injustice has occurred, in an instance of an employee who alleges that an employer has treated them differently and unequally as compared to other individuals on prohibited grounds of discrimination.⁶² Further argues that, where discrimination which is unfair is clearly identified, the one who alleges bears the onus to prove that the perpetrator had the motive and intent to discriminate unfairly against them.⁶³

Du Toit submits as follows, that discrimination on prohibited grounds has long been outlawed in the 1980s, however, the conduct was still perpetuated by the apartheid laws and by-laws that ensured black people and women were continuously oppressed,⁶⁴ the assertion made here is that, stringent and express provisions need to be implemented in order to address employment inequalities with such actual precision, and that passing law will not be enough, enforcement is necessary.⁶⁵

Van Niekerk suggests that, for equal work performed either by men or women, remuneration should be made following the notion of equal pay for equal work which

provisions, see *Women in the working world: equality and protection within the European Social Charter* Study prepared by the Council of Europe Directorate of Human Rights (1995) 20-35; Johnson B S “Ensuring equality: pursuing implementation of the equal pay principle via the institutions of the European Union, the North American Agreement on Labour Cooperation, and Corporate Codes of Conduct” 1998 *Virginia Journal of International Law* 861-868.

⁶⁰ See Section 29(4) of the Equality Act. The list of unfair practices in the schedule is intended to assist courts in determining the unfairness of such practices, with the aim of ultimately eradicating them.

⁶¹ Promotion of Equality and Prevention of Unfair Discrimination Act 2000.

⁶² Doyle O and Carolan E (eds) *The Irish Constitution: Governance and Values* (Dublin Thomson Round Hall 2008) 327-332.

⁶³ See *Watson v Fortworth Bank and Trust* 487 US 977 (1988) at 839.

⁶⁴ Industrial Conciliation Act of 1924 and

⁶⁵ Du Toit *et al The Labour Relations Act 28: A comprehensive Guide* 2nd ed (LexisNexis Butterworths 1995) 430-431.

can be read alongside the principle of work of equal value for equal pay; the notion will be applied from a case to case basis as circumstances will differ as they come.⁶⁶ It is further argued that, the notion of equal pay for equal work or work of equal value, if they are to be understood and protected as rights of individuals, that will set a trend and high standard on equal pay rights, in that it will be easier to determine whether unfair labour practice has occurred to an individual who alleges and what measures can be taken in trying to remedy the said injustice.⁶⁷ The test that can be deployed in order to determine if unfair labour act has occurred, would not be fixed, it can be subjective and on other circumstances objective, for instance, it may not result in unfair discrimination to pay different wages for equal work, however, it will be unfair labour practice if there discrimination is found to be on prohibited grounds of unfair discrimination.⁶⁸

Christie and Others asserts that, the concept of equal pay for equal work should not be seen in isolation, on the premises that general prohibition grounds are also applicable where an individual is treated unfavourably as compared to others and the allegation can be proved. Failure to acknowledge the existence of this principle speaks to the fact that people refuse to subject themselves to this precious economic right, as a failure on the part of the employer not to pay equally for the work of equal value remains a clear unfair labour practice and discrimination on one of the prohibited grounds, common factor in this debate is that, intervention through express provisions remains necessary.⁶⁹

Reliable sources contents that, equality clause should be interpreted to give effect to other statutes, this right is defined to be fundamental in its application, and individuals should enjoy the proceeds from this rights fully in a democratic society.⁷⁰ This implies that the right to equality must be interpreted in ways that promote greater equality in people's access to the resources and services protected in the socio-economic rights provisions in the Bill of Rights.⁷¹ Moseneke J (as he was then)

⁶⁶ [1988] 9 ILJ 1149 (IC).

⁶⁷ [1988] 9 ILJ 410 (IC).

⁶⁸ A Van Niekerk "Equality Rights and the new Act" in Cheadle M H ET AL 1993 *Current Labour Law* 76 88-90.

⁶⁹ Cheadle M H et al 1993 *Current Labour Law* 123 at 134.

⁷⁰ See section 9 of the South African Constitution Act of 1996.

⁷¹ See section 9 (2).

in *Minister of Finance v Van Heerden*⁷² stated that, “absent a positive commitment progressively to eradicate socially construed barriers to equality and to root out systemic or institutionalised under privilege, the constitutional promise of equality must, in the context of our country, ring hollow”.⁷³

Campanella argues that, “socio-economic rights were not enshrined as principles of law in the unfair labour practice definition.”⁷⁴ They are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed, for example, the payment of unequal pay for equal work or work of equal value in the context of unfair discrimination.”⁷⁵ Newman suggests that, as a measure to avail access of socio-economic rights to individuals, it is important that the state conduct a survey in which they will be in a position to be able to determine the needs of the society and weigh them against the available resources in order to can best cater these rights equally to the citizens of South Africa.⁷⁶

Kahn-Freund submitted that, for every development in a particular state pertaining to change that will affect lives of individuals in a society, comparative study is paramount in order to have an insight of possible outcomes, literature on international law and foreign law jurisprudence may be used for the purpose of comparison, the social and-political aspects of those sources would be informative.⁷⁷

Summers asserts that, he used a comparative method of research in order to evaluate employment place forum proposal in South African labour law, in the survey he referred to foreign law where he compared South African workplace forum proposal with the tried and tested labour laws of developed states, that is Germany,

⁷² [2004] (12) BLLR 1181.

⁷³ See *MEC for Education: KwaZulu-Natal v Pillay* Para 27. See also section 1 and 15(2) (c) of the EEA section 5 of 1998; section 14(3) (l) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 2000.

⁷⁴ See Campanella G “Equal Pay- The Price of Equality” (Labour Law News and Court Reports in South Africa University of Cape Town 20 March 1993 Cape Town) V4 N5 3.

⁷⁵ Campanella G *The concept “discrimination” in the definition of unfair labour Practice* (London Blackwell 1989) 104-106.

⁷⁶ Newman D G “Institutional Monitoring of Social and economic rights”, A South African case study and new research agenda 2003 *SAJHR* 19 189-216.

⁷⁷ Kahn-Freund O “On uses and misuses of comparative law” 1974 *Modern Law Review* 37 1-27.

Japan, United State and Sweden.⁷⁸ Summers further made the following remarks pertaining to the importance of comparative analysis, the point of departure in conducting a comparative study is to first, establish a link or common factors in your study and the sources you intend to draw comparison from, the characteristics which frames the model of your study. Another important factor is then to try and establish existing differences and the circumstances that perpetuate such difference. After having established both similarities and differences, the aim and purpose would be to reconcile the differences that exist which will assist in narrowing down the gap between the strength and weaknesses⁷⁹

Van Niekerk J argues⁸⁰ that, one who alleges to have been treated differently in an equal pay claim must establish and prove the ground upon which the alleged discrimination took place, first it is also required that the applicant must have performed work of equal value as compared to another who was treated favourably. In a case where the applicant was able to prove that the difference was discriminatory considering the listed ground, the onus will now shift to the employer to defend the decision which led to the allegations, to argue that the difference was not unfair against the applicant.⁸¹

McCrudden cites a number of labour market studies done during the 1960s in the United States that adopted a more "institutional" approach to the exclusion of blacks from employment.⁸² These studies indicated that "prejudiced discrimination was only one of a number of exclusionary aspects of the labour market. They demonstrated that an attempt to eliminate "prejudiced discrimination" through the prohibition of disparate treatment or direct discrimination would have little impact on the disadvantaged position that black people occupied in the labour market.⁸³ The role of prejudiced discrimination alone is downplayed as an influence on racially discriminatory employment patterns. The market itself operates in a discriminatory

⁷⁸ Summers C W "Workplace forums from a comparative perspective" 1995 *Industrial Law Journal* 16 806-813.

⁷⁹ Summers C W "An American perspective of the German model of workers participation" 1987 *Comparative Labour Law Journal* 8 333-355.

⁸⁰ [2003] 12 BLLR 1124 (LC) at par 6.

⁸¹ See section 11 of the EEA of 1998.

⁸² See McCrudden C "Institutional Discrimination" 1982 *Oxford Journal of Legal Studies* 306-307.

⁸³ Bourn C and Whitmore J *The Law of Discrimination and Equal Pay* (Sweet and Maxwell Ltd London 1989) 242-245.

manner. Employers in the majority of cases did not have the “intention” to discriminate, and would therefore not fall foul of the prohibition of discrimination as defined by the federal courts in the US.⁸⁴

Devenish⁸⁵ states that the concept of socio-economic rights is new in South Africa and came along under the new era of constitutional dispensation. The challenge lies in the application of these rights, however, precedent has been set through the decided court cases which have laid basis on how the Courts and other pertinent institutions can follow in the application of these rights, the courts have also applied limitation clauses after having considered the availability of the state resources.⁸⁶ Now, the Court had to create or adopt a method that will best regulate the access to the resources in order to cover the large part of the society equally, the large population of South Africa versus limited state resources, Court then had to adopt the availability approach, which suggests that Court will use reasonable approach in order to enforce socio-economic rights.⁸⁷

Davis commented on the importance of state committing itself to the cause of treating individuals equally in a society and also observed remarks submitted in a Court decision of *Pradeep Jain v Union of India*,⁸⁸ where it was noted that “equality must not remain a mere idle incantation but must become a living reality for the large masses of people”.⁸⁹ Janet is of the view that, formal equality is rather stagnant and subjective in that, it fails to comprehend the existing differences between an individual and a group in a community on social and economic matters that affect

⁸⁴ Devenish G *A commentary on the South African Bill of Rights* (Butterworths Durban 1999) 54-55: “It is obvious that the emerging South African approach mirrors to some extent the differential minimal scrutiny test adopted by US Supreme Court in examining socio-economic legislation” Swart H C “An outcomes-based approach to the interpretation of the right to equality” 1998 *SAPRIL* 226-227 and also *Nyamakazi v President of Bophuthatswana* [1994] (1) BCLR 92 (1) at 131A. See, however, the remark of Kriegler J in *President of Republic of South Africa v Hugo* [1997] (10) BCLR 708 (CC) para 75: “The Constitution does not establish levels of scrutiny in the manner of the American Constitution”. In *S v Lawrence*, *S v Nagel*, *S v Solberg* 1997 (10) BCLR 1348 (CC) the court discussed the meaning of the rational connection test in the context of s 26(2) of the Interim Constitution. At 1365A-1366G.

⁸⁵ See Devenish G *A Commentary on the South African Bill of Rights* (Butterworths Durban 1999) 358.

⁸⁶ *Soobramoney v Minister of Health (KwaZulu Natal)* [1998] (1) SA 765 (CC).

⁸⁷ See for example Devenish G *A Commentary on the South African Bill of Rights* (Butterworth Durban 1999) 358.

⁸⁸ See note 17 above.

⁸⁹ See note 18 above.

people.⁹⁰ Substantive equality applies a different approach to the formal equality in that, although it observes the form, it is not confined to the rigid form but pays attention to the outcomes as a result of interpretation that has been applied. This type of equality aligns itself with the needs of the society in order to ensure that the needs of people in a society are met and the constitutional mandate has been accordingly executed, this form of equality is flexible in all material aspects and observes the actual social conditions that adversely affect the society.⁹¹

Albertyn asserts that, the golden key to apply substantive equality approach, first lies in the understanding of the concept of equality, all forms of discrimination, direct or indirect and under what circumstances can we now conclude that a possible discrimination has occurred which led to another being treated different as compared to their counterpart. Now a heavy burden rests with the judicial system to the inclusion of presiding officers and barristers to understand the context in which inequality would transpire.⁹²

Garbers⁹³ challenges employers to promote equality at workplaces, recommending that employers to observe constitutional and legislative provisions that aims at promoting equal opportunities and fair treatment in the employment sector, be formal or informal sector. The question of eliminating discrimination starts with employers giving effect to the anti-discrimination policies in the employment sector.⁹⁴

Yacoob J one of the prolific and most reliable judge in our Constitutional Court argued that, it is important to afford careful consideration to interpretation of rights, be political, civil rights, social and economic rights, no rights should be interpreted in isolation as rights are in their nature interrelated, the learned judge further explained that, rights entrenched in the Constitution holds fundamental values such as dignity

⁹⁰ Freeman A in his seminal article on US civil Rights law, refers to formal equality as the "perpetrator perspective" of antidiscrimination law, because its concern is with rooting out the behaviour of a few bad actors who perpetrate discriminatory acts and he refers to substantive equality as the "victim perspective" of antidiscrimination law, because it is rooted in concrete historical experience rather than a timeless abstract norm. The "perpetrator perspective" is the dominant one in American legal culture.

⁹¹ See Freeman A "Anti-discrimination Law: The view from 1989". See Kairys D *The Politics of Law: A Progressive Critique* 2nd ed (Pantheon Books University of Southern California New York 1990) 124-125.

⁹² Albertyn C "Substantive equality and transformation in South Africa" 2007 *SAJHR* 253-276.

⁹³ See Garber C "Proof and evidence of Employment Discrimination under the Employment Equity Act of 1998" 2000 *SAMLJ* 136-152.

