

**COMMENTARY ON SOUTH AFRICA'S POSITION REGARDING EQUAL PAY  
FOR WORK OF EQUAL VALUE: A COMPARATIVE PERSPECTIVE**

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A minithesis submitted in partial fulfillment of the requirements for the degree of  
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**NOMAGUGU HLONGWANE**

## **KEYWORDS**

Comparison

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Justification for unequal remuneration

Symmetrical treatment

Women

Work of equal value

## **ABSTRACT**

### **COMMENTARY ON SOUTH AFRICA'S POSITION REGARDING EQUAL PAY FOR WORK OF EQUAL VALUE: A COMPARATIVE PERSPECTIVE**

**NOMAGUGU HLONGWANE**

LLM minithesis, Faculty of Law, University of the Western Cape.

This paper briefly compares the South African concepts of pay equity and 'equal pay for work of equal value' with those of industrialised countries, including the United States, the United Kingdom, Australia and Canada. The comparative study considers how South Africa recognizes the right to promote equal pay, in the absence of a proper legal framework which expressly includes such a right. The paper also focuses on the impact of statutes and case law on the developments of equal pay in the aforementioned industrialized countries. It also considers the impact of the decisions of the European Court of Justice on such developments as well as its impact on the interpretation of equal pay in these industrialised countries. The purpose of such comparison is not to transplant the legal systems of these industrialised countries but to assist South Africa in remedying its weaknesses by creating legal rules for the promotion of equal pay for work of equal value.

The paper concludes that unequal remuneration for work of equal value should be expressly addressed in the Employment Equity Act in order to promote 'equal pay for work of equal value'. This will align the South African labour market with international standards and allow South Africa to compete effectively both locally and internationally.

## DECLARATION

I declare that Commentary on South Africa's position regarding equal pay for work of equal value: a comparative perspective is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledge by complete references.

NOMAGUGU HLONGWANE

DECEMBER 2004

SIGNED: .....

## 1. INTRODUCTION

At present, unequal pay for work of equal value is regulated by the Employment Equity Act<sup>1</sup> and the Labour Relations Act<sup>2</sup> which aim to promote equality in the workplace. Such legislation does not expressly prohibit the unequal pay for work of equal value but merely prohibits discriminatory practices, such as unequal pay and separate pension funds for different race groups in the company.<sup>3</sup> South Africa therefore requires legislation governing unequal pay for work of equal value. The research conducted in this area of study will reveal that no struggle for equal pay will be complete unless express provisions for equal pay are included in legislation.

Pay equity is a broad concept in this study. A distinction can be drawn between two pertinent concepts: 'equal pay for equal work' and 'equal pay for work of equal value'. The concept 'equal pay for equal work' is based on gender equity and implies that women and men who perform substantially similar work within the same contextual setting must receive similar wages. The concept 'equal pay for work of equal value' indicates that, if a woman is employed in a traditionally female working environment, her work has the same value as that of men working in a male environment.<sup>4</sup> Hence men and women must then be paid similar wages even if their job descriptions differ.<sup>5</sup> The main reason for the wage discrepancy is due to the fact that women's work was undervalued and underpaid in relation to that of men.

Prior to 1997 minimum employment standards were regulated by the Basic Conditions of Employment Act<sup>6</sup> and the Wage Act.<sup>7</sup> The Basic Conditions of Employment Act stems from legislation introduced in the period from 1920 to 1940, which reflected a rigid and outdated approach to the regulation of working hours and other conditions of employment.<sup>8</sup> It must also be taken into account that, according to

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<sup>1</sup> No 55 of 1998.

<sup>2</sup> No 66 of 1995.

<sup>3</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler and others* (1998) 19 ILJ 285 (LC).

<sup>4</sup> The concept 'equal pay for work of equal value' also includes cases where a woman and a man are doing different jobs in the same environment, but these jobs have the same value.

<sup>5</sup> Pay Equity Commission (Ontario) *Pay equity in non-union workplace*  
<http://www.on.ca/LAB/pec/pubs/lawworke.htm>.

<sup>6</sup> No 3 of 1983.

<sup>7</sup> No 5 of 1957.

<sup>8</sup> Green Paper: Minimum standards directorate policy proposals for a new employment standards statute (Notice 156 dated 23 February 1996).

Lewis the apartheid policy reflected a deliberate attempt to perpetuate the economic inferiority of Blacks.<sup>9</sup>

This paper presents a background on the principle of equal pay for work of equal value under the international conventions and declarations. It also examines how industrialized countries such as the United States, the United Kingdom, Australia and Canada have dealt with their pay equity. It analyses how South Africa has dealt with pay discrimination against women, and considers the features of anti-discrimination legislation. After briefly comparing international pay equity, the concluding remarks focus on the implementation of measures to combat wage discrimination.

## **2. INTERNATIONAL CONVENTIONS AND DECLARATIONS**

The International Labour Organisation (ILO) aims to improve working conditions globally by promoting minimum standards in employment conditions. Member countries can, however, improve upon these minimum standards. Convention No. 100,<sup>10</sup> concerning equal remuneration for men and women workers for work of equal value, commits member states to ensure that pay equity is applied to all workers by means of national laws, wage determination machinery, collective bargaining, or a combination of these methods.<sup>11</sup> Remuneration is defined as to ‘include the ordinary, basic or minimum wage or salary and any additional emoluments payable directly or indirectly, whether in cash or in kind, by the employer to the worker arising out of the worker’s employment’.<sup>12</sup> Terms and conditions of employment, including remuneration, should not be subject to, *inter alia*, sex according to Convention No. 111.<sup>13</sup>

Article 27(1) of the Convention on the Elimination of All Forms of Discrimination against Women<sup>14</sup> defines discrimination against women as ‘...any distinction,

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<sup>9</sup> R Lewis ‘Summary of economics of the colour bar by W.H Hutt’ in R Lewis *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; L Seftel 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.

<sup>10</sup> Equal Remuneration Convention No 100 of 1951 International Labour Organization (ILO).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid* article 1.

<sup>13</sup> Discrimination (Employment and Occupation) Convention No 111 of 1958 ILO.

<sup>14</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979 *entry into force* 3 September 1981.

exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. The Convention provides that member states must penalize anyone who discriminates against women in order to ensure that no person, organization or business for example discriminates against women and changes or removes all laws, regulations, customs, and practices which discriminate against women.

According to Eyraud,<sup>15</sup> international labour conventions have played a decisive role in the implementation of the principle of equal pay. In European countries, the 1975 Directive of the European Economic Community<sup>16</sup> played an important role in improving legislation regarding wage discrimination.

Other declarations were adopted to advance the concept of equality. Such declarations are neither conventions nor international treaties but merely international consensus statements made by governments. These declarations are not binding but have a persuasive value to member governments. The Declaration on Equality of Opportunity and Treatment for Women Workers<sup>17</sup> states that 'all forms of discrimination on the grounds of sex which deny or restrict equality of opportunity and treatment are unacceptable and must be eliminated'.<sup>18</sup> The Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment<sup>19</sup> also stressed that a concerted effort between governments, employers and workers' organisations was still needed in order to implement the principle of equality.<sup>20</sup> The 1995 Beijing Declaration and Platform for Action aimed to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity.<sup>21</sup> This Declaration stated that the member government must 'increase

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<sup>15</sup> F Eyraud 'Equal pay and the value of work in industrialized countries' (1993) 132(1) *International Labour Review* 33.

<sup>16</sup> Equal Pay Directive 75/117/EEC.

<sup>17</sup> The Declaration on Equality of Opportunity and Treatment for Women Workers and the Resolution concerning a Plan of Action with a View to Promoting Equality of Opportunity and Treatment for Women Workers (1975) ILO.

<sup>18</sup> International Labour Organisation *ILO policies and instruments*  
<http://www.ilo.org/public/english/bureau/gender/pol-set/ind-pol.htm>.

<sup>19</sup> Resolution on Equal Opportunity and Equal Treatment for Men and Women in Employment (1985) ILO.

<sup>20</sup> Note 18 above.

<sup>21</sup> United Nations (UN) Department of Public Information *Platform for Action and Beijing Declaration*, Fourth World Conference on Women, Beijing China 4-15 September 1995 (New York) UN 1995.



efforts to close the gap between women's and men's pay, take steps to implement the principle of equal value by strengthening legislation, including compliance with international labour laws and standards and encourage job evaluation schemes with gender-neutral criteria'.<sup>22</sup>

### 3. COMPARATIVE PERSPECTIVE

This study compares South Africa's perspective on 'equal pay for work of equal value' and that of industrialized countries. In a comparative method approach the extent to which any rule can be transplanted depends primarily on how closely it is linked with the foreign country power structure. Kahn-Freund stated in his conclusion that '[a]ll I have wanted to suggest is that its use (that is the comparative method) requires a knowledge not only of the foreign law, but also of its social, and above all its political context'.<sup>23</sup> Summers applied the comparative method in assessing South Africa's workplace forum proposal. In this assessment he drew on the experience of Germany, Sweden, Japan and the United States.<sup>24</sup> He also pointed out the value of comparative study by stating:

The first step in making comparisons, therefore, is to recognise and make explicit the special characteristics which frame our perspective. Only then can we recognise fundamental differences so that we can not confuse superficial similarities with functional equivalents. Once we recognise those differences we can compare the roles which various institutions play in each system and make meaningful comparisons as to the strengths and weaknesses of each system in achieving particular social goals. This can then lead us to inquire what each system might usefully learn from the other, not by transplanting but by cultivating or creating institutions or legal rules, which will remedy weaknesses made visible by the comparison.<sup>25</sup>

The reason for comparing these countries with South Africa is that South Africa's labour law is based on foreign aspects dealing with labour issues, resulting in a reasonably coherent jurisprudence. In other words, when South Africa enacted its Labour Relations Act of 1995, it considered certain aspects of law from these

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<sup>22</sup> J Hodges 'Recent developments concerning equal pay for work of equal value' (1997) ILO 36.

<sup>23</sup> O Kahn-Freund 'On uses and misuses of comparative law' (1974) 37 *Modern Law Review* 27.

<sup>24</sup> CW Summers 'Workplace forums from a comparative perspective' (1995) 16 *Industrial Law Journal* 806-813.

<sup>25</sup> CW Summers 'An American perspective of the German model of workers participation' (1987) 8 *Comparative Labour Law Journal* 333.

countries, such as the ‘duty to bargain’ (United States), ‘alternative dispute resolution’ (United Kingdom), and ‘freedom of association’ (Canada).<sup>26</sup>

### 3.1 United States

The United States government has been the main initiator of change by means of intervention and regulation.<sup>27</sup> The National War Labor Board<sup>28</sup> applied the principle of equal pay in its awards, stating: ‘If it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work’.<sup>29</sup> In the period 1945 to 1963, 22 states enacted equal pay legislation.<sup>30</sup> The United States Congress then enacted the Equal Pay Act of 1963<sup>31</sup> and Title VII of the Civil Rights Act of 1964 to promote the principle of equal pay. The United States has not ratified the Equal Remuneration Convention No. 100; therefore, we cannot consider the regulations by the United States as responding to standards set in the Convention.

During the late 1970s, the issue of ‘pay equity’ was raised once again. The debate focused on the ‘comparable worth’ theory; that is, the question of why women were paid less for what many thought was work of similar value to more highly paid men’s work.<sup>32</sup> According to Weiler, comparable worth implies that employers will be required to pay comparable wages for different jobs that are comparable in value or worth, and where these jobs are filled predominantly by women and men, respectively.<sup>33</sup> This new item on the political and legal agendas was a theory of wage discrimination prohibiting employers from paying lower wages for distinctively ‘female’ jobs, such as nurses or secretaries, than they pay for typically ‘male’ jobs,

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<sup>26</sup> ‘Explanatory memorandum to the Draft Labour Relations Bill 1995’ (1995) *Industrial Law Journal* 278; P Benjamin ‘Reforming labour: lessons from the USA’ (1995) 19 (2) *South African Labour Bulletin* 49.

<sup>27</sup> JR Bellace ‘Equal pay in the United States’ in F Eyraud & C Hartnell (eds) *Equal pay protection industrialised market economies: in search of great effectiveness* ILO Office 160.

<sup>28</sup> *Ibid* The National War Labor Board dealt with labour issues during the first and second world wars. Its wage-setting principles did not result in any legislative pronouncement but had a profound impact on wage structure in the industry.

<sup>29</sup> Report of the Secretary of the National War Labor Board to the Secretary of Labor 31 May 1919 (US Government Printing Office 1920) 69-71: discussed in Bellace (note 27 above) 160.

<sup>30</sup> Bellace (note 27 above).

<sup>31</sup> This Act amends the Fair Labor Standard Act (FLSA) of 1938.

<sup>32</sup> Bellace (note 27 above) 159.

<sup>33</sup> P Weiler ‘The wage of sex: the uses and limits of comparable worth’ (1986) 99 *Harvard Law Review* 1728.

such as electricians, provided the disparity in pay does not reflect comparable differences in the worth of work performed.<sup>34</sup>

The debate on the comparable worth theory was almost settled in *Country of Washington, Oregon v Gunther*,<sup>35</sup> a case in which the state differentiated between female and male prison officers. The state employed women as matrons to guard female prisoners and men as correction officers to guard male prisoners. Although the job descriptions were similar the women's salary was 30 percent less than that of the men. The Supreme Court found that unequal pay for work of equal value is a form of discrimination prohibited by Title VII of the Civil Rights Act.<sup>36</sup>

### 3.1.1 Equal Pay Act

The United States Congress enacted the Equal Pay Act in 1963 giving legislative force to the ideas promoted by the National War Labor Board. The Equal Pay Act prohibits sex discrimination only with respect to wages paid for equal work<sup>37</sup>, but it does not contemplate mandatory evaluation and revision of a firm's pay structure across different jobs.<sup>38</sup>

According to Bellace, the Equal Pay Act as interpreted by courts requires that a woman be employed on the same or substantially similar work as a man and that she must be working at the same geographical location.<sup>39</sup> This does not apply to dissimilar work. Bellace states that courts are required to establish whether there are significant differences between the two jobs: that is, whether the wage differential compensates for an appreciable variation in skill, effort or responsibility between otherwise

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<sup>34</sup> *Ibid* 1729 quoting Eleanor Holmes Norton (Head of the Equal Employment Opportunity Commission) hearings before the United States Equal Employment Opportunity Commission: On job segregation and wage discrimination, 28-30 April 1980.

<sup>35</sup> 452 US 161 (1981).

<sup>36</sup> *Ibid* 166.

<sup>37</sup> Section 3 of the Act states that no employer shall pay women less than men in any establishment 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions'.

<sup>38</sup> The bill, as introduced for vote on the Senate floor, suggested that the basic purpose of the Act is to ensure that those who perform tasks which are determined to be equal shall be paid equal wages: discussed in Weiler (note 33 above) 1732.

<sup>39</sup> Bellace (note 27 above) 162.

comparable work activities.<sup>40</sup> Equal work has been interpreted to mean substantially equal rather than identical.<sup>41</sup>

Neither the Equal Pay Act nor Title VII, discussed below, stipulates any particular method to be used by the courts in order to determine whether work is 'equal'.<sup>42</sup> There is no procedural device whereby a judge can, during the fact-finding process, issue an order directing a neutral expert to make recommendations based on a job evaluation<sup>43</sup> exercise undertaken by the expert.<sup>44</sup>

### 3.1.2 Title VII of the Civil Rights Act

The historic mistreatment and continuing plight of black Americans led the United States Congress to enact Title VII of the Civil Rights Act of 1964. On the last day of the House Floor debate on the Civil Rights Act, the word 'sex' was added as a protected category.<sup>45</sup> Title VII states that '[i]t shall be unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color (*sic*), religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color (*sic*), religion, sex, or national origin'. Bellace states that Title VII is directed at employers; therefore, social security payments under a state scheme are not within the scope of Title VII.<sup>46</sup> In *City of Los Angeles Department of Water and Power v Manhart*<sup>47</sup> it was held that employers may not require female employees to make larger monthly contributions to a pension fund comparable to that of males in order to receive the same monthly pension payment upon retirement.

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Shultz v Wheaton Glass Co* 398 US 905 (1970); B Lindemann *et al* (eds) *Employment Discrimination Law* (1996) 497.

<sup>42</sup> Bellace (note 27 above) 165.

<sup>43</sup> Term explained below 19.

<sup>44</sup> Note 42 above.

<sup>45</sup> Representative Howard Smith of Virginia offered the amendments to insert the word 'sex' into Title VII: discussed in Weiler (note 33 above) 1734.

<sup>46</sup> Bellace (note 27 above) 161.

<sup>47</sup> 435 US 702 (1978).

A debate was held in the United States on how to interpret the Civil Rights Act with the Equal Pay Act that came into effect that same year. Title VII was amended by Congress<sup>48</sup> stating that it does not violate the Civil Rights Act for an employer ‘to differentiate upon the basis of sex in determining the amount of the wages or compensation paid... if such differentiation is authorised by the provisions’ of the Equal Pay Act.<sup>49</sup>

The Bennett Amendment denoted two possible interpretations. First, it indicated that Title VII will be violated in case of sex discrimination on pay if such practice constitutes a violation of the Equal Pay Act. Secondly, the Amendment incorporates certain specified defences from the Equal Pay Act into Title VII. What was important in this regard, was whether the Civil Rights Act could serve as an additional and more powerful weapon in substantiating pay equity for women.<sup>50</sup> The dispute over the interpretation of the Bennett Amendment was resolved in the case of *Gunther*.<sup>51</sup> The court held that the Amendment does not restrict Title VII prohibition of sex-based wage discrimination to claims for equal pay where men perform the same or substantially similar work, and that the Amendment merely incorporates the four defences listed in the Equal Pay Act into Title VII. In *Spaulding v University of Washington*,<sup>52</sup> predominately women professors in the school of nursing claim that they were paid less than other professors at the same University. All other schools had predominately male professors. The decision in *Gunther* has been interpreted by the lower court as limiting comparable worth claims under Title VII to cases where the plaintiff can prove disparate treatment discrimination: that is, where the employer deliberately underpaid women because the holders of the job were women.<sup>53</sup> In *American Nurses Association v Illinois*, the court has expressed the view that comparable worth claims are not known under Title VII.<sup>54</sup>

As Title VII does not clearly stipulate any job evaluation in determining whether the degree of work performed is ‘equal’, or whether the women’s job is dissimilar to that of men, the courts usually require a sophisticated means of comparing these jobs.

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<sup>48</sup> Amendment known as Bennett Amendment.

<sup>49</sup> Weiler (note 33 above) 1734.

<sup>50</sup> *Ibid* 1735.

<sup>51</sup> Note 35 above.

<sup>52</sup> 740 F 2d 686 (9<sup>th</sup> Cir. 1984).