⁹⁴ See section 5 of the Employment Equity Act, 1983.

of human life, liberty and equality. Therefore, realisation of these rights guarantees equality between men and women and their ability to can achieve equal goals in an equal society.⁹⁵

1.9. Methodology

The research will adopt qualitative method of research throughout; the focus of the study will be orientated by the collective review of literature obtained from various reliable sources in a form of journals and articles, previous research studies conducted, newspaper reports, statute nationally and internationally, international Law to the inclusion of treaties and pertinent conventions and decided cases, The study with the assistance of all these material, draw its attention to issues pertaining to equal pay for equal work in a democratic South Africa and how to minimise and face out unfair discrimination in work environment.

1.10. Ethical considerations

In its endeavour to produce and add value to other studies already conducted, this mini-dissertation will confine itself to the fundamental principles that distinguish scholarly work to any other method of writing. The study will uphold, protect and respect the rights of any person that may feel a need to add value to the study. The author will identify and work that is not original or his, on the simple premise that plagiarism is prohibited in all its forms and that appropriate sanctions may be imposed. The author will adhere to proper referencing, avoid deception and maintain confidentiality.

1.11. Limitation of the study

Although this research has stated clearly what its aims and objectives are, there are however some unavoidable limitations and shortcomings. First, because of the time limit, this research will be conducted based on tangible materials pertinent to the study, such as, the South African labour statutes, books, journals and articles, which holds little or for argument sake, no literature on equal pay law. Secondly, since South Africa has no express provisions on equal pay, but rely on discrimination

⁹⁵ Grootboom paras 23 and 83. See also *Khoza v Minister of Social Development* para 40; *Kaunda v President of RSA* [2005] (4) SA 235 (CC). [2004] (10) BCLR 1009 (CC) para 274; *Union of Refugee Women v Private Security Industry Authority* [2007] (4) SA 395 (CC); [2007] (4) BCLR 339 (CC) para 111.

provisions as outlined in the Employment Equity Act (section 6), this might adversely affect the outcome of the study on South African perspective on equal pay law, as the study will from time to time refer to other jurisdictions where equal pay statutes are protected and regulated effectively. Finally, another challenge that might come with the promulgation of express provisions on equal pay statute would be the manner in which such legislation will be regulated and interpreted to give effect to equal opportunity and treatment at workplace.

1.12. Outline of the dissertation

The thesis is organised into five chapters:

Chapter 1 provides the general background underlying the research question and an overview of the thesis.

Chapter 2 will review the legal framework on the convergence of rights pertaining to equal wages at the workplace in the South African context.

Chapter 3 will reflect on the comparative approaches to equal pay for equal work and its implications in South Africa.

Chapter 4 will discuss the existing relationship between equal for equal work as a component of socio-economic rights.

Chapter 5 summarises the conclusions that can be drawn from this research and provides recommendations for future developments.

CHAPTER 2: AN OVERVIEW OF THE LEGAL FRAMEWORK ON THE RIGHT TO EQUAL PAY

2.1. Introduction

This chapter will discuss in detail the legal framework on equal wages, from the constitutional perspective, Employment Equity Act, Basic Conditions of Employment Act and Promotion of Equality and Prevention of Unfair Discrimination Act on the rights of equal pay of employees. The researcher will further discuss International Conventions giving effect to equal pay and relevant cases that set precedence varying from one country to another.

The position regarding equal opportunities in South Africa covers mostly expressed provisions and silent on matters such as equal pay for equal work, for instance, matters like unfair discrimination including discrimination on listed grounds as expressed are covered under the Constitution, Employment Equity Act and Labour relations Act and any other acts that prohibit discrimination.⁹⁶ The Constitution and the legislation do not expressly address issues of equal pay for equal work, however, interpretation of the discrimination laws may as well assist in ensuring that equal pay for equal work is acknowledged.⁹⁷

2.2. Constitutional right on labour relations

Prior to the constitutional dispensation, tribunals have presided over a number of pay equity claims, however, the introduction of the interim Constitution and the 1996 Constitution required that interpretation of the law is important and that employment legal principles should be interpreted in line with the purport, spirit and objects of the Constitution as stipulated in chapter one of the Constitution.⁹⁸ It cannot be over-emphasised that the right to equality as enshrined in chapter 2 of the Constitution is of paramount importance and calls for protection from the state. Reliable provisions in the Constitution avers that, employees have a right to work in an environment that affords them fair and equal opportunities as a result of fair labour practice.⁹⁹

⁹⁶ See note (5 and 6) above.

⁹⁷ [1998] 19 ILJ 285 (LC).

⁹⁸ Section 35 (3) of the interim Constitution. Section 39(2) of the 1996 Constitution contains a similar provision.

⁹⁹ See section 23.

Reliable sources asserts that provisions of section 23 of the Constitution, may have a considerable influence on the outcomes concerning labour disputes in court of law and then set a precedent that will be binding in matters to arise in the near future.¹⁰⁰ As a result of the provisions of section 23, three important statutes then emanated from section 23 namely, Labour Relations Act,¹⁰¹ the Basic Conditions of Employment Act¹⁰² and the Employment Equity Act, which further addresses issues that affect employees in an employment sector.¹⁰³ As *Currie et al* observe, the specific provisions of these statutes must be applied before the Bill of Rights and its provisions may be invoked. Over the last two decades, workers have by means of a great effort secured the rights encapsulated in section 23. The constitutionalisation of these rights means that they are secured against retrogressive legislative amendment that could in the future be affected to the trilogy of laws listed above.

Provisions of section 23 affords employees equal right to fair labour practice, the right which includes the right to equal pay for equal work. The fact of the matter is that for the vast majority of workers, the fairness of labour practices is determined through collective bargaining. Obviously, the courts will not disturb agreements arrived at through collective bargaining, this then insinuate that the scope of the application of section 23(1) will be limited to individual employment practices.¹⁰⁴

Section 23(2) and (3) guarantees the right to participate in legally recognised trade unions and employer organizations for workers and employees. The above provisions under section 23 were further recognised and interpreted by our courts, case in point *South African National Defence Union v Minister of Defence*,¹⁰⁵ where the court found that members of the defence force must be considered as “workers” for the purposes of section 23, and as a result invalidated a law which prohibited them from forming or joining a trade union. However, the court declared that some of the rights conferred by section 23, such as the right to strike and collective bargaining could be limited in relation to the defence force personnel in order to maintain discipline, thereby ensuring the effective operation of the force.

¹⁰⁰ See *Currie I et al The New Constitutional and Administrative Law* 5th ed (Juta Cape Town 2002) 384.

¹⁰¹ 66 of 1995.

¹⁰² 75 of 1997.

¹⁰³ 55 of 1998.

¹⁰⁴ See section 23(1) of the Constitution of South Africa of 1996.

¹⁰⁵ [1999] 6 BCLR 615 (CC); [1999] 4 SA 469 (CC).

It is clear however, that section 23 is more than merely a right to associate for the purposes of employment. In addition, workers and employers are accorded the right to participate in various activities of the relevant union and employer's organizations respectively, to organize, to bargain collectively, and workers are afforded the right to strike. From this, it is apparent that our system of labour relations is "a voluntarist, collective bargaining regime where economic power is used to reach collective bargaining between labour and management".¹⁰⁶ It must be noted that although an employer's right to lock out, which is controversial, is not expressly recognised in the Constitution, it may indeed form part of the employer's right to bargain collectively.¹⁰⁷

Section 23(6) provides that national legislation may recognize union security arrangements as encapsulated in collective agreements, provided such law complies with the relevant provisions of the Bill of Rights. The Labour Relations Act,¹⁰⁸ referred to above, authorises a particularly contentious "union security arrangement," in the form of a closed shop agreement, according to which employees within a particular workplace, as a condition of their employment, are required to belong to a specified trade union. It can be argued that the recognition of the closed shop agreement contravenes the negative freedom not to associate. In mitigation it must however be noted that the Labour Relations Act imposes several restrictions on the mechanism of the closed shop. So, for example, the membership fees may not be employed for party political purposes. As a result, *Currie et al* comment that its provisions are unlikely to be found to be wanting in the event of a constitutional challenge.¹⁰⁹

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2.3. Interpretation of section 6 of Employment Equity Act on equal pay claims

For the purpose of interpreting the purpose of EEA and the impact it has on the equal pay for equal work, it is important first to discover if the EEA acknowledges equal pay for equal work. In response, the answer is not in the affirmative on the simple premises that, the EEA lacks expressive provisions that can best regulate equal pay for equal work claims in workplaces. Reliance on the provisions of Section 6 of the Act is not in itself efficient as the section only addresses unfair discrimination

¹⁰⁶ See *Currie et al* 385.

¹⁰⁷ See *In re: Certification of the Constitution of the RSA* [1999] 10 BCLR 1253 (CC); [1996] 4 SA 744 (CC) para 64-68.

¹⁰⁸ 66 of 1995.

¹⁰⁹ See section 23(6) of the Constitution of South Africa of 1996.

especially focusing on the listed grounds,¹¹⁰ However, unfair discrimination remains unfair discrimination no matter where is committed, listed or unlisted, therefore, another alternative would be to interpret section 6 objectively in order to accommodate unfair treatment on equal pay for equal work.

Interpretation of section 6(1)¹¹¹ of the EEA places the onus on the one who alleges to prove by facts that indeed they were treated differently for performing equal work, as a result they were not remunerated accordingly. In a decided case of *Ntai & Others v South African Breweries Ltd*,¹¹² court noted that the one who alleges lies with the onus to prove the allegations against the defendant and to further establish that a prima facie case of unfair discrimination exist in order for court to hear the claim. And the defendant must then respond to the allegations and justify the decision he/she took and further elicit reasons for court to believe that the discrimination was not unfair.

Landman J also acknowledged the burden placed upon the applicant in the case of *Louw v Golden Arrows Bus services (Pty) Ltd*,¹¹³ where he observed the following, that there are various forms of unfair labour practice that can be encountered by different employees under different circumstances, however interpretation is key under the circumstances, argued further that it is not an unfair discrimination to remunerate different salaries for equal work or work of equal value, unless only if the motive is to discriminate directly or indirectly.¹¹⁴ Further discrimination can be identified if it occurred on the listed grounds.¹¹⁵

In *Harksen v Lane*,¹¹⁶ the court placed detailed analysis in an attempt to conceptualise the concept of equal pay for equal work, in particular where inequality cease to exist, court stated that in an employment contract, an employee has a duty to render services to an employer as per terms and conditions of the contract, and

¹¹⁰ Section 6 (1) of the EEA provides that: "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth".

¹¹¹ See section 6 of the EEA.

¹¹² [2001] 22 ILJ 214 (LC).

¹¹³ [2000] 21 ILJ 188 9LC).

¹¹⁴ See note 75 above.

¹¹⁵ See note 74 above.

¹¹⁶ [1998] (1) SA 300 (CC).

on the other hand the employer is vested with a responsibility to compensate employees for the work performed as per terms and conditions of employment.¹¹⁷ For an employer to remunerate an employee differently from another employee and such disparities appears to be unjustified especially where the employees are conducting work of equal value, such conduct would amount to unfair treatment as the discrimination would be on prohibited grounds,¹¹⁸ it is further safe to conclude that grounds as listed in section 6 of the EEA are broad enough to include claims of equal pay for equal work.¹¹⁹

In relation to claims where the differential that is asserted by the claimant is a difference in sex, the ILO Equal Remuneration Convention 1951 (No. 100)¹²⁰ situates the comparison to be made at the level of the value of work, and obliges ratifying member states to give effect to the principle of equal remuneration for men and women workers for work of equal value.¹²¹

2.4. Impact of statutes that give effect to equal pay

Item 2(1) of schedule 7 under LRA made provisions for remuneration and benefit in employment in South Africa.¹²² Since the Employment Equity Act has abolished item 2(1) (a), this suggests matters involving pay discrimination will be addressed under the Act. It must be noted that, section 6 of EEA does not have express prohibitions that directly regulate pay claims, which is important to interpret the section in order to give effect thereof.¹²³

Section 29 of PEPUDA¹²⁴ provides that state has a duty to ensure that effective methods are implemented in order to ensure that unfair labour practice is minimised in workplaces. The Act further stipulates that failure to adhere to the principle of equal pay is an act that will amount to unfair labour practice which is prohibited by the Act.¹²⁵ Section 8 of the Act further includes the “systemic inequality of access to

¹¹⁷ See section 1 of the Employment Equity Act 1998.

¹¹⁸ Convention 100 was ratified by the government of South Africa in 2000, Convention 111 in 1997.

¹¹⁹ [1998] (1) SA 300 (CC).

¹²⁰ See ILO Equal Remuneration Convention 1951 (NO. 100).

¹²¹ See Bowman Gilfillan Attorneys, “Pay Discrimination” 2013.

¹²² See item 2 (1) of schedule 7 of the Labour Relations Act 1995.

¹²³ See note 118 above.

¹²⁴ Act of 2000.