<sup>53</sup> *Ibid*.

<sup>54</sup> 606 F Supp 1313 (NDI 11 1985).

Therefore, it is common practice for parties to call an expert witness to testify as to the validity of the employers' policies and practices. Bellace states that the United States government as well as many other states and local government units use job classification<sup>55</sup> as the basis for slotting jobs into wage grades.<sup>56</sup> In Title VII, the issue does not concern job evaluation but rather whether the employer deliberately discriminated against women in setting wages. If the employer followed a method of wage-setting other than placing employees into sex-linked categories, the employer did not violate the conditions stipulated in Title VII.<sup>57</sup> Courts and administrative agencies are not permitted to 'substitute their judgement of the employer... who has established and employed a *bona fide* job rating system,' as long as the latter does not discriminate on the basis of sex.<sup>58</sup>

Title VII guarantees women equal access to the higher-paid jobs traditionally filled by men. Once in such jobs, women would be in a position to take advantage of their right under the Equal Pay Act to receive the same pay rate set by employers for the male incumbents in those jobs.<sup>59</sup>

An independent federal agency, Equal Employment Opportunity Commission (EEOC), was established to enforce Title VII. The EEOC focuses on discrimination in employment, including issues such as equal pay. The EEOC does not conduct routine compliance reviews with regard to equal pay but acts on its own initiative to investigate suspected acts of pay discrimination. An individual usually files a complaint with the district office of the EEOC.<sup>60</sup>

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<sup>55</sup> In job classification, the grading structure is established first and individual jobs fitted into the grading structure. A broad description of each grade is drawn up and individual jobs considered typical of each grade are selected as 'benchmarks'. The other jobs are then compared with these benchmarks and the general description is placed in their appropriate grade; discussed in RN Covington 'Equal Pay Acts: a survey of experience under the British and American statutes' (1998) 21 (4) *Vanderbilt Journal of Transnational Law* 663.

<sup>56</sup> Bellace (note 27 above) 165.

<sup>57</sup> *Ibid* 166.

<sup>58</sup> Note 35 above 171.

<sup>59</sup> This philosophy was expressed succinctly by Judge Van Dusen of the Third Circuit in *International Union of Elec. Workers v Westinghouse Elec. Corp.* 452 US 967 (1981) when he said: [R]ead together, Title VII and the Equal Pay Act provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assures that the men and women performing the same work will be paid equally. This approach provides a mechanism for eliminating sex-based wage discrimination, while at the same time assuring that the courts and federal agencies will not become entangled in adjudicating the wage rates to be paid for dissimilar jobs—a process in which they have little expertise, cited by Weiler (note 33 above) 1736.

### 3.1.3 Employer's defences

The Equal Pay Act expressly lists defences available to the employer. The Equal Pay Act provides that an employer may explain the pay discrepancy by pointing to a seniority system, a merit system, a system that measures earnings by quantity or quality of production (piece-work), or 'any factor other than sex'.<sup>61</sup> There is no market rate defence in the Equal Pay Act if the plaintiff can show that a job performed by a woman or a man is the same or substantially similar. The fact that women can be hired for lower wages than men is not a valid defence under the 'factor other than sex' defence.<sup>62</sup>

Title VII does not list any defences available to employers. However, all the defences listed in the Equal Pay Act are also available to a Title VII claim.<sup>63</sup> Since Title VII does not expressly provide for defences, case law must be examined in order to uphold any defences raised by the employer.

In *Gunther*, the court cautiously stated that it was not firmly decisive 'how sex-based wage discrimination litigation under Title VII should be structured to accommodate the defence of any factor other than sex of the Equal Pay Act'. After the *Gunther* case, federal judges almost uniformly refused to read into Title VII any strong version of comparable worth. According to Weiler, courts refused to accept that the objective disparity between the relative value and the actual wages paid for male and female jobs is sufficient in itself to justify a holding that an employer is guilty of sex discrimination.<sup>64</sup>

In *Griggs v Duke Power Co.*,<sup>65</sup> the court dealt with racial discrimination. The employer used job qualifications such as a high school diploma to recruit new staff, and such criteria had a negative impact on the black candidates. The court accepted the use of testing or measuring procedure; however, it forbids giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance so that they measure the person for the job and not the person in the abstract. The *Griggs* principle was available to bring apparently sex-neutral pay

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<sup>60</sup> Bellace (note 27 above) 166.

<sup>61</sup> Lindemann (note 41 above) 489; 29 U.S.C § 206(d)(i) (1982).

<sup>62</sup> *Corning Glass Works v Brennan* 417 US 188 (1974).

<sup>63</sup> Covington (note 55 above) 670; Lindemann (note 41 above) 532.

<sup>64</sup> Weiler (note 33 above) 1747.

practice within the scope of Title VII's ban on discrimination. Weiler states that this left judges with the responsibility of deciding whether existing pay differentials between particular 'female' and 'male' jobs were in fact defensible on some objective basis.<sup>66</sup>

Once these Acts were implemented, women's pay in relation to that of men has improved slightly. The main factor that made the Equal Pay Act less effective is the inclusion of the defence 'any factor other than sex'. This defence generated disagreement among courts.<sup>67</sup> The factor other than sex defence must satisfy the business relation test by relating to a legitimate business need. A court that requires business relation focuses its argument on the implied need of such restriction to prevent an easy escape from the Act.<sup>68</sup>

### 3.2 United Kingdom

The United Kingdom did not enact its sex discrimination laws until well after the United States had enacted the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.<sup>69</sup> The two statutes dealing with sexual equality in the workplace, namely the Equal Pay Act of 1970 and the Sex Discrimination Act of 1975, are based largely on the United States experience.

The United Kingdom ratified the ILO Convention on Equal Remuneration in 1971 and was thereby bound by an international policy.<sup>70</sup> The main European Community provisions that bind the United Kingdom as far as equal pay is concerned are Article 141 of the Treaty of Rome and the Equal Pay Directive.<sup>71</sup> Article 141 provides that 'each Member State shall... ensure and subsequently maintain... the principle that men and women should receive equal pay for equal work'.<sup>72</sup> There was uncertainty as

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<sup>65</sup> 401 US 424 (1971).

<sup>66</sup> Weiler (note 33 above) 1746.

<sup>67</sup> *Fallon v Illinois* 882f.2d 1206, 1211 (7<sup>th</sup> Cir. 1989); *EEOC v Randolph* 843 f.2d 249 (6<sup>th</sup> Cir. 1988).

<sup>68</sup> *Kouba v Allstate Insurance Co* 691 F.2d 873 (9<sup>th</sup> Cir. 1982).

<sup>69</sup> SL Willborn 'Equal pay for work of equal value: comparable worth in the United Kingdom' (1986) 34 *American Journal of Comparative Law* 418.

<sup>70</sup> The United Kingdom government meets the ILO convention criteria by enacting the Equal Pay (Amendment) Regulations 1983 and providing that women could draw upon men in the same employment in work of equal value as comparators.

<sup>71</sup> Note 16 above.

<sup>72</sup> Willborn (note 69 above) 422 quoting Office for Official Publication of the European Communities, *Treaties Establishing the European Communities* 205-575 (1978). The Treaty can also be found at *Treaty Establishing the European Economic Community* 23 November to 13 December (1957) 298 UNTS 11.



to the meaning and implementation of Article 141 until 1975 when the European Economic Community Council adopted an Equal Pay Directive 75/117, stating:

The principle of equal pay for men and women outlined in Article 119 (now 141) of the Treaty... means, for the same work or work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.<sup>73</sup>

In *Jenkins v Kingsgate (Clothing Production)*, the court held that Article 1 of the Directive is ‘principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 (now 141) of the Treaty’, and ‘in no way alters the content or scope of that principle as defined in the Treaty’.<sup>74</sup>

The United Kingdom’s reliance on the American jurisprudence of comparable worth waned from 1981 as shown in *Jenkins v Kingsgate*<sup>75</sup> where it was held that the disparate impact theory of discrimination applied in the United Kingdom under the Equal Pay Act of 1970 was an issue that remained unresolved in the United States.<sup>76</sup> In *Clarke v Eley (IMI) Kynoch Ltd*,<sup>77</sup> one United States case was cited and this revealed how the United Kingdom’s approach to sex discrimination had strayed from the United States’ approach to that issue.

The Sex Discrimination Act stipulates that ‘[d]iscrimination is unlawful against women in respect of the arrangements for determining who should be offered a particular post and the terms on which employment is offered’.<sup>78</sup> The principle of equal treatment contained in the Sex Discrimination Act of 1975 has no application to ‘benefits consisting of the payment of money when the provision of those benefits is regulated by the woman’s contract of employment’.<sup>79</sup> Where inequality of pay exists, the complaint must be brought under the Equal Pay Act of 1970, which implies an ‘equality clause’ into the contract of the applicant.<sup>80</sup>

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<sup>73</sup> Article 1 of the Equal Pay Directive 75/117.

<sup>74</sup> (1981) IRLR 228 (ECJ).

<sup>75</sup> (1981) ICR 715 (EAT).

<sup>76</sup> Note 35 above 161,170-171.

<sup>77</sup> (1982) IRLR 482 (EAT).

<sup>78</sup> Section 6(1) of the Sex Discrimination Act 1975.

<sup>79</sup> Section 6(6) of the Sex Discrimination Act 1975.

### 3.2.1 Sex Discrimination Act

The Sex Discrimination Act (SDA) makes unlawful both direct and indirect discrimination on the ground of sex.<sup>81</sup> Direct discrimination occurs when an employer treats a female employee less favourably than her male counterpart on the ground of her sex.<sup>82</sup> This has been held to include less favourable treatment on the basis of stereotypes such as the assumption that a man is the primary supporter of his spouse and children, and that women are therefore not regarded as breadwinners.<sup>83</sup>

Indirect discrimination occurs when the employer imposes a requirement or condition which is applied to both sexes, but which is of such a nature that the proportion of women that can comply with it is considerably smaller than that of men.<sup>84</sup> The purpose of introducing the concept of indirect discrimination was to seek to eliminate those practices, which had a disproportionate impact on women and were not justifiable for other reasons.<sup>85</sup>

The Sex Discrimination Act provides a defence to employers where sex discrimination is alleged to exist. The employers' defence is that the conduct complained of was not based on the affected employee's sex but on some other (innocent) ground.<sup>86</sup> There is a statutory exception for the selection or promotion based on 'genuine occupational qualifications' which men (or women) possess alone.<sup>87</sup> These qualifications are listed exhaustively by the statute, and the list is a closed one.<sup>88</sup> The main reason for providing statutory exception is to guarantee the

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<sup>80</sup> Section 1 of the Equal Pay Act 1970.

<sup>81</sup> C Louw 'Sex discrimination and the labour relations act' (1990) 2(2) *South African Mercantile Law Journal* 170.

<sup>82</sup> Section 1(1)(a) of the Sex Discrimination Act; C Barnard *EC Employment Law* (2000) 208.

<sup>83</sup> *Coleman v Skyrail Oceanic Ltd* (1981) IRLR 398 (CA).

<sup>84</sup> Section 1(1)(b) of the Sex Discrimination Act.

<sup>85</sup> Note 77 above.

<sup>86</sup> Louw (note 81 above) 173.

<sup>87</sup> Section 7 of the Sex Discrimination Act.

<sup>88</sup> Section 7(2) of the Act states that being a man is a genuine occupational qualification for a job only where-

(a) the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman; or

(b) the job needs to be held by a man to preserve decency or privacy because-

(i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman; or

(ii) the holder of a job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities; or

(c) the nature or location of the establishment makes it impractical for the holder of a job to live elsewhere than in premises provided by the employer, and

right to equal treatment in employment (including pay discrimination) without unfair discrimination on the ground of an employee's sex. In *Allonby v Accrington and Rossendale College*,<sup>89</sup> the College terminated the contract with all its part-time lecturers and re-employed them as sub-contract through an agent. The women complained that the new arrangements had caused a disparate impact on women, who made up two-thirds of the part-time lecturers, but only half of the full-timers. Sedley LJ concluded that in order to justify the practice of the college, it had to demonstrate a real need, and show that this was outweighed by its discriminatory effect upon women.<sup>90</sup>

The Sex Discrimination Act thus outlaws unequal treatment on the basis of an employee's sex. According to Louw, nothing in the Sex Discrimination Act requires the promotion of equal opportunities to remedy the effects of past discrimination practices, that is, affirmative action in favour of women.<sup>91</sup>

### 3.2.2 Equal Pay Act

The aim of the Equal Pay Act of 1970 is to 'prevent discrimination as regards terms and conditions of employment between men and women' (as stated in the Preamble). According to Honeyball and Bowers, 'it is mainly intended to eliminate the clearly lower pay given to women for centuries'.<sup>92</sup> The Equal Pay Act does not define 'pay'

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(i) the only such premises which are available for persons holding that kind of a job are lived in, or normally lived in, by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men, and

(ii) it is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for women; or

(d) the nature of establishment, or of the part of it within which the work is done, requires the job to be held by a man because-

(i) it is, or is part of, a hospital, prison or other establishment for persons requiring special care, supervision or attention, and

(ii) those persons are all men (disregarding any woman whose presence is exceptional), and

(iii) it is reasonable, having regard to the essential character of the establishment or that part, that the job should not be held by a woman; or

(e) the holder of a job provides individuals with personal services promoting their welfare or education, or similar personal services can most effectively be provided by a man; or

(f) the job needs to be held by men because of restrictions imposed by the laws regulating the employment of women; or

(g) the job needs to be held by a man because it is likely to involve the performance of duties outside the United Kingdom in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman; or

(h) the job is one of two to be held by a married couple.

<sup>89</sup> (2001) IRLR 364.

<sup>90</sup> *Ibid* para 29 cited by M Connolly 'Discrimination law: justification, alternative measures and defences based on sex' (2001) 30 *Industrial Law Journal* (UK) 312.

<sup>91</sup> Louw (note 81 above) 172.

<sup>92</sup> S Honeyball & J Bowers *Textbook on labour law* (2004) 273.

but the European Court of Justice has given it a wide interpretation making full use of the fact that under Article 119 (now 141), ‘pay’ includes not only ‘the ordinary basic or minimum wage or salary’ but also ‘any other consideration, whether in cash or kind, which the worker receives, directly or indirectly, in respect of his employment from his employer’.<sup>93</sup> The British Equal Pay Act required women and men to be paid equally for ‘like work in the same employment’<sup>94</sup> unless the employer can prove that a pay variation is ‘genuinely due to material difference (other than difference in sex)’.<sup>95</sup>

The Equal Pay Act requires equal pay between men and women, if they are employed in like work in the same employment. ‘[L]ike work’ is defined as ‘of the same or a broadly similar nature’ to that of a man, and the ‘difference (if any) between the things that she does and the things that they do are not of practical importance’, then she is entitled to equal pay.<sup>96</sup> Willborn states that the statute would not impose a duty on the employer to pay equal wages to persons performing different jobs; equal pay was only required for persons engaged in ‘like work’.<sup>97</sup> The Equal Pay Act of 1970 mirrors the United States’ Equal Pay Act of 1963. The two Equal Pay Acts are of similar limited utility in rectifying the wage gap between men and women. The wage gap is still present because women work in different and lower-paying jobs than men, it will not be affected by statutes that require equal pay for like or equal jobs.<sup>98</sup>

The Equal Pay Act limits the comparable worth guarantee<sup>99</sup> in certain instances. Willborn states that first, comparable worth would only be recognised under the statute if the claim were based on a job evaluation study.<sup>100</sup> Secondly, only certain types of job evaluation studies could be used to prove that jobs were equivalent. Thirdly, job evaluation studies could only be carried out in the United Kingdom with the agreement of the relevant parties, including the employer.<sup>101</sup>

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<sup>93</sup> *Garland v British Rail Engineering Ltd* (1982) IRLR 111 (ECJ); In *Barber v Guardian Royal Exchange Assurance Group Ltd* (1990) IRLR 240 (ECJ), the European Court of Justice held that redundancy payments were pay for the purpose of article 119 (now 141).

<sup>94</sup> Section 1(2)(a) of the Equal Pay Act 1970.

<sup>95</sup> *Ibid* section 1(3).

<sup>96</sup> *Ibid* section 1(4).

<sup>97</sup> Willborn (note 69 above) 420.

<sup>98</sup> *Ibid* 421.

<sup>99</sup> Comparable worth in the United States above 5.

<sup>100</sup> Willborn (note 69 above) 421.

<sup>101</sup> *O’Brien v Sim-Chem Ltd* (1980) ICR 573 (HL).

The procedure for establishing a *prima facie* equal value case under the Equal Pay Act is that the applicant must demonstrate that her work is of equal value to that of a more highly paid man in the same employment. The same employment requirements are that the applicant and comparator are employed by the same employer or associated employers and in the same establishment or at different establishments where common terms and conditions of employment are observed.<sup>102</sup> In *Chief Constable of West Yorkshire Police v Khan*,<sup>103</sup> the court dealt with discrimination on racial grounds. The House of Lords held the view that the comparator for establishing less favourable treatment should be a person who had not brought race discrimination proceedings, and clarified what is meant by ‘less favourable’. Lord Scott concludes that ‘It cannot... be enough for section 2(1)’s purpose simply to show that the complainant has been treated differently... I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently’.<sup>104</sup> According to Connolly, in determining less favourable, there must be more than just a perception that he/she has been treated less favourably.<sup>105</sup>

The Equal Pay Act provides little guidance concerning the meaning of ‘equal value’. Equal value is therefore to be determined in terms of the demands made on the applicant and the comparator with headings such as effort, decision and skills.<sup>106</sup> According to McCrudden, the relative value of jobs is assessed on the following criteria:

- work value to be determined in terms of demand made on the employee, not in terms of economic value to the employer;
- the job characteristics and not the personal characteristics of the incumbent are to be compared, and
- analytical job evaluation techniques (such as the point method) are preferable to non-analytical job evaluation techniques.<sup>107</sup>

Some aspects of the Equal Pay Act have been found wanting by the European Court of Justice. In *Commissioner of the European Community v United Kingdom of Great*

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<sup>102</sup> Section 1(6) of the Equal Pay Act.

<sup>103</sup> (2001) IRLR 830.

<sup>104</sup> *Ibid* para 76.

<sup>105</sup> M Connolly ‘Discrimination law: victimisation’ (2002) 31 *Industrial Law Journal* (UK) 164.

<sup>106</sup> Section 1(2)(c) of the Equal Pay Act; Willborn (note 66 above) 428.

<sup>107</sup> C McCrudden ‘Equal pay for work of equal value: the Equal Pay (Amendments) Regulations 1983’ (1983) 12 *Industrial Law Journal* (UK) 203.