¹²⁵ See Item 1 (c) of the schedule 7 of the Labour Relations Act of 1995.

opportunities by women as a result of the sexual division of labour” in its comprehensive definition of unfair discrimination on the ground of gender. While the Equality Act does not apply to employers bound by the provisions of the Employment Equity Act, it indicates an awareness of the realness of pay discrimination and provides the incentive for specific measures to address the problem.

2.5. The relationship between human rights and employment rights

In the past, that is, during the period of the 1990s, human rights served more as political rights as the apartheid laws did not give effect to the rights of black people and women. However, it is now important to note that the paradigm has shifted, meaning that political rights are now recognised as human rights.¹²⁶ The purpose of this shift was to mainly comprehend equal pay right as a human right more than a collective or political right, and to be in a position to address the inequalities and challenges that came with this change.¹²⁷

There is an inevitable relationship existing between various human rights, for example, employment rights to the inclusion of equal pay for equal work and socio-economic rights. Human rights as embodied in the Constitution, gives effect to all other rights and legislation that may be, therefore, although these rights are independent they are inter-dependant with a single objective which is to show that equal pay for equal work forms part of the fundamental rights.¹²⁸ Human rights activists around the world have argued that, it is indeed paramount that all people, women, children and social groups must be treated equally and be afforded an opportunity to rich their potential in their life time.¹²⁹

Equal pay for equal work is an important aspect of employees in that, it provides economic security to individuals, in that where employees are remunerated equally for equal work, this enhance their social standards which will see individuals in a society utilising the resources to rich their ultimate abilities as they provide for

¹²⁶ See Figart D M and Kahn P “Encyclopaedia of Political Economy” 1997 *Journal of Economics* 126-149.

¹²⁷ A paper presented on *Periodic report to the Committee on the Elimination of All Forms of Discrimination against Women: Ministry of Women's Affairs in Wellington* 28 March 2002 New Zealand.

¹²⁸ See *Ministry of Social Development Unpublished report on social status of women in Welling* 13 March 2003 New Zealand.

themselves and their families as a result of equal treatment.¹³⁰ Unfair treatment in employment sectors including pay inequalities are portrayed as matters of social and economic importance affecting social status of individuals and indirectly affecting those who are dependent on the employee suffering discrimination, national and internationally unfair discrimination is prohibited and both men and women should be treated equally.¹³¹

2.6. Equal Remuneration Convention, 1951 (No. 100)

The equal pay remuneration is governed under the ILO, member states who are signatories and have ratified to these international treaties must align themselves with provisions of these conventions, the convention provides that member states must develop methods to promote and uphold equal remuneration for work of equal value, which proposal will adopt various aspects, equal remuneration between men and women, the rates must be determined in order to narrow the gap on pay equity.¹³²

The purpose of equal pay for equal work or for work of equal value appears with a similar objective, that is curb the pay disparities that exist between men and women who performs work of equal value, promotes equal opportunities based on gender.¹³³ The convention therefore encourages the countries to promote objective appraisal on jobs based on the work to be performed. The principle established in the convention was reiterated in the International Convention on Economic, social and Cultural Rights¹³⁴ and various regional instruments. It also features in the initial text of the treaty of Rome and the revised versions establishing the European Union; while the treaty prefers the term “equal work” to “work of equal value”. Its implementation has had very similar results.¹³⁵

¹³⁰ Nussbaum M *Sex and Social Justice* 86: *Central Human Functional Capabilities* (Oxford University Press New York 1999) 42-44.

¹³¹ See Griffin K and McKinley T (eds) *Report on Human Development Strategy* (London Macmillan 1994) 111.

¹³² Committee on Equal Remuneration, statements Communicated by International Women's Organisations, 34th session, International Labour Conference, Document File No. ILC ILO Archives, Geneva 5 June 195134-509.

¹³³ Equal Remuneration Convention, 1951 (No. 100).

¹³⁴ Article 7 applies more broadly than to discrimination between men and women only.

¹³⁵ Lyon-Caen A *Droit Social International et europeen* 8th ed (Dalloz Precis Paris France 1993) 359.

The means of giving effect to Convention No. 100 must correspond, need we say, to the national mechanisms for determining wages. Employers and employees organisations must be fully associated in the process. Recommendation No. 30 on minimum wages stipulates that women should be included in the wage setting machinery as workers representatives and independent persons whenever an industry (or part of an industry) employs a large number of women.¹³⁶

The obvious debacle that faces the government in the implementation of equal pay for equal work is the fact that government has no direct influence in determining rates of remuneration in private sectors, and the end result is that, the government measures and methods cannot be implemented equally across the board.¹³⁷ Now, this calls for everyone including private entities to join hands with the government and adhere to the principle of equal pay for equal work performed and to deal away with unfair discrimination.

2.7. Summary

As stated in the introduction to the chapter above, in this chapter the study discussed the legal framework on the right to equal pay. The study unearthed the constitutional right to labour relations which is section 23 of the South African Constitution Act of 1996. The study also deliberated on various laws and statutes on labour laws that give effect to the constitutional right to equality, that is section 9 of the South African Constitution, section 6 of the Employment Equity Act also holds provisions for equal pay claim, it must be clear that section 6 of the Employment Equity Act prohibits unfair discrimination in any employment policy or practice. We have also learnt that previously claims of remuneration in South Africa have been heard under the previous LRA, the position has been amended and matters relating to equal pay are governed by the EEA.

Section 29 of the Promotion of Equality and Prevention of Unfair Discrimination Act determines that the state must ensure that reasonable legislative and other measures are taken to address unfair labour practices. The study also considered international instruments on equal pay law, International Labour Organisation on

¹³⁶ The Changing role of women in the economy: Employment and Social issues, GB, 261/ESP/2/2, 261st session, ILO Nov 1994.

¹³⁷ See Equal Remuneration Convention, 1951 (No. 100).

Equal Remuneration Convention No 100 of 1951 which gives effect to the principle of equal value for work of equal value, and International Labour Organisation on Discrimination in Employment Convention No 111, section 233 of the Constitution mandates courts to interpret all legislations in accordance with International law standards.

It is clear that, the constitutional provisions remains the major weapon of adequate significance in remedying unfair labour disputes and unequal treatment in work place, the government and private sectors in joining arms will defeat this inequality which has over the years manifested itself into an obstacle that defeat economic freedom.

CHAPTER 3: COMPARATIVE APPROACHES TO EQUAL PAY FOR WORK OF EQUAL VALUE AND ITS IMPLICATIONS IN SOUTH AFRICA

3.1. Introduction

In chapter 2, the study dealt with the legal framework pertaining to equal pay. The equality clause in the Constitution includes the right to equal treatment and opportunities at workplace. Labour statutes on the right to equal remuneration were also looked into as they play a very important role in paving a way to come up with equal pay provisions in South Africa.

The chapter demonstrated purposive illustration of South African perspective on equal pay in the pursuit of achieving progressive realisation of equal pay provisions in South African context free from Employment Equity Act.

This chapter puts in place evaluation measures to be used to monitor equal pay claims in South Africa. It reveals that South African courts have on a number of occasions dealt with cases of equal pay for work of equal value, which serves as evidence that there has been considerable jurisprudential development in South Africa on equal pay. Despite the voluminous number of cases and matters pertaining to equal pay for work of equal value, this chapter notes that South Africa still relies on Employment Equity Act to address matters of equal pay which is not in itself efficient.

In this chapter, the study attempts to explore the aspects of equal pay in comparative contexts, and seeks to demonstrate the implications for unequal pay in the South African context. This chapter finds it imperative to question the yardstick for measuring when work is of the same or of equal value. Furthermore, it is also important to know when work is of comparable worth. What is it that can be used as a yardstick to measure comparable worth at the workplace in South Africa? The chapter considers equal pay laws varying from different jurisdictions and case laws that have an effect on equal pay disputes.

As a point of departure, this chapter recognises that South Africa is confronted by the rampant phenomenon of unequal pay in work places, and employees are paid lesser by their employers. The concern here is that while there are alarming statistics on the high levels of unemployment, and of those who are employed, most of those

who are employed at the lower rungs of the South African society do not earn enough to provide for themselves and sustain their respective families. Various instances were relied upon to justify this assertion.

3.2. Equal work, equal value and work of comparable worth

3.2.1. Equal work and comparable worth in South African perspective.

In recent years, South African courts seemed to be upholding the notion of equal pay for equal work in the pursuit of creating work environment that promotes equality rights.¹³⁸ In the decided case law of *South African Chemical Workers Union v Sentrachem*,¹³⁹ the tribunal held that the inability to acknowledge the principle of equal pay for equal work based on race discrimination is on the listed grounds of discrimination as such the conduct resulted in unfair labour practice.¹⁴⁰ However, in *Mthembu v Claude Neon Lights*¹⁴¹ Court held that, compensating other employees unequally as compared to their counterparts where they have performed work of equal value may not necessarily amount to unfair treatment, especially if the differentiation is based on factors such as merits, productivity and work experience.¹⁴²

The concept of equal pay for equal work has further been deliberated to in the case of *Louw v Golden Arrow Bus Services*,¹⁴³ the applicants contested that they were treated unfairly as the employer paid them less as compared to their white counterpart, court admitted that yes there was discrimination and such discrimination was justified and did not constitute unfair discrimination as listed on the prohibited grounds, and therefore the difference in salary is justifiable.

¹³⁸ See ILO Report I (B), International Labour Conference, 91st session in Switzerland, 23 November 2003 Geneva 11.

¹³⁹ [1988] 9 ILJ 410 (IC).

¹⁴⁰ See also *National Union of Mineworkers v Henry Gould* [1988] 9 ILJ 1149 (IC): it is an unfair labour practice to extend benefits resulting from collective bargaining to non-union employees, while withholding benefits previously available to non-union employees from their unionised counterparts where the two categories perform the same work. The *Sentrachem* finding was subsequently confirmed in *Sentrachem v John* [1989] 10 ILJ 249 (T). For a discussion of the *Sentrachem* cases, see Campanella G "A time against race" 1991 *Employment Law* 8-9; Campanella G "Some light on equal pay" 1991 *ILJ* 13-23.

¹⁴¹ [1992] 13 ILJ 422 (IC).

¹⁴² See also *Transport and General Workers Union v Bayete Security Holdings* [1999] 4 BLLR 401 (LC): claim of pay discrimination based on race would not succeed where the employee cannot prove that his job is similar to that of the white comparator.

¹⁴³ [2000] 3 BLLR 311 (LC).

It was contended further that in order for employers to avoid unfair discrimination of employees as compared to others, the employer should at least consider the following factors objectively so, that is, skill, potential, responsibility, education, attitude, market and performance.¹⁴⁴ Socio-economic rights as entrenched in chapter 2 that is bill of Rights, these rights must be protected by the state and law enforcers as they uphold the principle of justice, logic and equality, these rights further include the right to equal pay for equal work or work of equal value, the courts can refer to the said rights in determining whether unfair labour practice has indeed occurred. It is vital to note that employment right is also noted under section 23 of the Constitution and which aspect affect the social and economic standards of citizens employed and their families.¹⁴⁵

Reliable forums have submitted that indeed EEA does not contain peculiar provisions that articulate more on the concept of equal pay for equal work, moreover section 6 of the Act is silent on the principle of equal pay for equal work, after debates pertaining the subject of equal pay, now it was submitted that should the statute be interpreted liberally, section 6 is broad enough to cover issues pertaining to equal pay for equal work.¹⁴⁶ In one of the decided cases¹⁴⁷ on equal pay for equal work, Court made a finding that, to an applicant is not merely sufficient to allege that they were discriminated on the basis of race, but applicant must show cause that indeed the said allegation of discrimination is on any prohibited grounds of discrimination as enlisted in section 6.¹⁴⁸

¹⁴⁴ Dupper O *Essential Employment Discrimination Law* (Juta and Co Cape Town 2001) 27.

¹⁴⁵ In the case of *Teamsters v United States*, 431 US 324, 335, N15, 52l Ed 2d 396, 97 S Ct 1848 (1977), Court held that, "the Plaintiff is required to prove that the Defendant had a discriminatory motive or intent."

¹⁴⁶ *Mangena & Others v Fila South Africa (Pty) Ltd & Others* [2009] 12 BLLR 1124 (LC) at para 5.

¹⁴⁷ *Mutale v Lorcom Twenty Two CC* [2009] 3 BLLR 217 (LC) at para 40.

¹⁴⁸ See also *NUMSA obo Magolego & Others v Mathews* [2006] 1 BALR 25 (MEIBC): wage differentials between employees in the same grade not unfair if based on different skills, training, job functions and length of service; *National Union of Metalworkers of SA & Others v Gabriels (Pty) Ltd* (2002) 23 ILJ 2088 (LC) at par 22: it is not enough for the complainants to allege that differences in pay are "disproportional, irrational, arbitrary and capricious", without ascribing the differential treatment to any listed or analogous ground of discrimination in terms of section 6(1) of the Employment Equity Act; *Roberts v Agricultural Research Council* [2001] 22 ILJ 2112 (ARB) at par 20: "a mere differentiation in salary as between persons in similar circumstances and where the historical circumstances which led to recognition of one and not the other are not established does not justify the inference or establish an impairment so fundamental that it can be regarded as an impairment of the applicant's dignity or that it can be regarded as affecting her in a comparably serious manner."