*Britain and Northern Ireland*,<sup>108</sup> the European Court of Justice ruled that the United Kingdom's Equal Pay Act of 1970 did not comply with Article 119 (now 141) and the 1957 Directive. The court held that 'British legislation does not permit the introduction of a job classification system without the employer's consent. Workers in the United Kingdom are therefore unable to have their work rated as being of equal value with comparable work if their employer refuses to introduce a classification system'.<sup>109</sup> The court also held that the Directive requires member states to put in place the means whereby equal value could be attributed to particular work 'notwithstanding the employer's wishes, if necessary in the context of adversary proceedings'.<sup>110</sup> Therefore, in 1983 the United Kingdom government amended the Equal Pay Act of 1970 with Equal Pay (Amendment) Regulations,<sup>111</sup> which set up a complex procedure for the adjudication of equal value claims, part of which is found in the Industrial Tribunal (Rules of Procedure) Regulations 1985.<sup>112</sup>

The Equal Pay Act of 1970 required equal pay for women in cases where women are performing 'like work' to that of men and where women are performing work rated as equivalent to that of men in a job evaluation study.<sup>113</sup> The Equal Pay Act (Amendment) allows a woman to claim that she is employed in work which is in terms of the demands made upon her (for instance, under such headings as effort, skill and decision) of equal value<sup>114</sup> to that of a man in the same employment.<sup>115</sup> When interpreted literally it appears that the right to claim is available only where a woman is employed in work which is neither 'like work'<sup>116</sup> nor 'work rated as equivalent'.<sup>117</sup> This means that, if men are employed alongside women in the same employment, women are employed in 'like work' with men; therefore reading section 1(2)(c) literally, the equal value claim is not available to them. In *Pickstone v Freemans plc*,<sup>118</sup> the House of Lords held that section 1(2)(c) could not be given a purely literal

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<sup>108</sup> (1982) ICR 578 (ECJ).

<sup>109</sup> *Ibid* para 5.

<sup>110</sup> *Ibid* para 13.

<sup>111</sup> Statutory Instrument 1983/1794.

<sup>112</sup> Statutory Instrument 1985/16 regs 7A and 8.

<sup>113</sup> Section 1(2)(a) and (b).

<sup>114</sup> In a case of equal value, equal pay could be awarded: Where it is claimed that the women's work is of equal value to that of man. A claim may be brought under equal value if it is not work to which like work or work rated as equivalent applies.

<sup>115</sup> Section 1(2)(c) of the Equal Pay Act.

<sup>116</sup> Term explained above 15.

<sup>117</sup> Term explained below 19.

<sup>118</sup> (1988) IRLR 357 (HL).

reading given that the scheme of the Treaty and Directive required a woman to have an unqualified claim of equal value.

When a claim of equal value is made, the industrial tribunal may not determine it unless it has received a report from an independent expert whose task it is, in general terms, to evaluate the jobs which are being compared.<sup>119</sup> The tribunal can decide to reject the claim at the outset on the basis that ‘there are no reasonable grounds’ for determining that the work is of equal value as claimed.<sup>120</sup> This implies that an employer can prevent the appointment of an independent expert by successfully arguing that there is no *prima facie* case, or the claim might fail as a result of other defences specified in the Act.

In *Shields v E Coomes (Holdings) Ltd*,<sup>121</sup> the court held that the Equal Pay Act and the Sex Discrimination Act ‘should be construed and applied as a harmonious whole in such a way that the broad principle underlying the whole scheme of legislation is not frustrated by a narrow interpretation or restrictive application of particular provision’.

### 3.2.3 Job evaluation

Job evaluation is defined as ‘a system of comparing different jobs to provide a basis for a grading and pay structure’ and plays an important role in determining whether or not work is ‘equal’. When a woman bases a claim for equal pay on the grounds that she is doing work rated as equivalent to that of men, four factors are usually considered in the job evaluation process, namely skills, effort, responsibility, and working conditions. Gregory states that ‘given the highly subjective nature of job evaluation and the long-standing historical link between gender and skills, it is difficult to grasp how opposing perspectives can be reconciled’.<sup>122</sup>

The ILO defines job evaluation as a technique aimed at ‘establishing pay structures that are fair and equitable in the sense of ensuring equal pay for jobs demanding what

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<sup>119</sup> Section 2A(1)(b) of the Equal Pay Act 1970.

<sup>120</sup> *Ibid* section 2A(1)(a).

<sup>121</sup> (1978) ICR 1159.

<sup>122</sup> J Gregory ‘Dynamite damp squib? - an assessment of equal value law’ (1996) 1 *International Journal of Discrimination and the Law* 316.

are considered to be broadly similar sacrifices and of rewarding appropriately greater efforts and hardships involved in some jobs as compared with others'.<sup>123</sup>

In comparing two jobs to determine whether they are 'like' jobs, tribunals have been directed to take a broad approach rather than to make a microscopic examination, and to avoid trivial distinctions.<sup>124</sup> In *Capper Pass Ltd v Lawton*,<sup>125</sup> the Employment Appeal Tribunal (EAT) found that a canteen cook's work was comparable to that of a male assistant chef in the director's dining room.

The Equal Pay Act requires equal pay when women are employed in work 'rated as equivalent' to that of men in the same employment.<sup>126</sup> In terms of section 1(5) of the Equal Pay Act, the concept of 'rated as equivalent' is defined as follows:

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

Budlender argues that job evaluation systems can benefit workers in the sense that such a system can cut down management's prerogative in deciding on individuals' pay, avoid the victimisation of individuals, and make the method of rating explicit.<sup>127</sup> An equal value claim can be dismissed at the preliminary stage by an industrial tribunal, if the job of the claimant and the male comparator have been given different values on a job evaluation system, and when the tribunal is satisfied that there are no reasonable grounds for determining that the scheme was made on a system which discriminates on grounds of sex.<sup>128</sup>

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<sup>123</sup> D Budlender 'Pay equity' (1994) Paper prepared for Judas Gender Equality Seminar, Mimeo.

<sup>124</sup> SD Anderman *Labour law management decisions and workers' rights* (2000) 284.

<sup>125</sup> (1976) IRLR 366 (EAT).

<sup>126</sup> Section 1(2)(b) of the Equal Pay Act 1970.

<sup>127</sup> D Budlender 'Human resource development and gender affirmative action' (1992) Paper prepared for the National Education Policy Initiative. CASE, Braamfontein.

<sup>128</sup> The Equal Pay (Amendments) Regulation 1983 section 3 adding new section 2A(2)(a) and (2)(b) to the Equal Pay Act 1970.



In *Neil and others v Ford Motor Co*,<sup>129</sup> the female applicants were unable to make a claim under the Equal Pay Act because of the absence of men employed on ‘like’ work. The applicants were among the first to file the application under the new regulations. The tribunal informed them that there were no reasonable grounds for determining that the 1968 job evaluation system was discriminatory. In *Wood and others v William Ball*,<sup>130</sup> the EAT held that the tribunal has an obligation to notify the parties of their right to induce their own expert evidence.

A study must be ‘analytical’ in order to satisfy the requirement of section 1(5) of the Equal Pay Act. If a job evaluation scheme is not sufficiently ‘analytical’ in the meaning of the section, it can be challenged as falling outside the definition.<sup>131</sup> In *Bromley v H & J Quick Ltd*,<sup>132</sup> a group of consultants had used a method of ranking jobs based on its job description in order to establish the position of the benchmark jobs. At no point were the jobs other than the benchmark jobs analysed in terms of the factors of effort, skill, and decision, unless there was an appeal against the grade allocated to a particular job. It was held that section 1(5) requires that the work of the woman and that of her comparator must be analysed under the relevant headings. In *Dibro v Hore and others*,<sup>133</sup> the complainants were employed as assemblers and claimed that they were employed on work of equal value with two male operators. In 1983 a job evaluation was carried out by one of the employer’s managers and in 1988 the employer carried out another job evaluation study in which they contend that it resulted in an analytical job evaluation scheme. The EAT held that provided that a job evaluation scheme is analytical and valid within section 1(5) and relevant to the issue which the tribunal has to decide, it is open to an employer to utilise such scheme as evidence at any stage up to the final hearing.

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<sup>129</sup> (1984) IRLR 339.

<sup>130</sup> (1990) IRLR 129 (EAT).

<sup>131</sup> Anderman (note 124 above) 285.

<sup>132</sup> (1988) ICR 623.

<sup>133</sup> (1990) IRLR 129 (EAT).

European Community Law provides some limited guidance on the issue of job evaluation. The leading case is *Rummler v Dato-Druck*<sup>134</sup> in which the court held that a job classification system must not be organised in such a manner as to discriminate against workers of one sex. If the job classification system uses criteria that tend to favour men, such as physical effort, it must also take into account criteria for which women may have a particular aptitude. Moreover, the method of evaluating criteria must not disadvantage a group of workers of one sex in the process, since that would run the risk of indirect discrimination.

The EAT in *Dibro* held that the object to be achieved in a job evaluation scheme is to ensure that equal pay should be awarded to jobs of value whether the applicants are women or men. According to McCrudden, priority should be given to developing 'imaginative and diverse systems of measuring skills, which aim to do more than reproduce the current grading and status of jobs'.<sup>135</sup>

#### 3.2.4 Employer's defences

If an employee succeeds in establishing an equal pay claim under section 1(2)(a), (b), (c) of the Equal Pay Act, then the employer must prove that:

3.2.4(1) (the variation is genuinely due to a material factor, which is not the difference of sex (section 1(3)); or that

3.2.4(2) there is in existence a job evaluation scheme and there are no reasonable grounds for determining that the scheme was discriminatory (section 2A(2)).

If the personal difference alleged is merely a pretext for intentional discrimination, or if intentional discrimination was a causal element in the variation, the employer will not succeed.<sup>136</sup>

The employer's defences are essentially objectively justifiable. In *Bilka-Kaufhaus GmbH v Weber von Harz*,<sup>137</sup> the European Court of Justice laid down a test to determine what is 'objectively justified'. The relevant test was:

3.2.4(3) whether there are objective grounds justifying the difference;

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<sup>134</sup> (1986) ECR 2101.

<sup>135</sup> S Horrell, J Rubery & B Burchell (1990) 'Gender and skills' *Work Employment and Society* 214: discussed in Gregory (note 122 above) 320.

<sup>136</sup> C McCrudden 'Equal pay in the United Kingdom' in Eyraud & Hartnell (eds) *Equal pay protection in industrialised market economies: in search of great effectiveness* ILO Office 145.

3.2.4(4) whether the practice is ‘necessary’ to that end, and

3.2.4(5) whether the difference claimed to be justified is proportionate to the objective purpose.

The court also held that there must be a real need for the difference on the part of the business, and that it is not enough to show that the reason for the difference was not discriminatory. The ECJ resolved doubts expressed in *Jenkins* and established that the true meaning and effect of Article 119 (now 141) in this particular context is the same as that attributed to section 1(3) of the Equal Pay Act by the EAT. In *Hill and Stapleton v Revenue Commissioners and Department of Finance*,<sup>138</sup> the court stated that it required concrete evidence before accepting a justification. The court rejected the Revenue Commissioners and Department of Finance argument that a rewards system maintains staff motivation, commitment and morale. The court held that an employer could not justify discrimination arising from a job-sharing scheme solely on the grounds of cost. Certain defences were also raised by employers in order to justify their discriminatory practice.

#### *Material factor*

The material factor defence is a crucial element in the demarcation line between worker protection and management decisions. Anderman states that when interpreted widely, it can defeat the purpose of the Equal Pay Act. If interpreted narrowly, it could put employers in a difficult financial position to make up for past inequality.<sup>139</sup>

In *Clay Cross (Quarry Services) Ltd v Fletcher*,<sup>140</sup> a male clerk was appointed at a higher salary than that of two other female clerks because he was earning that much in his present job. The Court of Appeal rejected the defence of ‘I paid him more because he asked for more’ as a material defence. Instead the court accepted the argument that market forces tend to undervalue work done by women and this was the main reason for unequal pay.

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<sup>137</sup> (1986) IRLR 317 (ECJ).

<sup>138</sup> (1998) IRLR 466 (ECJ).

<sup>139</sup> Anderman (note 124 above) 270.

<sup>140</sup> (1978) IRLR 361 (CA).

In *Jenkins v Kingsgate (Clothing Production)*,<sup>141</sup> a group of speech therapists (women) claimed equal pay for equal value with clinical psychologists and pharmacists (men). The European Court of Justice held that ‘the state of the employment market, which may lead the employer to increase the pay in particular jobs in order to attract candidates, may constitute an objectively justified ground’.<sup>142</sup>

In *Rainey v Greater Glasgow Health Board*,<sup>143</sup> the House of Lords adopted the formulation of the *Bilka* case in determining whether market forces could count as a genuine material factor justifying a difference in pay. The House of Lords rejected the *Clay Cross* dictum that only the personal equation rather than extrinsic forces could constitute a genuine material difference as the distinction was ‘between her case and his’. Hence, when considering a person’s case one must not necessarily consider all the circumstances of that case. These may well go beyond what is not very happily described as ‘the personal equation’, that is the personal qualities by way of skill, experience or training which the individual brings to the job. The court in *Rainey* also held that the applicants’ different routes of entry into the employment were attributable to sound, objectively justified reasons, and that the difference in pay was therefore justified.

The debate whether market force defence is justified was clarified in *Enderby v Frenchay Health Authority*.<sup>144</sup> The European Court of Justice accepted that market forces constitute a genuine material difference. The court indicated that ‘the defence would only hold good for such part of the difference as could be attributed to that reason. Thus, if a proportion of the difference could not be accounted for in this way, there would be no objective justification in respect of it’.<sup>145</sup>

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<sup>141</sup> (1981) IRLR 228 (ECJ).

<sup>142</sup> Anderman (note 124 above) 272.

<sup>143</sup> (1987) IRLR 26 (HL).

<sup>144</sup> (1993) IRLR 591 (ECJ).

<sup>145</sup> G Pitt *Employment law* 158.

In *Barry v Midlands Bank plc*,<sup>146</sup> the applicant complained to the tribunal that in calculating the severance payment the respondent had indirectly discriminated against her in breach of her right to equal pay for equal work. The industrial tribunal held that the scheme used was both appropriate and reasonably necessary to that end and the difference in sex between the applicant and her male comparator and that of section 1(3) of the Equal Pay Act was satisfied. The House of Lords affirms the tribunal decision that the respondent had not indirectly discriminated against the applicant. Moreover, even if there had been such discrimination, it would have been objectively justified.

In *Strathclyde Regional Council v Wallace*,<sup>147</sup> it was held that in order to establish a defence under section 1(3) of the Equal Pay Act, the employer had to show that any disparity in pay was genuinely due to a material factor which was not sex, and prove further that they were causally relevant to disparity in pay complained of. However, in *Glasgow City Council v Marshall*,<sup>148</sup> the appellants (instructors, seven women and one man) and teachers (opposite sex) were remunerated according to two different nationally negotiated pay scales. The House of Lords held that the employment tribunal erred in holding that section 1(3) requires a good and sufficient reason for the variation in pay, even where the absence of sex discrimination has been demonstrated. The court adopted the same reasoning as in *Strathclyde*, namely that the employer, who proves the absence of sex discrimination, direct or indirect, is under no obligation to prove a good reason for the pay disparity.

In *Christie v John E Haith Ltd*,<sup>149</sup> the employees complained that their employer was paying them less than their male comparators. The tribunal found that the male comparator dealt with heavier packages whereas the employees in question did not. The tribunal concluded that physical effort and unpleasantness involved in loading and unloading might have been a material factor to justify the difference in pay. The EAT held that factors such as physical effort and unpleasantness taken into account in determining whether work was of equal value should not be excluded from consideration of whether, under section 1(3) of the Equal Pay Act, there was a material factor other than gender, that justified the difference in pay.

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<sup>146</sup> (1999) IRLR 581 (HL).

<sup>147</sup> (1998) IRLR 146 (HL).

<sup>148</sup> (2000) IRLR 272 (HL).

<sup>149</sup> (2003) IRLR 670 (EAT).

### *Collective bargaining*

Employers and trade unions consider the regulation of equal pay in the industry or workplace in their collective agreement. According to Anderman, courts are cautious in accepting an employer's defences of separate collective bargaining structure as objective justification for difference in pay between men and women.<sup>150</sup> It is difficult to accept that collective bargaining can provide a ground for justification, as the employer is a party to this specific agreement. In *Enderby*, the court recognised that to allow the mere existence of separate agreements to preclude a *prima facie* finding of discrimination would be to invite the use of separate collective agreements as a device to circumvent the principle of equal pay.

In *Nimz v Freie und Hansestadt Hamburg*,<sup>151</sup> a collective agreement provides that employees who worked at least three quarters of the full-time hours move up a salary grade after six years. Part-timers who worked at least half but three quarters of full-time hours had only half their years of service taken into account. The court dealt with a question of where there is indirect discrimination in a provision of collective agreement which is incompatible with article 119 (now 141), taking into account, in particular, the freedom of action of parties to such an agreement. The court held that national courts were obliged to set aside any discrimination provision in a collective agreement immediately without requesting or waiting for the removal of that provision by legislative means or by any other constitutional process.

In *Specialarbejderforbundet i Danmark v Dansk Industri acting for Royal Copenhagen A/S*,<sup>152</sup> the court relaxed the strict view of *Enderby*. In *Dansk Industri* Danish ceramics producers employed semi-skilled workers including turners and painters, and were covered by a collective agreement under which they were paid on piece-work basis, that is level of pay was wholly or partially dependant on output. The court held that rates of pay determined by collective bargaining or by negotiation at local level may be taken into account by a national court as a factor in its assessment of whether differences between the average pay of the two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex.

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<sup>150</sup> Anderman (note 124 above) 274.

<sup>151</sup> (1991) IRLR 222.

<sup>152</sup> (1995) IRLR 648 (ECJ).

### *Performance-related pay*

In the early 1980s, the payment system based on merit was used by employers and encouraged by government.<sup>153</sup> According to Gregory, in local government, women were concentrated in the lower-grade white-collar positions still largely unaffected by such schemes. In the private sector, women were more likely to be included in performance-related systems, as these have been widely adopted for the predominantly female clerical staff, as well as the managerial and professional grades.<sup>154</sup>

In *Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)*,<sup>155</sup> the court held that when determining the performance-related pay, judgement may be subjective in that there is a high risk of unconscious discrimination. The court found that the pay system was unclear and lacked transparency. Therefore the employer bears the burden of proof that the difference in pay is not discriminatory. The court emphasised that employers who use merit payment schemes should ensure that clear criteria are adopted and applied objectively, and should monitor the practice in relation to performance-related pay and other discretionary or merit pay systems.