3.2.2. Test for work of similar nature

In order to conclude that work is of similar nature or not, the test should be objective in comparing factors that counts in determining if the work is of similar nature or not, of importance is that, in conducting the test it is necessary to consider only factors that have material impact on the existing similarities or disparities.¹⁴⁹ It is without doubt that no value of work can be determined if factors such as skill, responsibility, accountability, physicality, mental strength, educational qualification and experience are not considered.¹⁵⁰

On this aspect, the court in the case of *Louw v Golden Arrows Bus Services*¹⁵¹ held that, in an instance where the above mentioned factors are presented and were considered accurately by the employer in justifying salary differences in respect of employees, court was of the view that, such differentiation would not amount to unfair labour practice.¹⁵² Further, the court held that, in an equal pay dispute, an applicant bears an onus to prove to court the ground upon which discrimination was based on. The court considering facts of the case came to a conclusion, indeed there was a differentiation in remuneration, on the basis that some employees were paid more than the applicants, however, the court did not find a ground in which it could declare the said pay discrimination to be unfair, and stated that, the applicant has a duty to show to court on what basis do they claim racial discrimination.¹⁵³

Other independent tribunals came to a finding that, it cannot be disputed that discrimination on the basis of race remains vastly prevalent in the borders of South Africa, be conscious or sub-consciously, as a result this also has influenced or affected labour markets in terms of standard of job to be performed by a certain group and the manner in which they are remunerated. It is therefore concluded that an equal pay claim will only hold water if the applicant is in a position to prove that they were discriminated unfairly.¹⁵⁴



¹⁴⁹ [2009] 12 BLLR 1124 (LC) at par 6.

¹⁵⁰ See: note 144 above.

¹⁵¹ [2000] 3 BLLR 311 (LC).

¹⁵² Rycroft A 1991 "Preventing and Proving Workplace Discrimination" 1991 *International Law Journal* 12 722-729.

¹⁵³ See *Watson v Fortworth Bank and Trust* 487 US 977 (1988) at 839.

¹⁵⁴ [2009] 12 BLLR 1124 (LC) para 15.

The Constitution of South Africa recognises international law and a need to compare different legal systems and learn from other states in developing the country. In other states which have grown economically, they have drawn methods that will best assist them in determining whether work is of equal value or not.¹⁵⁵ Section 11 of the Canadian Human Rights Act¹⁵⁶ determines that the value of work is to be ascertained by considering the composite of the following factors in relation to the actual work¹⁵⁷ performed by an employee or class of employees:

- i. Skill – qualifications (intellectual or physical) that have been acquired through education, experience, training or natural ability;
- ii. Effort – the commitment and intellectual ability that an employee portrays in caring out the work;
- iii. Responsibility – the accountable standards of an employee in relation to their work prescription;
- iv. Working conditions – the environment and resources available in order to perform work.¹⁵⁸

The objective aspect of evaluating whether jobs are of equal value or comparable worth, amongst other factors, it requires the employer to consider both the qualitative and quantitative amount of work undertaken by employees in ensuring that they perform in accordance with their employment contract. The ultimate goal here is to ensure that employees are treated equally in the employment sector.¹⁵⁹

It is submitted that equal pay for equal work can best be achieved by conducting an analytical job evaluation program in order to ascertain and quantify the worth of work both under the relevant Canadian provisions and under section 1 of the United

¹⁵⁵ Fey T "Labour standards on Southern Africa in the context of globalisation: The need for a common approach" 1999 *ILJ* 1445-1450.

¹⁵⁶ See section 11 of the Canadian Human Rights read together with sections 3 to 8 of the Canadian Equal Wages Guidelines of 1986.

¹⁵⁷ As early as 1970, the Ontario Court of Appeal found in *R v Howard, Ex parte Municipality of Metropolitan Toronto* 13 DLR (3d) 451 (Ont CA) that assessing the value of work requires looking at actual duties performed, and not at official job descriptions.

¹⁵⁸ Section 5 of the Ontario Pay Equity Act.

¹⁵⁹ See Hildebrand G H *The market system Comparable worth: Issues and Alternatives* 2nd ed (Transcend Publishers Washington DC 1993) in Livemash (ed) *Comparable worth: issues and alternatives* (1980) 94–95.

Kingdom Equal Pay Act¹⁶⁰ and, despite their shortcomings, are thought to be the most effective existing mechanism to ascertain comparable worth.

3.3. Equal pay evaluation methods

3.3.1. Job evaluation as a yardstick to measure unequal pay discrimination

Arguably speaking conducting job evaluation in order to ascertain if employees conducting work of similar nature should be paid equally is the best possible remedy to curb the unfair labour disputes on equal pay for equal work. Analysing the worth of jobs by means of a job evaluation scheme and structuring remuneration policies accordingly may contribute significantly to the realisation of comparable worth.¹⁶¹ The results of a job evaluation study may also serve as a defence against a pay equity claim. In *Misra v Telkom*,¹⁶² the CCMA found that it was fair to use a job evaluation system in order to determine employee's eligibility for promotion. While not dealing directly with remuneration, the decision indicates that it is useful for employers to rely on the results of job evaluation studies when facing allegations of unfair discrimination.

Basically job evaluation system is to encourage employers to take necessary measures that will assist in reducing the existing unjustifiable disparities pertaining to equal pay for equal work, whilst on the other hand, employees equally have a duty to understand their employment mandate as stipulated in their employment contract, and if for some reasons they have a reasonable suspicion that they are not treated fairly as compared to others based on equal pay for equal work, same should be addressed by the employee concerned.¹⁶³

¹⁶⁰ See *Bromley v H & J Quick* [1988] IRLR 249 (CA); *Dibro v Hore* [1990] IRLR 129 (EAT).

¹⁶¹ See also *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T) at 317D–F where court held as follows “it can hardly ever be a justification for direct discrimination that it would be too costly to implement measures for equalisation especially if there are other avenues open to the parties”..

¹⁶² [1997] 6 BLLR 794 (CCMA).

¹⁶³ Regulation R1360 of 1999 *Government Gazette* vol 413 no 20626 23 November 1999 (“Employment Equity Regulations”).

3.3.2. Three methods of achieving equal pay

3.3.2.1. Like work

Another controversial subject is that of like work, that is, where people are employed for a work that is similar in nature to each other and have similar characteristics, where a female is employed for a work that is “like” to that of a man, it is required that they should be remunerated alike without any form of discrimination. The courts are vested with interpretation of what work would constitute like work, and courts in comparing like work should avoid trivial difference that may exist.¹⁶⁴

The concept of like work was further given judicial attention, where the Court went as far as defining what may constitute like work, it was held that, work will be considered to be like work where it has similarities in its characteristics and further that, unless where the existing difference between two jobs are of material and practical importance, then such will not be regarded as like work.¹⁶⁵ In *Dance v Dorothy Perkins Ltd*,¹⁶⁶ court held that, whether this is contractual or simply part of the performance of the job duties, a claim that the work is “like” work will be defeated. However, if the different duties are infrequently exercised in practice then these differences can be ignored. Thus in *Shield v Cooms (Holdings) Ltd*,¹⁶⁷ special security responsibilities was exercised. Moreover, in *Dugdale v Kraft Foods*,¹⁶⁸ court held that the male employee was prepared to work night shift but rarely did.

3.3.2.2. Work rated as equivalent

On the second aspect of job evaluation, if job is rated as equivalent, again, this element should not be addressed subjectively, but must be subjected to a liberal interpretation, and after all the pertinent factors have been considered and work is seen to be equivalent between two people or men and a women, both should be paid equally for work of equal value, where disparities exist on the premises of different pay, same must be justified by the employer, if the employer relied on fair

¹⁶⁴ See note 43 above

¹⁶⁵ *Capper Pass Ltd v Lawton* [1977] ICR 83, 1976 1RLR 366, EAT.

¹⁶⁶ [1978] ICR 760, EAT.

¹⁶⁷ [1978] ICR 1159, 1978 IRLR 263, CA.

¹⁶⁸ [1978] ICR 48, 1976 IRLR 368.

discrimination grounds, for instance, skill, competency, commitment, experience, etc.¹⁶⁹

In a case where the job evaluation criteria is not elaborative in terms of what may constitute equal work or work of equal value, the obvious guide would be to consider grounds listed in section 6 of the EEA which provides for prohibited grounds of discrimination, gender discrimination is prohibited and men and women should be afforded similar opportunities based on fair discrimination, this will lay a proper foundation to adhering to the principle of equal pay for equal.¹⁷⁰ This view was further given judicial attention in the case of *Rummler v Dato-DruckGmbH*,¹⁷¹ where the court held that,

A female printer in Germany claimed that she was wrongfully classified under a job classification scheme based on a national collective agreement because the system gave undue weight to muscular effort. The German Labour Court referred the issue to the court of justice which held that not only must job classification schemes use the same criteria for men and women but that such schemes must be organised so that as a whole they do not in practice discriminate against one sex.¹⁷² Mr Rummler had argued that the directive outlawed any distinction in job evaluation systems based on muscular effort. The court held that such a criterion was permissible as long as they were objectively measurable. However, if a job classification system as a whole was to be non-discriminatory such criteria had to be accompanied by other criteria "in relation to which women had other avenues". It is pertinent that the methods of evaluating criteria should not discriminate against another group of workers, since that would run the risk of indirect discrimination.¹⁷³

3.3.2.3. Equal value claims

The third method has been dealt with in the former chapter, this aspect is self-explanatory, in that both men and women who have been employed for work of equal value should be remunerated equally in that regard, women who have been previously discriminated on the basis of gender should be allowed to claim equally to

¹⁶⁹ *Eaton Ltd v Nuttal I* [1977] ICR 272, [1977] IRLR 17; *England v Bromley London Borough Council* ICR, EAT.

¹⁷⁰ See European Commission's Report to the Council on the Application of the principle of Equal Pay for men and women COM in Switzerland (78) 16 January 1979 Geneva 711 at 65-83.

¹⁷¹ [1987] 3 CMLR 127, ECJ.

¹⁷² [1999] 20 ILJ 373.

¹⁷³ Loenen T "The Equality clause in the South African Constitution: Some remarks from Comparative Perspective" 1997 SAJHR 401 at 419-429.

men for work of equal value.¹⁷⁴ Where a woman possess similar qualities to that of a men looking at skill, commitment, intellectual capacity, accountability, experience and academic qualification, similar opportunities must be afforded to a women in the spirit of equally and building a discrimination free society.

In *Pickstone v Freeman Plc*,¹⁷⁵ however, court held that, where it is difficult to cut to size what would constitute work of equal value where factors such as skill, experience, commitment and others have been considered but it still appears to be difficult to justify work of equal value, the court stated that purposive interpretation based on the work conducted by men over the one done by women would be relevant to establish if the job has equal value.¹⁷⁶ The Court further noted that purposive interpretation would assist in determining whether work is of equal value or not and to further determine if pay disparities are justifiable or not.¹⁷⁷

3.4. South African position on equal pay law

Employment Equity Act in South Africa is a statute that was enacted in order to address employment discrimination based on prohibited grounds of discrimination, more precisely section 6 of the Act provides grounds which constitutes unfair discrimination, for example, discrimination on gender, race, culture, religion etc.¹⁷⁸ Section 6 of the Act does not make mention of express provisions which addresses the notion of equal pay for equal work, with that having been said, with purposive interpretation, section 6 of the Act is broad enough to include unfair discrimination based on work of equal value.¹⁷⁹

¹⁷⁴ See Equal Pay Act 1970 and the Sex Discrimination Act 1975, and the equal provisions Act 1995.

¹⁷⁵ [1988] IRLR 357, HL.

¹⁷⁶ See Birdman G "Proof and Evidence of Discrimination" in Hepple B and Szyszczak E M *Discrimination: The limits of the Law* (Mansell London 1992) 50 at 57.

¹⁷⁷ Engles S "Problems of proof in employment discrimination: The need for a clearer definition of standards in the United States and the United Kingdom" 1994 *Comparative Labour Law Journal* 15 340-370.

¹⁷⁸ No 55 of 1998.

¹⁷⁹ Section 6 of Employment Equity Act of 1998.

3.5. International and foreign jurisprudence on equal pay

3.5.1. Comparable worth in international and foreign law

Reliable sources have submitted that, the notion of equal pay for equal work remains a subject that is still developing looking at its application in both international and foreign law, judicial application also has shown that this subject lacks universal interpretation, in that various states understand and interpret the concept of equal pay differently.¹⁸⁰ This notwithstanding, legislative authorities, courts and administrative tribunals across the world seem increasingly willing to acknowledge the importance of the notion of comparable worth in achieving substantive equality of remuneration.¹⁸¹

International law provides that member states should uphold the principle of equality, that even at workplaces men and women should be afforded equal opportunities, where women performs same duties as men they should also be paid equally for equal work performed.¹⁸² In one of the cases decided by international court, it was argued that the concept of equal pay should not be applied randomly but rather be limited to equal pay for work which is objectively similar.¹⁸³

The EEC issued an Equal Pay Directive¹⁸⁴ which construes the notion of equal pay for equal work, and further states that no one should be discriminated based on gender, and therefore the purpose of the issued directive was to eliminate all forms of discrimination in employment. In a European Court it was held that, the Equal Pay Directive was placed under scrutiny and criticised because the enforcement methods were not as stringent, that is even after the implementation of the Directive, the

¹⁸⁰ See section 1(3) of the United Kingdom Equal Pay Act; *Buckland v Dowty Rotol* [1979] IRLR 162

¹⁸¹ In the United States, courts disagree on whether wage differentials can be justified by market demand, see *Horner v Mary Inst* 613 F2d 706 (8th Cir 1980).

¹⁸² The treaty has recently been consolidated, with the provisions of art 119 now being contained in art 141 Smit N "A comparative perspective of gender discrimination in the workplace (including discrimination due to pregnancy and family responsibilities)" 1998 *TSAR* 508–509; Rubenstein *Discrimination: a guide to the relevant case law on race and sex discrimination and equal pay* [2000] 66–76.

¹⁸³ *Defrene v Sabena* 43/75 [1976] ECR 445 (ECJ).

¹⁸⁴ Council Directive 75/117/EEC of 10 February 1975.

survey conducted proved statistically that there was still a large gap in pay between man and women who performed work of equal value.¹⁸⁵

The “equal value/comparable worth” claim is, however, limited to circumstances where it is not possible to rely on the “formally equal” criteria,¹⁸⁶ and it is further complicated by the Act insisting that the work in question be compared to that of a male worker in the same employment. It is notoriously difficult for women in female-dominated sectors of employment to locate such a comparable male. Also, forced reliance on a male norm to found gender equality obscures and reinforces the dominance of masculine values in employment, a primary cause of women.

The equal pay law¹⁸⁷ in the United State of America provides that remuneration discrimination on gender would amount to unfair discrimination, Equal Pay Act states firmly that men and women should be paid equally in an instance where they are doing similar work or work of equal value,¹⁸⁸ the equal pay system comes again with imperfections and series of criticisms, although the system comes with its flows it cannot be disputed that it is more concise and peculiar enough to address issues of equal pay for equal work, or based on comparable worth or equal value claims.¹⁸⁹ Like South African employment system has section 6 of the EEA which lists prohibited grounds of discrimination, the United State of America also has Title VII of the Civil Rights Act¹⁹⁰ which prohibits discrimination in employment on the basis of race, colour, religion, sex or national origin, the Act was amended to incorporate equal pay claims, and same can be done with South African system in

¹⁸⁵ *Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] IRLR 591 ECJ. For the impact of art 119/141 and Directive 75/117 on the law of Member States, see Harvey R “Equal treatment of men and women in the workplace: the implementation of the European Community’s equal treatment legislation in the Federal Republic of Germany” 1990 *American Journal of Comparative Law* 32–37.

¹⁸⁶ See Fredman S *Women and the law* (Clarendon Press Oxford New York 1997) 234; Loveday G “Gender discrimination in the workplace. Part 1” 1997 *TSAR* 104-109.

¹⁸⁷ See Equal Pay Act of 1963 United States of America.

¹⁸⁸ *Corning Glass Works v Brennan* 471 US 188 [1974] at 195. Courts have decided that work need not be identical, but only “substantially equal” to qualify for the protection of the Equal Pay Act. In *Bruntin v Breathitt County Board of Education* 134 F3d 796 (6th Cir 1998) at 799, the court found that determining whether work is substantially equal involves an overall comparison of the work rather than examining the individual components of each job. See also *Gandy v Sullivan County Tennessee* 24 F3d 861 (6th Cir 1994); *Stanley v University of Southern California* 15 F3d 1313 (9th Cir 1994); *Krenik v County of Le Seur* 47 F3d 953 (8th Cir 1995); *Strag v Board of Trustees* 55 F3d 943 (4th Cir 1995).

¹⁸⁹ Harvey (note 213) 32-37.

¹⁹⁰ 42 USC § 2000e – 2(h).

order to have express provisions.¹⁹¹ However, the onus under Title VII is on the plaintiff to show that the employer had discriminatory intent, a requirement absent from the Equal Pay Act.¹⁹²

That the scope of Title VII might extend beyond claims of equal work to also encompass claims of comparable worth was contemplated but left undecided by the United States Supreme Court in *County of Washington v Gunther*,¹⁹³ in which a sex discrimination claim by female prison guards in the women's section of a county jail, who were paid less than male guards in the men's section, succeeded. By not expressly limiting the scope of Title VII to claims of equal work in *Gunther*, the door seemed to have opened for comparable worth claims under Title VII.¹⁹⁴ Disappointingly, federal courts have since indicated that they are not willing to accommodate comparable worth concerns under Title VII.

In *AFSCME v State of Washington*,¹⁹⁵ the court stated that it was clear from the legislative history of the Equal Pay Act that Congress preferred the "equal work" standard above that of comparable worth, but made no pronouncement on the value of comparable worth. In *American Nurses Association v Illinois*¹⁹⁶ and *International Union UAW v Michigan*,¹⁹⁷ however, circuit courts refused to use comparable worth theory to mandate pay equity across sex-segregated job classes. Furthermore, the United States Equal Employment Opportunity Commission's guidelines on the "Bennett Amendment" state that it should be interpreted in accordance with the "similar work" standards of the Equal Pay Act, to avoid conflict between the Equal Pay Act and Title VII.

Australian pay equity measures are also criticised for not catering for comparable worth claims. The notion of comparable worth was first rejected in 1986, when the Australian Conciliation and Arbitration Commission dismissed a claim by nurses that their jobs be re-evaluated according to comparable worth criteria.¹⁹⁸ Comparable

¹⁹¹ *County of Washington v Gunther* 452 US 161 [1981] at 168.

¹⁹² As explained in *Tidwell v Fort Howard Corporation* 989 F2d 406 (10th Cir 1993).

¹⁹³ 452 US 161 (1981) at 181.

¹⁹⁴ See note 236 above.

¹⁹⁵ 770 F2d 1401 (9th Cir 1985) 1404.

¹⁹⁶ 783 F2d 716 (7th Cir 1986).

¹⁹⁷ 886 F2d 766 (6th Cir 1989).

¹⁹⁸ See the discussion of the *Nurses Test Case* by Fredman (note 206) 120-121.

worth claims based on subsequently enacted legislative provisions¹⁹⁹ have similarly failed.²⁰⁰

More proactive on the issue than the United States, Britain or Australia, statutory provisions on pay equity can be found on both federal and provincial level in Canada.²⁰¹ On the federal level, section 11 of the Canadian Human Rights Act²⁰² determines that to “establish or maintain differences between male and female employees employed in the same establishment performing work of equal value” is a prohibited discriminatory practice. The most proactive provincial pay equity legislation, the Ontario Pay Equity Act, requires employers “to establish and maintain compensation practices that provide for pay equity in every establishment”.²⁰³ The Pay Equity tribunal have interpreted this provision liberally to encompass both the concepts of equal work and comparable worth.²⁰⁴

3.6. Summary

The study in this substantive chapter, attempted to unearth various aspects of equal work of equal or comparable worth. South African perspective on equal pay was explored, demonstrating that South African courts have previously dealt with discrimination pertaining equal pay for equal work. In this chapter, another important lesson learnt is that, EEA is broad enough to incorporate equal pay for equal work, or as an alternate to be more peculiar, section 6 of EEA can be amended to expressly make provisions for equal pay disputes.

The study examined foreign law on pay equity principles. According to Canadian law on equal pay guidelines of 1886, the law provides measures in relation to the actual work performed by an employee/class of employees, for all the foreign law and international law which recognises the principle of equal pay, one thing that is

¹⁹⁹ These include provisions of the Industrial Relations Reform Act 1993, the 1994 amendment to the Sex Discrimination Act 1984 and the Workplace Relations Act 1996.

²⁰⁰ See *Clelland v Graham Allen* [1994] 3 253/98.

²⁰¹ All the Canadian provinces have specific equal pay legislation: Gunderson K and Riddell C “Economic issues pertaining to pay equity” 1995 *Employment law in Canada* 987-1005. [1977] RSC 1985.

²⁰² Section 7 (1) of the Ontario Pay Equity Act.

²⁰³ See *ONA v Regional Municipality of Haldimond-Norfolk* (No 6) 2 PER 105 [1991].

²⁰⁴

common is the criteria that is applied, with similar factors and purposive interpretation being at the helm of the application of the principle of equal pay.

International law on equal pay was considered as there are treaties and conventions that provide guidance on equal pay. South Africa is a member state to the international community, which means that it is supposed to take the concept of equal pay very serious as it will assist in eliminating discrimination at workplace.

CHAPTER 4: THE EXISTING LINK BETWEEN EQUAL PAY FOR EQUAL WORK AND SOCIO-ECONOMIC RIGHTS

4.1. Introduction

Chapter 3 dealt with the evaluation methods that can be implemented in order to monitor progress pertaining to the principle of equal pay for equal work in South Africa. The chapter dealt with the question of comparable worth, to say, when can we actually say work is of comparable worth? What qualifies work to be of comparable? This was achieved through a comparative study from different jurisdictions on their respective equality clauses on equal pay at workplaces. International law treaties also assisted bringing understanding of what work of comparable worth means.

This chapter intends to discuss in detail the relationship which exists between equal pay for equal work and socio-economic rights as entrenched in the Bill of Rights. Collective literature concerning equal pay for equal work will be the focal point in establishing if indeed there is a relationship between equal pay for equal work and socio-economic rights. The study will advance an argument that, if socio-economic rights are basic rights of citizens, then the right to equal pay for equal work or equal value also must be treated similar as the Constitution guarantees the right to security and right to employment, and that effort to enforce and implement effectively this right should be based on the correct framework.

Although nationally there are no express provisions on equal pay for equal work or any adjudicated relationship between equal pay and socio-economic rights, the concept of equal pay for has found its expression on the international law and as a result was entrenched in the labour conventions and treaties. Now, the rationale behind the international law mandate to states which are member states to these conventions, is that, the states have to align themselves with the treaties and conventions they have ratified to, that is, give effect to these laws within their national jurisprudence.

4.2. Link between equal pay for equal work and socio-economic rights as reflected by the international law

South Africa is a member state to international community and has ratified a number of treaties and conventions; more peculiar is the International Labour Convention. The international law recognises the concept of equal pay for equal work, that is where employees conduct work that is of equal value or work of comparable worth, their remuneration scale should be proportional.²⁰⁵ The Constitution further provides that where the law does not make provisions to certain aspects that require legal intervention, the courts can make references to both foreign and international law in order to remedy the problem, moreover South Africa is a member state to numerous conventions.²⁰⁶

The concept of equal pay for equal work is globally recognised as various developed states applies the principles alongside the individual's right to equality, which is one of the fundamental rights of an individual.²⁰⁷ The provisions of the Universal Declaration of Human Rights stipulates that, everyone without unfair discrimination has a right to equal pay for equal work where their duties have been evaluated and it is objectively concluded that the work conducted by two individuals is work of equal value.²⁰⁸

In the international law the right to equal pay was recognised during the year 1951, the right to equal pay was seen to be having a fundamental impact on the socio-economic status of women who were discriminated on the basis of gender and paid less as compared to their male counterpart, as a result the International Labour Organisation deemed it fit that it then promulgate a convention on equal remuneration between men and women for work of equal value.²⁰⁹ Reliable sources submitted that, the International Labour Organisation then went on to strengthen the

²⁰⁵ Idriz N I "Rethinking the Value of Preferential Treatment" 2009 *Journal of Law and Jurisprudence Review* 45-47.

²⁰⁶ See section 39 of the Constitution.

²⁰⁷ See Universal Declaration of Human Rights (1948).

²⁰⁸ See Article 23 of the Universal Declaration of Human Rights (1948).

²⁰⁹ International Labour Organisation Convention (No. 100) Equal Remuneration for Men and Women for Work of Equal Value of 1951.

convention on equal pay for equal by further enacting a convention on discrimination at workplace.²¹⁰

The international Labour Organisation promulgated these two conventions after having realised that the conventions complement one another, and therefore interrelated in that they give effect to one another, reality is that, as long as there is discrimination on equal pay based on gender, race, culture or religion, the question of advancing socio-economic status of individual will remain a lost battle, Canadian labour system also recognises the importance of equal remuneration and the impact it has on the social and economic status of individuals.²¹¹

Internationally, it has become apparent that one cannot make mention of the principle of equal pay without making mention of the relationship it has with social-economic rights.²¹² On the continuous debate and discussions to promote equality at workplaces, the international law went on to say that, convention on pay remuneration between men and women and the convention regulating discrimination at workplace must both be implemented by member states with the sole purpose of promoting equal opportunities in an employment environment,²¹³ and further that, to ensure that protection is afforded to social and economic needs of the people, the International Covenant on Social and Economic Rights is also ratified by the member state so that all these rights are interpreted to achieve the same goal.²¹⁴

Reliable sources further assert that, employees have a right to working environment that is fair, just and equitable efficient to ensure that they deliver services as required by their employment contracts, that is workers should be presented with equal opportunities including equal pay for work of equal value, both men and women must be treated with utter respect and without any form of unfair discrimination.²¹⁵ The pay equity must further conform to the minimum wage standard in that employees are not paid less; the most important thing about employment is to enhance the



²¹⁰ International Labour Organisation Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation of 1958.