In *Calder v Rowntree Mackintosh Confectionery Ltd*,<sup>156</sup> the applicant was a machine operator who claimed that she was doing work of equal value to that of a male machine operator working in a different department on a different confectionary item. The applicant worked from 5h30 to 10h30 pm five days a week while her comparator worked two different rotating shifts on alternative weeks. The court held that there was no lack of transparency in the sense used by the European Court of Justice in the *Danfoss* case because it was clear that the premium was payable to those employees (both women and men) who worked rotating shifts. However, in the *Glasgow* case the court stated that no one suggested that the pay disparity was tainted with sex discrimination and accordingly, the education authorities made good their defence under section 1(3).

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<sup>153</sup> Gregory (note 122 above) 323.

<sup>154</sup> *Ibid* 324 referring to Industrial Relations Services (1990).

<sup>155</sup> (1989) IRLR 523 (ECJ).

<sup>156</sup> (1993) IRLR 212 (CA).

### *Red circling*

Should red circling be accepted as a material difference? An employee is red circled when he/she on a higher-rated job is moved to a lower-rated job, often because of ill-health or because the job has been degraded, and is still paid at the higher rate.<sup>157</sup> In *Snoxell v Vauxhall Motors*,<sup>158</sup> the company had a separate scale for men and women before the enactment of the Equal Pay Act. Before the Equal Pay Act came into force the scales were integrated and the women's rate was fixed as the rate for the job. Thereafter, all new men received the same pay as the women, but the men who were previously paid on the higher rate were red circled. The EAT held that red circle was not an absolute defence. The court also found that the company had no plans to phase out or eliminate red circling. Therefore, women were entitled to equal pay.

In *Benveniste v University of Southampton*,<sup>159</sup> the applicant was appointed as a lecturer in times of financial constraint which later eased. The court of appeal rejected the practice of red circle in this case because red circled employees remain protected. The court held that after the financial constraints had eased, there was no longer any material difference between men and women. In *Ratcliffe v North Yorkshire Country Council*,<sup>160</sup> the General Manager of the Direct Service Organisation decided to reduce the wages of the applicants (employed to serve school dinners) below collective bargaining levels in order to compete with a rival tenderer. The court held that employers had failed to show that the variation between the appellant's contract and that of their male comparators was due to material factor which was not a difference of sex. Lord Slynn of Hardley said he was satisfied that to reduce women's wages below that of their male comparators was the same discrimination in relation to pay which the Equal Pay Act sought to remove.

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<sup>157</sup> Pitt (note 145 above) 161.

<sup>158</sup> (1978) IQB 11.

<sup>159</sup> (1989) IRLR 122.

<sup>160</sup> (1995) IRLR 439 (HL).



The United Kingdom's Sex Discrimination Act dealt with unequal treatment on the basis of the employee's sex. Since this Act deals with indirect and direct discrimination, it will not promote equal pay for work of equal value without the Equal Pay Act. If the complaint is based on equal pay, then it had to be brought under the scope of the Equal Pay Act of 1970. The Equal Pay Act had a significant impact on preventing unequal pay between men and women. The wage gap is still present because women work in different and lower-paying jobs than men. The Equal Pay Act requires equal pay when women are employed in work rated as equivalent by job evaluation to that of men in the same employment. This means a job evaluation must be undertaken, and an independent expert appointed. This creates uncertainty as to how much weight should be attached to the expert report. The Equal Pay Act has limited impact on the promotion of equal pay, and it renders its interpretation difficult. This Act provides for grounds of justification for unequal pay but it is uncertain as to what constitutes a ground for justification for unequal pay. The main reason is that few women succeeded in their equal pay claim since it is not difficult for employers to justify their pay difference because of legal technicalities.

### 3.3 Australia

In 1912, the Australian Conciliation and Arbitration Commission<sup>161</sup> explicitly rejected a request for a similar basic wage for both women and men. This reinforced a sharp legal distinction between work suited for men, for which the male basic wage would be paid, and work suited for women, for which a lower rate would be paid.<sup>162</sup> Even in 1969 the ACAC did not want to remedy the situation and stated that 'this commission could not escape its own history including the history of the court, even if it wanted to'.<sup>163</sup>

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<sup>161</sup> Herein thereafter referred to as 'the ACAC'.

<sup>162</sup> *Rural Workers Union and United Labourers Union v Mildura Branch of the Australian Dried Fruits Ass'n* 6 CAR 61 (1912).

<sup>163</sup> *Australasian Meat Indust. Employees Union v Meat and Allied Trade Fed'n of Australia (Equal Pay Cases)* 127 CAR (1969).

The *Aboriginal Stockmen*<sup>164</sup> case dealt with racial pay differentials. The Aborigines employed on vast cattle stations in North Australia were excluded from an award covering white employees. The employers emphasised that their claim for classification was based on work value rather than on racial grounds. The principle applied by the commission in settling this industrial dispute was that all adult male employees were entitled to be paid a basic wage unless they are classified in some special category such as slow workers. The ACAC adopted the employers' claim that the work of Aborigines was of considerably less value than that of white employees. According to Stockpoole-Moore, 'equal pay was granted as a matter of overwhelming industrial justice'.<sup>165</sup>

Australian women are protected from wage discrimination by the legal doctrine of 'equal pay for work of equal value'. Stockpoole-Moore states that this doctrine has not eliminated the overall wage differential between men and women in the Australian labour market.<sup>166</sup> Australian working women are still paid less than men for doing the same job or work of equal value.<sup>167</sup>

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<sup>164</sup> 113 CAR 651 (1966): discussed in J Stackpoole-Moore 'From equal pay to equal value in Australia: myth or reality?' (1989) 11 *Comparative Labour Law Journal* 278.

<sup>165</sup> *Ibid* 279.

<sup>166</sup> *Ibid* 273.

<sup>167</sup> H Hughes 'equal pay for work of equal value: moving towards, or away from, wage justice for women?' (1998) *Issue Analysis 2* <http://www.cis.org.au/issueanalysis/IA2.htm>; 'Equal pay' enterprising ideas September 1997 *Labour information network* ACTU <http://www.actu.asn.au/public/library/equalpay.htm>.

In Australia, the difference in wages between men and women is relatively lower than in the United States, the United Kingdom and Canada, where the high rate has been influenced by the high rate of female unionisation and centralised wage-fixing systems. According to O'Donnell and Golder,<sup>168</sup> the general wage-fixing principles are probably more important than the mechanisms for pursuing equal pay in explaining the wage of men and women workers. Wage setting is controlled by industrial tribunals at both federal and state levels by means of Conciliation and Compulsory Arbitration. The highest wages have been commanded by powerful male-dominated unions (perceived to be most productive) rather than female-dominated unions.<sup>169</sup> Thornton states that these minimum wages and conditions are normally incorporated into awards that are formal, legally binding instruments ratified by an industrial tribunal. Since wages is fixed at national industry level, those who are industrially weak, particularly migrant women, have benefited from such awards.<sup>170</sup>

Australia ratified the Equal Remuneration Convention in 1974, but prior to this date, New South Wales became the first Australian state to incorporate the ILO spirit in restricted terms to the effect that male and female employees were to receive equal pay for 'performing work of the same or a like nature and of equal value'.<sup>171</sup> This legislation was further incorporated into the New South Wales Industrial Arbitration Act 1940-1980 as section 88D. This section provides that the ACAC shall upon application insert an award in an agreement that fixes rates of wages between male and female employees performing work of equal value. The ACAC will also consider whether female employees are performing the same range and volume of work as male employees under the same conditions.<sup>172</sup>

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<sup>168</sup> C O'Donnell & N Golder 'A comparative analysis of equal pay in the United States, Britain and Australia' (1986) 3 *Australian Feminist Studies* 59.

<sup>169</sup> M Thornton 'Equal pay in Australia' (1993) in Eyraud & Hartnell (eds) *Equal pay protection industrialised market economies: in search of great effectiveness* ILO Office 23.

<sup>170</sup> *Ibid* 23-24.

<sup>171</sup> Female Rates (Amendment) Act (NSW 1958).

<sup>172</sup> Section 88D reads as follows: (1) The commission or a committee shall upon application therefore (*sic*) insert (by way of variation or otherwise) in any award or industrial agreement which fixes rates of wages for male and female employees performing work of the same or a like nature and of equal value provisions for equal pay as between the sexes based upon the principles set out in this section.

(2) Where the commission or a committee is satisfied that male and female employees are performing work of the same or a like nature and of equal value the same marginal or secondary rates of wages shall be fixed irrespective of the sex of the employees. For the purpose of determining whether female employees are performing work of the same or a like nature and of equal value as male employees the commission or a committee shall in addition to any other relevant matters take into consideration whether the female employees are performing the same work or work of a like nature as male employees and doing the same range and volume of work as male employees and under the same conditions.

Section 88D(9)(b) entrenched the industrial myths of the disparate value of male and female work. It thus renders the Act irrelevant to the majority of women in the occupationally segregated workforce.<sup>173</sup>

In the first equal pay case heard in 1969, the union called for a reassessment of wage differentials. They cited sociological and technological changes in Australian society which had affected both the economic structure and group relationships within the community.<sup>174</sup> The ACAC granted equal pay for equal value if male and female employees were working under the same terms. The work performed should be of the same or 'a like' nature and of equal value and mere similarity in the name of male and female classifications may not suffice to establish that males and females do work of like nature. The consideration in determining work of the same or equal value should not be restricted to one establishment but should extend to the general situation under determination.<sup>175</sup>

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(9) (a) This section shall apply to and in respect of awards and industrial agreements made before or after the commencement of the Industrial Arbitration (Female Rates) Amendment Act, 1958.