²¹¹ See Canada's Federal Pay Equity.

²¹² See International Convention on Social Economic and Cultural Rights 1966.

²¹³ See Beijing Declaration and Platform for Action (1995).

²¹⁴ See Canadian Human Rights Act, S.C. 1976-77.

²¹⁵ Hepple B *Equality: The new Legal Framework* (Hart Publishers Ltd Oxford 2011).

socio-economic status of employees that will see them realising equal opportunities.²¹⁶

United Nations having realised the consistent pattern of social and economic injustices prevailing at workplaces, mostly discrimination against women who are not afforded equal opportunities as compared to their male counterparts despite the fact that they perform work that is of equal or comparable worth,²¹⁷ the committee then enacted a convention that intends to regulate any kind of discrimination against women and further protects their rights as employees.²¹⁸ The provisions of this convention, in particular article 11 deals with the right to equal pay and equal treatment in respect of opportunities at workplace.²¹⁹ Arguably, the convention on the elimination of discrimination against women has given direction to numerous states on how to prevent discrimination against women, the convention is arguably the most influential component to provide guidelines as to how to eliminate, protect and promote the rights afforded to women in the modern society.²²⁰

The impact caused by the CEDAW was so positive with reasonable and just provisions that could be easily implemented or enforced by member states, it was not long until China government recommended that Beijing Declaration guarantees protection of women rights to equality.²²¹ And implementing protection and promotion of women's rights by China government was to give effect to the International Labour Standard, which aims at eliminating sex discrimination between men and women and ensuring a working environment that will afford both men and women equal opportunities where they perform work that is of comparable worth.²²² The government of China in an endeavour to eliminate gender discrimination between men and women went to an extend of entrenching provisions that will provide a

²¹⁶ See article 7 of the International Covenant on Social and Economic Rights.

²¹⁷ Prokos A and Padavic I, An examination of competing explanations for the pay gap among scientists and engineers. 2005 *Gender and Society* 19 523-543.

²¹⁸ Convention on the Elimination of All Forms of Discrimination Against Women 1981.

²¹⁹ See Article 11.1 of the CEDAW.

²²⁰ Lea R 'Women make different choices. That's not bias; Britain doesn't need "golden skirts". They are bad for business and bad for equality'. *The London Times* 7 January 2013 18.

²²¹ See note 213 above.

²²² Passant J 'Women Must Spoil for a Fight to Win Equal Pay' *The Canberra Times* 10 January 2013 19.

structure effective enough to adjudicate on the concept of equal pay for equal work and minimum wages generally.²²³

The efforts taken by the international community to eradicate discrimination at workplaces cannot be over emphasised, the international law created conventions and treaties in order to regulate this global endemic in the form of discrimination at workplace relating to equal opportunities, a subject that affect both social and economic status of employees, ILO further adopted another declaration “Declaration on Fundamental Principles and Rights at Work”.²²⁴

This declaration unlike any, aligns the right to equal pay for equal work with the most important human rights, such as right to education, social and economic security, right to health and freedom of movement, this is another confirmation that suggests that the right to equal pay for equal work should in fact be afforded protection and be viewed as a component of socio-economic rights.²²⁵ The right to equal pay for equal work in fact gives effect to other human rights in that, for one to access medical facilities or education they require means in a form of money, where minimum wages and equal pay are recognised, issues pertaining to poverty, social and economic imbalances will be addressed.²²⁶

Socio-economic rights are recognised as those rights which entails many other human rights, in a developing country like South Africa access to these rights will sole depend on the availability of state resources in order to serve and avail services to the people. The right to work should be viewed as a component of socio-economic right and therefore, it would only be fair, just and equitable that the rights of the working class in South Africa be protected equally between men and women, this is a process that requires the state to take a positive action.²²⁷ It is contended by human activists that, pleading ignorance to these social unrests delays progress into realising and upholding equality at workplace, for years nothing has been done, if there were attempts there has been no visible progress at all, in that men continues

²²³ Coleman K Equal Pay For Equal Work: Not Even College Helps Women. (2012, October 24). from NPR: www.npr.org [date of use 24 March 2013].

²²⁴ See the ILO Declaration on Fundamental Principles and Rights at Work, 1998.

²²⁵ June Ellenoif O'Neill "Comparable Worth" *The Concise Encyclopaedia Economics*, 1993, Library Economics and Liberty. <http://www.econlib.org> [date of use 12 April 2013].

²²⁶ Jadwanth S, "Affirmative Action in a transformative context: the South African experience" 2003 *Conn L Review* 36 725.

²²⁷ Burrows N "Positive Action" 2010 *Green's Employment Law Bulletin* 96 4-6.

to be treated favourably as compared to women and the concept of equal pay for equal work has no voice as of today, on the premises that no express provisions have been enacted, private sectors violate the rights of employees and unfair discrimination remains a progressive problem.²²⁸

4.3. International Covenant on Economic, Social and Cultural Rights and its influence.

This covenant demonstratively deals with matters affecting social and economic status of people, and also the cultural rights of individuals, the needs of people are not only fundamental on the national level but also on the international level. Now, the Canadian Constitution under section 36 recognises the relevance of the International Covenant on Economic, Social and Cultural Rights and the effect it has on the right to equal pay for equal work.²²⁹ Informed sources proffers that, the government of Canada has committed itself to promoting equality at all levels at workplaces on the basis of gender, race, culture or even religion, where employees performing duties that are of the same value will be exposed to equal opportunities and equal remuneration, this is a course that both the federal and provincial government have targeted to achieve.²³⁰

The Canadian government has realised that equality is fundamental as a right and failure to afford it the protection it deserves simply means that many other human rights will be violated, it is safe to say all other human rights are informed by the right to equality, including the right to equal pay and the socio-economic rights.²³¹ The main objective of section 36 was to ensure protection and enjoyment of human rights, to identify the problem that has since seen unfair discrimination defeating equality, the government strives to protect the vulnerable groups, including women, homosexuals and the disabled people at workplace.²³²

²²⁸ Reem B "Litigating Social and Economic Rights in Canada in Light of International Human Rights Law: What difference can it make?" 2002 *CJWL* 158.

²²⁹ See Sossin L *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell Toronto 1999) 1 249.

²³⁰ Gwen B "The Subversion of Human Rights by Governments in Canada" in Young M et al (eds) *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press 2007).

²³¹ Nicole B "Affirmative Action in Women's Employment: Lessons from Canada" 2006 *Journal of Law and Society* 42.

²³² Arbour L "Freedom from want' from charity to entitlement" *Lecture delivered at the Institute for Canadian Citizenship LaFontaine-Baldwin Lecture*, 3 March 2005 Quebec City 7.

Section 15 under the Canadian Charter is equally important as it complements the provisions of section 36; the provisions of this section are peculiar as they focus on the equality rights at all levels, from government to private sectors. The section protects the rights of all employees whether they are women, men, disabled or affected in any other manner that will render them less disadvantageous to others.

Prolific authors stated that, when interpreting section 15 and section 36 of the Canadian Constitution, it becomes clear that both rights caters for security of individuals in order to realise their rights both socially and economically, in an instance where employees are treated equally and are presented with equal opportunities being paid equally for performing work of equal value. Again, the analysis here is that there is a clear relationship between socio-economic rights and the right to equal pay for work of equal pay.²³³

Over the years scholars and practitioners have advanced arguments pertaining to what exactly constitute socio-economic rights and the specific obligations arising from them.²³⁴ The answer was granted following the court decision in the case of *Irwin Toy Ltd v Quebec*,²³⁵ the court dissected the question that has long been asked, which is "what does socio-economic rights include?" The court stated in its findings that the concept of socio-economic rights is inclusive of various fundamental human rights, rights that speaks to the daily needs of the people and their social and economic welfare,²³⁶ to list but a few, rights such as the right to equality, right to employment, right to education, right to health, environment, housing, now the right to employment and equality include the right to equal opportunities including the right to equal pay for equal work.²³⁷ The Court in reaching its decision took a cautious approach through its interpretation and the court applied purposive interpretation that was objective.

²³³ Young M "Section 7 and the Politics of Social Justice" 2005 *University of British Columbia Law Review* 38 539-56:0.

²³⁴ Gwen B & Selagh D "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" 2002 *CJWL* 185.

²³⁵ [1989] 1 SCR 927, SCJ, No. 36.

²³⁶ Porter B "Judging Poverty: Using International Human Rights Law to Refine the scope of Charter Rights" 2005 *J.L & Soc. Pol'y* 117.

²³⁷ Liu D X and Boyle E H "Making the case: The women's convention and equal employment opportunity in Japan" 2001 *International Journal of Comparative Sociology* 389-404.

4.4. Equal pay as a component of socio-economic rights

It was recently discussed in the Third World Network information service on United Nations Sustainable Development²³⁸ that equal pay should be interpreted as a component of socio-economic rights.²³⁹ Throughout the discussion, concerns were expressed particularly in relation to global strategies on how to adopt equal pay for equal work as a critical component of social and economic security rights.

In the continued discussion, article 22 of the Universal Declaration on Human Rights²⁴⁰ was quoted to say “everyone, as a member of the society, has the right to social security and is entitled to realisation, through national effort and International co-operation and in accordance with the organisation and resources of each state of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.²⁴¹ The provisions of this declaration drew an inference that, the state bears a duty to ensure that the socio-economic status of people must be realised through creating working environment that appreciates the right to equality and that people are paid equally for work of equal value. The state should also through awareness programs involve private sectors to also ensure that rights of employees are respected and upheld.²⁴²

As part of the hot-heated discussion about the existing relationship between equal pay for equal work and socio-economic rights, in line with article 23 of the Universal Declaration of Human Rights the following was stated, that citizens in a state has a right to under the provisions which are just and equitable, that is, without any form of prejudice or unfair discrimination.²⁴³ That employee have a right equal pay for work of equal value, an aspect which will ensure that an employee is placed in a situation enabling to provide for their families both economically and socially. The article has also seen it necessary to include a provision which talks about joining trade unions that will secure their interests as employees.²⁴⁴ This discussion also instigate that

²³⁸ Third World Network (TWN) Info Service on UN Sustainable Development www.twn.org [date of use 18 December 2013].

²³⁹ See Third World Network (TWN) Info Service on UN Sustainable Development (2013).

²⁴⁰ Res G A *Universal Declaration of Human Rights* 10 December 1948 New York 217A (III) 71.

²⁴¹ See Article 22 of the Universal Declaration of Human Rights of (1948).

²⁴² Orr E Equal pay for work of equal value paper presented at a conference “Celebrating All women” in New Zealand 21-23 November 2003 Palmerston North.

²⁴³ See article 23 of the Universal Declaration of Human Rights.

²⁴⁴ Barnard C and Hepple B “Substantive Equality” 2005 *Cambridge Law Journal* 562.

there is an undisputed relationship between socio-economic rights and equal pay for equal work.

It was noted that, employment is an important component to address social and economic disparities, and that it is through job creation and better working conditions that people, various communities and countries can emancipate themselves from the poverty struggle and to better their living conditions together with their families. However, this objective is only possible and realisable where our people will be provided with decent work, equal and fair wages.²⁴⁵ It is then quite apparent, true and correct that both the international and foreign labour law upholds the principle of equality in the working environment, equality as a right has manifested itself in many forms pertaining to employment, such as, eradicating discrimination, eliminating abhorrent and exploitative working conditions.²⁴⁶

Reliable sources stated that, the need to promote equality at work, it will set employees free economically and further assist in creating a productive employment environment and in eradication of poverty,²⁴⁷ decent work for all, social integration and protection are interrelated and mutually reinforcing, thus enabling environments to promote these needs to be created at all levels, this includes ensuring that equal wages are implemented at workplaces and interpreted to give effect to socio-economic rights.²⁴⁸

The concept of equal pay for equal work remains a very complex subject and it does not imply that employees should be remunerated equally without proper interpretation and evaluations.²⁴⁹ In fact, considering wage structures of foreign states where the principle of equal pay for equal has been practiced, it is clear that an objective test has been used to determine salaries of employees who perform

²⁴⁵ Fredman S 'The Potential and Limits of An Equal Rights Paradigm In Addressing Poverty ' 2011 *Stellenbosch Law Review* 22.

²⁴⁶ See Montes M, "Obstacles to Development in the International Economic Architecture", *Report on UNCTAD economic information in Switzerland* 14 February 2011 Geneva.

²⁴⁷ United States Census Bureau, *Income, Poverty and Health Insurance Coverage in the United States: Table A-4*, www.census.gov [date of use 12 September 2013].

²⁴⁸ Judge Abella R S *Equality in Employment: A Royal Commission Report*, Ottawa, Canadian Government Publishing Centre, 1984, 232-235.

²⁴⁹ Stephanie B, Marie-Josée D and Guylannic V "Beyond Formal Equality: Closing the Gender Gap in a Changing Labour Market-A Study of Legislative Solutions Adopted in Canada" 2009 *The Journal of Legislative Studies* 15 481.

work of similar nature or that of comparable worth.²⁵⁰ The concept's main purpose is to promote equal treatment in cases of employees performing work of equal value, where it is probable that employees performs work that is considered like in very material aspects, subject to the evaluation methodology, it is expected that the existing differentials on their salaries should be reasonable and justifiable, and the existing differences must not be premised on grounds that resembles unfair discrimination as stated in section 6 of the Employment Equity Act.²⁵¹

Survey conducted on equal pay has accurately pointed out the rationale behind equal pay system; it suggested that it is not the formal structure put in place, but the interpretation and analytical methods that will shape up the success of this important socio-economic venture.²⁵² The courts will assume an important role in the interpretation and development of equal pay, that the salaries earned by employees although they differ they must still promote the economic and social standings of individuals, no one must be treated less favourably without any valid justification, again the burden further rests on the employer to place methods of evaluation in place.²⁵³

Change is confined to time, therefore for every development that is effected, it may take some years before equal pay for equal work can be a system that is well oiled and runs on its own, the change will not be sudden.²⁵⁴ For a developing country like South Africa which has experienced the pro and cons of change previously, the risk that may come with the principle would include private sectors retrenching employees, employers running a business at a deficit and some private firms closing down perhaps,²⁵⁵ that is the unfortunate part about change, therefore the principle

²⁵⁰ Perfect D "Gender Pay gap" *Report on Human Rights commission Briefing paper 2 presented 2 October 2012 United Kingdom*.

²⁵¹ Middlemiss S Equal Pay legislation and its pay impact on the gender pay gap. 2001 *International Journal of Discrimination and the Law* 11 164-186.

²⁵² Daniels H "National minimum wage": *Low pay commission report 2010 Annual survey of hours and earnings* 1 May 2009 United Kingdom.

²⁵³ Riddell S "National Equality Panel", *An Anatomy of Economic Inequality in the UK – Report of the National Equality Panel, Government Equalities Office* 27 January 2010 United Kingdom.

²⁵⁴ Noon M "The Shackled Runner: Time to rethink Positive Discrimination?" 2010 *Work, Employment and Society* 24 4 728.

²⁵⁵ McCrudden, C What would improve the current system? Paper presented to the Nabarro/UCL Conference, Where is Anti-Discrimination Law Going Wrong? 2007 *Industrial Law Journal* 14.

involves whole lot of factors, but it must be emphasised that this process will need time for proper implementation and enforcement.²⁵⁶

As a result of unequal pay at workplaces, poverty, insecurities and inequalities on socio-economic status of the employees becomes tangible and clear,²⁵⁷ salaries that are below minimum wages and persistent discrimination in remuneration leads to poverty, employees being in debts, unable to invest their salaries and also failing to enhance themselves and their families economically. The remedy to the solution is but one, to appreciate the significance of adopting the notion of equal pay for equal work which will add value to the socio-economic welfare of employees and development economically.²⁵⁸ Under the circumstances, equal pay would be one of the contributing factors,²⁵⁹ as it will best address socio-economic status of people who are employed, in a nutshell, employment objectives would become meaningless where socio-economic status of people are not met.²⁶⁰

4.5. Summary

It is evident that much has been elaborated in discussions of equal pay for equal work as a component of socio-economic right, and it is further important to note that in the continuous discussions and arguments unfair discrimination has taken a centre stage as a contributory factor to issues of unequal pay for equal work. Conclusively, it is clear from the above discussion that equal pay for equal work is a component of socio-economic rights. On the International arena, there are lots of provisions in relation to socio-economic rights and equal pay for work of equal value.

There are treaties and Conventions that makes provisions for the importance of equal protection at workplace, and which provides the importance of such equality in the socio-economic status of such employees. It is then apparent that there is a relationship between equal pay for equal work and socio-economic rights, and that equal pay exist as a component of socic-economic rights. Equal pay is an integral

²⁵⁶ Levy A Article on Labour Law: *Presented at the Sage Annual Labour Law Seminar in South Africa* 23 October 2013 Johannesburg.

²⁵⁷ In the American system, Article 6 and 7 Protocol of San Salvador set out the right to work and that conditions of work shall be just, equitable and satisfactory.

²⁵⁸ Harish C *et al* Employment Equity in Canada and South Africa: a comparative review" 2012 23 *The International Journal of Human Resource Management* 1.

²⁵⁹ Fredman S "Breaking the Mold: Equality as a Proactive Duty" 2012 *American Journal of Comparative Law* 60 263.

²⁶⁰ Fredman S *Discrimination Law* 2nd ed (Oxford University Press Oxford 2011).

part of socio-economic right of employees; hold a great influence in the implementation of employment equity. This chapter has demonstrated that employers also bear a duty to also include in their policies the right to equal pay that will promote a fair and equal labour practice.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

This chapter provides findings about factors that were discussed in the previous chapters, and proffers some recommendations as to what measures can be taken by South African legislature to ensure that proposed amendments to give effect to equal pay policies are effectively implemented. Of importance is that the state has an obligation to ensure that citizen's right to socio-economic rights are protected, and to realise this obligation the state need to involve all sectors of employment which will also ensure that the right to equal opportunity is respected and upheld at workplaces and employees are treated fair and just.

5.1.1. Conclusions

It is not in dispute that although there are statute and previous court findings on the right to equal pay for equal work, it is however not efficient, therefore, it is important to have in addition to discrimination laws, effective and enforcement methods to monitor progress on the recommendation gap, these measures are necessary to ensure adequate enforcement on current and future equal pay policies.²⁶¹

The courts have laid a foundation on how to regulate the equal pay discrimination, and the burden that lies with the plaintiff to prove that indeed they were discriminated on prohibited grounds,²⁶² and the employer also has a reciprocal duty to show course that discrimination is not based on unfair grounds but rather justified if indeed there was any discrimination. The courts in their findings further referred to international law and foreign law to ensure that an informed and founded judgment is handed down, in a nutshell, precedent that meet the international standard has been set taking into account numerous cases that were discussed in the preceding chapters.

Following arguments in this study, clearly there is a need for express provisions which will deal effectively with equal pay claims, this means that, considering the

²⁶¹ O'Conneide C "Positive Action and the Limits of Existing Law" 2006 *Maastricht Journal of European and Comparative Law* 13 351.

²⁶² Stephanie B, Marie-Josée D and Guylannic V "Beyond Formal Equality: Closing the Gender Gap in a Changing Labour Market-A Study of Legislative Solutions Adopted in Canada" 2009 *The Journal of Legislative Studies* 15 481.

change in global economy and the persistent recession, the legislature must create a system adaptable to the current economic status, whatever form of intervention is deployed must be to address this gross injustice of human rights particularly the right to equal pay for equal work.²⁶³

The study acknowledges the previous attempts taken by the legislature to amend various sections in the EEA to address issues pertaining to income differentials,²⁶⁴ again the amendments were also running short of peculiar solutions to the current equal pay unrests. Any amendments made by the legislature or any court judgment handed down pertaining to the subject of equal pay for equal work, must not be myopic or be viewed in isolation, however, it must be able to involve other stake holders independent from the government so that they can also play a role in promoting equal pay for equal work principle.²⁶⁵

The study has also proven that section 6 of the EEA is broad enough to encompass equal pay for equal work, since this right is recognised as one of the fundamental rights, socio-economic right, it simply means that whatever form of unfair discrimination would be unconstitutional and prohibited, therefore, equal pay for equal work should be expressly included in the EEA so that it will be binding to non-government sectors and any other employer.²⁶⁶

The role that will be played by the amendments or proposed amendments is that, the state will be in a better position to curb future equal pay claims and any forms of discriminations a workplace, employers will be familiar with the rights of the employees at workplace. It is again in the open that there is a need for integral equal pay for equal work solution, integrated in the sense that, all the role players will see it fit and mandatory that they confine their employment policy to those recommended by the government with the sole intent of eradicating unfair labour practices pertaining to equal pay claims.²⁶⁷

²⁶³ Allanson P, Atkins J P & Hinks T "No End to the Racial Wage Hierarchy in South Africa?" 2002 *Review of Development Economics* 6(3) 442-457.

²⁶⁴ See section 27 (1) of the Employment Equity Act 55 of 1998.

²⁶⁵ Hepple B "Enforcing Equality Law: Two Steps Forwards and Two Steps Backwards for Reflexive Regulation" 2011 *Industrial Law Journal* 40 4 315-316.

²⁶⁶ Section 27 (2) of the EEA 55 of 1998.

²⁶⁷ See the Proposed Employment Services Bill, 2010.

Pay inequality has deep structural foundations dating back to the era of apartheid whereby by-laws were passed to ensure that segregation prevails, women and black people in general continue to suffer economically. From the arguments heard throughout the study, it is with ease that one can conclude that unequal pay for equal work can be reduced directly and or indirectly. There are various statutory measures put in place to ensure that income differentials and other issues pertinent to pay equity are respected and complied with, for example, Section 27(3) of the Employment Equity Act together with Basic Conditions of Employment Act encourages the collective bargaining system where a platform to address employment concerns is put in place so that in an instance where employees are not satisfied with their working conditions they can address that and remain protected from victimisation by the employer.²⁶⁸

While section 27 deals with income differentials within specific classes of employment and does not require an analysis of differentials based on, for example, race or gender, the mechanism it establishes could easily be used to also address those differentials. In any event, reducing wage differentials within occupational categories and levels would likely improve the position of victims of wage discrimination, albeit indirectly.²⁶⁹

The study has established that the remedy to curb equal pay differentials lies in the recognition of express provisions relating to equal pay for equal work, in no way does the study suggests that the salaries should be fixed as that would not solve the problem but add more to discriminatory tendencies. The study also provided a criterion reliable to define what may constitute work of equal value or work of comparable worth and what may be deemed to constitute discrimination on prohibited grounds.²⁷⁰

Further discussed that, the test to be applied in the course of equal pay discourse must be objective in the sense that, employee will be given an ample opportunity to establish a prima facie case against the perpetrator who subjected him or her to unfair labour practice, further the employee must also show course that the perpetrator had a motive or intent. Whilst on the other hand, the employer has a duty

²⁶⁸ Servais J M *International Labour Law* 2nd ed (Kluwer Law International Netherlands 2009).

²⁶⁹ Section 27 of the Employment Equity Act 1998.

²⁷⁰ See section 54 (2) (g) of the Employment Conditions Commission

to rebut allegations against him or her, in an instance where there is discrimination the employer must be able to justify his or her actions with regard to the existing differentiation.²⁷¹ Express provisions on equal pay for equal work would further eliminate discrimination between men and women on the basis that certain work requires men due to their nature, for example, masculine and women are discriminated, such perceptions are derogatory and unconstitutional, to resolve this argument, where a female employee is unable to perform a work that require strength, male colleagues will simply assist the physically challenged employee.²⁷²

It has further been established that of all available labour related policies and legislations, the EEA is in the forefront in ensuring that equality becomes a living reality in workplaces and employees are afforded equal opportunities. However, it cannot be reiterated that EEA lacks direct express provisions to address matters pertaining to equal pay for equal work. In South Africa there are resources available to ensure enforcement at an instance where the policy makers create express equal pay provisions. The study further proved that the EEA is broad enough to encompass equal pay for equal work provisions.

The study has further shown that there can be no discussions relating to express provisions on equal pay for equal work without discussing the issue of enforcement which will ensure that both governmental and non-governmental sectors enforce the provisions. Enforcement should not prove a difficult task to South African employment sector, on the simple premises that South Africa must add precedent to the current decided cases on issues pertaining equal pay for equal work, further refer to foreign and international law where the implementation of equal pay provisions was a success.²⁷³

²⁷¹ See Basic Conditions of Employment Act 1997.

²⁷² See Covington R N "Equal Pay Acts: a survey of experience under the British and American statutes" 1998 *Vanderbilt Journal of Transnational Law* 21 (4) 650-730.

²⁷³ Mkhwanazi S "The New Age reported yesterday that the Minister of Labour, Mildred Oliphant, has tabled the Employment Equity Amendment Bill in Parliament, paving the way for a raft of changes in the labour regime. Among the proposals in the draft law is that there should be equal pay for work of equal value for men and women and that it would be unfair discrimination if people were paid differently when doing the same job. The Bill has also proposed that unfair discrimination cases, which are currently heard by the labour court, be handled by the CCMA", *South African labour news reports at SA Labour News* 24 October 2012:40.

Chapter 3 of this study dealt with job evaluation methods which can be applied to establish if work is of similar nature or comparable in order to determine if indeed employees are treated the same or differently on prohibited grounds,²⁷⁴ these methods include like work, work rated as equivalent and equal value claims. The purpose of this evaluation is to face off subjective assessment of work performed by different employees by applying factors which would not constitute unfair discrimination as such skill, experience, responsibility, determination, education etc. The system applied must be diplomatic in its nature, that is, it should not be gender biased.²⁷⁵

Issues pertaining to equal opportunities have received necessary attention on the international jurisprudence, where the International Labour Organisation has submitted that

The elimination of discrimination at work is central to social justice which lies at the heart of the ILO's mandate. It underpins the concept of decent work for all, which is founded on the notion of equal opportunities for all those who work or seek work and a living, whether as labourers, employers or self-employed, in the formal or informal economy. The elimination of discrimination is an indispensable part of any viable strategy for poverty reduction and sustainable economic development.²⁷⁶

However, whilst the constitution and relevant legislation are clear about the rights of employees, it should be cautioned that rights should not be taken to be self-existent or that they are a stand-alone phenomenon, i.e. every right arises out of an obligation. This topic has been a subject of discussion by legal and other experts and they all agree to the afore-going assertion. The Constitution itself affords citizens both rights and obligations.²⁷⁷ Section 3(2) states:

All citizens are –
(a) equally entitled to the rights, privileges and benefits of citizenship; and
(b) equally subjected to the duties and responsibilities of citizenship. Further, the law bestows on citizens individual competencies, subjective rights and legal obligations.

The South African labour laws have been subjected to scrutiny by the International Labour Organisation and severely criticised for failure to implement express

²⁷⁴ Aaron J, Henry J and Cameron M. Lougy *The Comparable Worth Controversy: On the fence; neither pro nor con* (Brooking Institution Press Washington DC 1986).

²⁷⁵ See Laila Harre, Minister of Women's Affairs, July 2002.

²⁷⁶ ILO Declaration on Fundamental Principles and Rights at work, 2003.

²⁷⁷ See section 3 of the Constitution of South Africa Act, 1996.

provisions relating to equal pay for equal work, because failure to implement these provision also means that the constitutional right to equality, dignity, right to employment and socio-economic rights are being overlooked whereas the state has a duty to ensure that rights are protected and respected.²⁷⁸ The study has further placed a responsibility on the employer, that an employer must make an undertaking to the effect that equal pay provisions will be included in their policy practice in order to have a working environment that is just and equitable.

The study also discussed a very pertinent subject and or question that lie in the core of this study, which is “whether there exist any relationship between socio-economic rights and right to equal pay for equal work”? Chapter 4 of the study confined it’s discussion on the above questions and proved that indeed there exist a tangible relationship between these two rights. The study has demonstrated by facts the relationship that exists between socio-economic rights and right to equality which was for the purpose of this study narrowed down to equal pay for equal work.

Factually speaking right to equality and socio-economic rights are entrenched in chapter 2 of the Constitution Bill of Rights, not absolute rights but extremely fundamental rights, these rights suffered under the apartheid era where they were both not recognised due to the persistent oppression that have seen majority of South African citizens being treated unequally as compared to their white counterparts. On social standards white minority had more privileges as compared to black majority, and also economically white had more opportunities as compared to black majority who were subjected to more unstable jobs, another cause being that blacks were not educated or the educational system was of a nature that would not yield positive fruits to blacks when they look for jobs.

The study also discussed the fact that failure to protect equal pay for equal work affect various rights, in that employees suffering such discrimination would not fulfil their economic and social goals, their families will be affected be directly or indirectly, they will not compete economically as the demand is high. Therefore, protection of equal pay rights would insinuate other socio-economic rights would also be protected including the fundamental right to equality.

²⁷⁸ See also section 9 of the Constitution Act, 1996.

Now, the study further articulate the fact that segregation which has seen population of South Africa not being afforded equal opportunities has led to persistent inequalities which has seen black people living under poverty stricken conditions. Economic freedom is associated with right to employment that will see people despite of their colour, race, gender, religion or culture being subjected to equal opportunities which includes the right to equal pay for equal work. Although these rights are independent they are however inter-dependent, equality gives effect to the right to equal pay for equal work.

Therefore, there is a need for express provisions which will regulate equal opportunities at workplace, more precisely the right to equal pay for equal work which is a component of socio-economic right that calls for equal protection under the Constitution.

5.1.2. Recommendations

It is important that express provisions regulating the right to equal pay for equal work be addressed under a relevant statute so that it can serve the purpose for which it was promulgated for, for example, Promotion of Equality and Prevention of Unfair Discrimination Act²⁷⁹ has a clause which deals with the notion of equal pay for work of equal value, of which it is not a relevant legislation in which the notion should be addressed under. It would only be effective where the principle of equal pay for equal work can be covered under Employment Equity Act which is a statute that deals directly with workplace injustice, precisely the elimination of all forms of discrimination.²⁸⁰

Inclusion of express provisions of the right to equal pay for equal work would simply mean that, employer will have to create a transparent working environment in which employees will understand how their remuneration is calculated as compared to other employees, the job evaluation criteria used to arrive to a particular pay method. This form of transparency will reduce a number of disputes pertaining to equal pay claims in that for every person who is employed would be placed in a position to comprehend their salaries as per their job description. Assuming that an

²⁷⁹ Act of 2000.

²⁸⁰ See Giles G Report posted on GilesFiles "*Sensible negotiations will result from correct measuring 'equal pay for work of equal value'*" 26 Jul 2011 South Africa.

employer has policies regulating transparency to a certain extent, it would simply mean that the employer will be required where there is a claim of unfair discrimination to explain and bring facts to justify the pay differential that exists.²⁸¹

In respect of equal value, “transparency” means that information about how job demands have been assessed and how the assessment results in the rate of pay for the job. The concept of equal pay for equal work can be interpreted to mean variety of things, which means that an educational intervention would be required in order to teach employees and employers what is meant by equal pay for equal work, under what circumstances can different people be treated differently and when can they be treated equally? Which criteria are used to attain such findings? The end result would be that, the number of unnecessary disputes and litigation would be reduced.

Following criticisms by the International Labour Organisation on the South African labour law for omitting express methods to address remuneration discrepancies based on the prohibited grounds as listed in section 6 of the EEA,²⁸² it means that legislature must include the express provisions in the Employment Equity Act.²⁸³ A labour department official was quoted on saying, “a new clause should be added to labour law stipulating ‘equal pay for work of equal value,’ and further proposed a new clause to deal with unfair discrimination by employers in respect of employees doing the same work, similar work or work of equal value.”²⁸⁴

The research study conducted by the Employment Equity Commission²⁸⁵ suggested that, pay discrimination is mostly prevalent on two discriminatory grounds, that is gender and or race, therefore most inequalities are premised on this two grounds, these are very familiar grounds regulated under section 6, therefore, it would be remedial where equal pay for equal work provisions are expressly implemented and enforced.²⁸⁶ The ILO did not only critic South African labour system but, submitted

²⁸¹ See Benjamin P “Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document” 2010 31 *ILJ* 845 866.

²⁸² Coleman, K. (2012, October 24). Equal Pay For Equal Work: Not Even College Helps Women, from NPR: <http://www.npr.org> [date of use 20 March 2013].

²⁸³ See CEE Annual Report 3.

²⁸⁴ Mamashela N 2011 Equal pay for equal work www.iol.co.za [date of use 3 Feb 2011].

²⁸⁵ Established in terms of s 59 of the BCEA.

²⁸⁶ See CEE Annual Report at 36.

that, inclusion of provisions regulating pay equity specifically equal pay for equal work would assist to eliminate unfair labour practices.²⁸⁷

Over and above the recommended amendments to eliminate pay inequality at workplaces where employees conduct work of similar nature, policies and statute enacted for this purpose would assist to a limited extent,²⁸⁸ the main resolution lies in the interpretation of the law. The courts have a serious task of interpreting the law and applying the facts based on the merits presented, the benefit thereof would be that courts will set a precedent in a form of guideline to enable employers and employees to know what is expected from them in ensuring that a working environment that is just and equitable is created. And the purposive interpretation will further result in strengthening the law applicable to equal pay for equal work in South Africa.



The study discussed job evaluation methods that are applicable in other states and internationally, admittedly; requirements such as skill, experience, education, performance, determination, commitment, and so on, are subjective in nature; now a more liberal approach following an interpretation of these factors would be of great assistance in determining if indeed unfair discrimination has occurred or not. Fact of the matter is that, for each and every case merits will be considered in order to come to a just finding.²⁸⁹

The EEA already regulates unfair discrimination at workplace under section 6 of the Act. To strengthen the principle of equal pay for equal work which has no direct platform in the EEA the legislature can consider adding the following elements:

- a) A difference in terms and conditions of employment between employees of the same employer performing the same work or work of equal value is a form of unfair discrimination and is prohibited on any one, or more grounds of unfair discrimination listed in subsection (1).²⁹⁰
- b) The Minister of labour may, after consultation with the Commission (for employment Equity), issue a code of good practice setting out the criteria and the methodology for assessing work of equal value.

²⁸⁷ Paul B "Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa: A Discussion Document" 2010 *ILJ* 845-866.

²⁸⁸ See Roberta E R "Equal pay for work of equal value." Issues and Policies 1987 *Canadian Public Policy* 13 4 445-461.

²⁸⁹ Figart D M Equal Pay for Equal Work: The Role of Job Evaluation in an Evolving Social Norm, 2000 *Journal of Economic issues* 34 1 1-19.

²⁹⁰ See Proposed Employment Service Bill, 2010.

The system is not expected to be ideal, however develop the current state of affairs concerning equal pay for equal work which lacks a platform to correctly resolve equal pay rights. Equal pay for equal work should be interpreted alongside socio-economic rights; again interpretation will vary from court to court based on facts presented in each and every case. Throughout all interpretations, the goal is one in my view that is any method that will respect, protect and uphold the socio-economic status of employees will be appropriate given the circumstances.²⁹¹

Shifting the paradigm to the employers on the other hand, in order to have a progressive labour environment that will see the rights both employees and employers protected, employers will also have to acknowledge the necessary changes that are required in order to eliminate unfair labour disputes. The employers will have a duty to include in their employment policies methods of determining work of similar nature or work of equal value in order to curb future labour disputes. The employer must in addition outline the procedure and practice adopted to evaluate jobs amongst employees. This transparent system works in two ways, one that is, the employee would understand the type of work and differences that exists thereof, and the employers would have reduced the costs in court litigation to explain the differences in pay equity,²⁹² this follows the notion that discrimination can take two forms, a fair discrimination and unfair discrimination, hence the employers would be expected to set out methods used for differences in their pay policies.

In a case where indeed a dispute arises between employer and employee based on equal pay for equal work, the platform apart from the High Court route to lodge and argue disputes is highly expensive to most employees as they are not earning enough, and their calamities remains unresolved whilst discrimination benefit in the process, however, an alternative dispute resolution can be availed to the employees to challenge pay inequalities at workplace.

Again gender discrimination should not be having a place at this age, women and men should be presented with equal opportunities, with equal pay for equal work, there is no law stating that women would buy bread, milk, clothes at a cheaper price,

²⁹¹ Botch G S "Legislation closing the equity gap in SA's companies" *Business Day* 06 June (2001) 9.

²⁹² Financial Services Inquiry, Sex Discrimination and Gender Pay Gap Report of the Equality and Human Rights Commission, September 2009.

no, both men and women are treated equally economically same should be done with their work remuneration. The study has proven that many women have become bread winners in the conspicuous absence of male figures in their respective families, therefore, women deserves to be paid according to the services they render not less on the basis of gender inequality. Gender discrimination has been discouraged and fought against internationally and by foreign laws in a democratic society.²⁹³

It is further advisable that the concept of equal pay for equal work be interpreted on the same breathe with the socio-economic rights, neither one of these paramount rights should be interpreted in isolation. This is another weapon that can be used to eradicate poverty and eliminate social and economic imbalances of citizens that has seen majority of South Africans living in unacceptable conditions even during the era of constitutional dispensation. Recognition of Equal pay for equal work would also guarantee peaceful working conditions with limited protests towards matter of unfair pay practice by the employer.

Acknowledging the fact that there is an existing relationship between socio-economic rights and the right to equal pay would simply imply that, enforcement of these rights will be protected and prioritised by the state and private sectors, remember that the role of the state as stated under section 7 of the Constitution is to ensure protection of rights entrenched in the Constitution. Employers should also take an undertaking that the right to equal pay for equal work is included in their practice policies in order to have a workplace that is more equitable.

5.2. Future research agenda

In conducting this work, it has become transparent that equal pay for equal work would not be realised successfully unless proper implementation and monitoring of pay policy is put in place to address disparities that exist in the workplaces. There will be a general need to review equal pay legislation from time to time in the pursuit of ensuring that it meets the demands of modern pay structures. Research projects can be embarked upon to examine the trends in which these pay and reward

²⁹³

See Olsen W *et al* "The Gender Pay Gap in the United Kingdom 1995-2007" *Government Equalities Office Research Report* 15 March 2010 London.

systems operates and perhaps emphasise on the need to assess jobs based on economic-based evaluation systems than the traditional notion of market value system.

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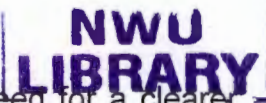
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