(b) This section shall not apply to and in respect of those provisions of any awards and industrial agreements which are applicable to persons engaged in work essentially or usually performed by females but upon which male employees may also be employed.

(c) In this section 'appropriate basic wage for adult males' means the basic wage for adult males as may be applicable pursuant to the provisions of Part V

<sup>173</sup> Stackpoole-Moore (note 164 above) 277.

<sup>174</sup> *Ibid* 280.

<sup>175</sup> Nine proportions to determine equal pay for work of equal value (a) The male and female employees concerned, who must be adults, should be working under the same terms of the same determination or award.

(b) It should be established that certain work covered by the determination or award is performed by both males and females.

(c) The work performed by both males and females under such determination or award should be of the same or a like nature and of equal value, but mere similarity in name of male and female classifications may not be enough to establish that males and females do work of a like nature.

(d) For the purpose of determining whether the female employees are performing work of the same or a like nature and of equal value as the male employees, the arbitrator or commissioner, as the case may be, should in addition to any other relevant matters take into consideration whether the female employees are performing the same work or work of a like nature as male employees and doing the same range and volume of work as male employees and under the same conditions.

(e) Consideration should be restricted to work performed under the determination or award concerned.

(f) In cases where males and females are doing work of the same or a like nature and of equal value, there may be no appropriate classifications for that work. In such a case appropriate classification should be established for the work which is performed by both males and females and rates of pay established for that work. The classifications should not be of a generic nature covering a wide variety of work.

(g) In considering whether males and females are performing work of the same or like nature and of equal value, consideration should not be restricted to the situation in one establishment but should extend to the general situation under the determination or award concerned, unless the award or determination applies to only one establishment.

(h) The expression 'of equal value' should not be construed as meaning 'of equal value to the employer' but as equal value, at least from the point of view of wages or salary assessment.

In 1972, the ACAC acknowledged that the concept of ‘equal pay for equal work’ was too narrow, and therefore introduced the concept of ‘equal pay for work of equal value’ which considers the work performed irrespective of the sex of the worker. The ACAC held that the female rate would be determined by work value comparisons, using techniques well established within the Australian industrial culture.<sup>176</sup>

The Affirmative Action Agency was established in 1986 to eliminate structural discrimination in the workplace. The Agency’s objective is to facilitate the achievement of the goal of equal opportunity by following an eight-step process established under the Affirmative Action (Equal Employment Opportunity for Women) Act.<sup>177</sup>

### 3.3.1 Equal pay for work of equal value

The Australian concept of work of equal value differs from that in the United States and the United Kingdom because in Australia the value of work does not mean value to the employer but the value of work refers to worth in terms of award wage or salary fixation. The notion of equal value was introduced into wage-fixing principles following the *National Wage and Equal Pay* cases decision.<sup>178</sup>

In 1972, the ACAC considered the comparison between female and male classification by commenting that:

Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such comparisons are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and/or comparisons of work value between female classifications in different awards. In some cases comparisons with male classification in other awards may be necessary.

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(i) Notwithstanding the above, equal pay should not be provided by application of the above principle where the work in question is essentially or usually performed by females but is work for which male employees may also be employed.

<sup>176</sup> Thornton (note 169 above) 25.

<sup>177</sup> No 91 of 1986 amended as Equal Opportunity for Women in the Workplace Act 1999.

<sup>178</sup> *National Wage and Equal Pay Cases* 147 CAR 172 (1972): discussed in Stackpoole-Moore (note 164 above) 281.

According to Thornton, the equal pay for work of equal value principle was incorporated into awards either by means of agreement or failing this by means of arbitration, if agreement could not be reached. The equal pay decision was persuasive rather than mandatory as far as the unions were concerned.<sup>179</sup> An employer is bound by an award, when a union has made an application for equal pay and includes an award in its application. Prosecutions could be instituted for underpayment of wages, but Short stated that after 1972 there was a notable absence of any work value assessment by the ACAC.<sup>180</sup>

### 3.3.2 Workplace Relations Act

The Workplace Relations Act of 1996 repealed the entire section on equal pay in the Industrial Relations Act of 1988 as amended in 1993 (Division 2 of Part VIA). In terms of the Workplace Relations Act of 1996, the purpose of Division 2 dealing with equal remuneration for work of equal value is to give effect to the Anti-Discrimination Conventions, the Equal Remuneration Recommendation and the Discrimination (Employment and Occupation) Recommendation.<sup>181</sup> The expression 'equal remuneration for work of equal value' refers to equal remuneration for men and women workers for work of equal value.<sup>182</sup>

The legislature empowers the Australian Industrial Relations Commission<sup>183</sup> to make such orders as it considers appropriate to ensure that there will be equal remuneration for work of equal value for employees covered by the orders.<sup>184</sup> An order may provide for such increases in rates of remuneration that the Australian Industrial Relations Commission considers appropriate to achieve equal remuneration for work of equal value.<sup>185</sup>

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<sup>179</sup> C Short 'Equal pay-what happened?' (1986) 28 *Journal of Industrial Relations* 320.

<sup>180</sup> *Ibid* 324; Thornton (note 169 above) 26.

<sup>181</sup> Section 170BA.

<sup>182</sup> Section 170BB1.

<sup>183</sup> Formerly known as the Australian Conciliation and Arbitration Commission.

<sup>184</sup> Section 170BC(1).

<sup>185</sup> Section 170BC(2).

In terms of section 170BC(3) the Australian Industrial Relations Commission may make an order where two conditions are met: first, the Australian Industrial Relations Commission is satisfied that, for the employees who will be covered by the order, there is not equal remuneration for work of equal value; secondly, the order must reasonably be regarded as appropriate and adapted to giving effect to either one or more of the Anti-Discrimination Conventions or Equal Remuneration Convention or the Discrimination (Employment of and Occupation) Recommendation. The Australian Industrial Relations Commission may not make an order if adequate alternative remedy exists under another law of the commonwealth, or under state or territory, and that remedy will ensure for the employees concerned equal remuneration for work of equal value.<sup>186</sup>

### 3.3.3 Comparable worth doctrine

Comparable worth doctrine is not confined to workers within the one occupation but could encompass comparisons across different occupations. The Australian Council of Trade Unions (ACTU) supported the implementation of the comparable worth doctrine<sup>187</sup> in Australia because of pressure from feminists within the union. The comparable worth doctrine was rejected in the *Nurses Test* case,<sup>188</sup> in which the nurses claimed that the 1969 and 1972 decisions failed to redress the imbalances women face in a predominately, female occupation. They argued that the nurses were not beneficiaries to the 1972 equal pay decision.

The ACAC reaffirmed the equal pay for work of equal value principle and rejected the comparable worth theory. The ACAC holds the following view:

The term comparable worth in the Australian context would lead to confusion, and in particular, we believe that it would be inappropriate and confusing to equate the doctrine with the 1972 principle of equal pay for work of equal value. For all of these reasons we specifically reject the notion.<sup>189</sup>

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<sup>186</sup> Section 170BE.

<sup>187</sup> Comparable worth in the United States above 5.

<sup>188</sup> 1986 AILR 117: discussed in Stackpoole-Moore (note 164 above) 282.

<sup>189</sup> Discussed in Thornton (note 169 above) 28.

The ACAC also held that applications must be processed using the guidelines established in the *1983 National Wage* case.<sup>190</sup> The ACAC felt that adoption of the comparable concept in Australia would ‘strike at the heart of long accepted methods of wage fixation in this country’. According to Thornton, comparable worth would involve a new methodology which would likely corrode Australia’s central wage-fixing system.<sup>191</sup>

#### 3.3.4 Job evaluation

Since the comparable worth doctrine was rejected in 1985, there has been resistance to a more systematic method of job evaluation using traditional factors such as skill, effort, responsibility, and working conditions. A scientific evaluation method was attempted once in *Metal Traders Award*<sup>192</sup> where ‘the commonwealth attempted a detailed methodical approach to wage fixation by filling of check sheets for each job inspected as the end producing a table of relative for each job’. The resistance may have been due to time and cost involved in the job evaluation system. However, employers may voluntarily develop their own scheme to determine the wage difference.<sup>193</sup>

In Australia, the rate of equal pay for men and women is high because of the female unionisation and the centralised wage-fixing system. This figure would have been higher if collective bargaining were at enterprise level. The equal pay for work of equal value principle has eliminated discrimination in the workplace but the rejection of the doctrine of comparable worth and job evaluation method using traditional factors such as skills, effort, responsibility, and working conditions has impeded the promotion of equal pay.

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<sup>190</sup> *National Wage Case* 219 CAR (1983): discussed in Stockpoole-Moore (note 164 above) 283.

<sup>191</sup> Thornton (note 169 above) 28.

<sup>192</sup> 121 CAR (1966): discussed in Thornton (note 169 above) 33.

<sup>193</sup> Thornton (note 169 above) 34.



### 3.4 Canada

Canada has fourteen different jurisdictions,<sup>194</sup> with different legislation dealing with pay discrimination. Three approaches have been developed to reduce the wage gap, namely ‘equal pay for equal work’, ‘equal pay for work of equal value’ and ‘pay equity’. This section of the paper focuses on the pay equity of Ontario. Canada ratified the ILO Convention on Equal Remuneration in 1972.<sup>195</sup>

Four Canadian jurisdictions have introduced proactive pay equity legislation<sup>196</sup> and Canada continues to rank among those countries that have successfully narrowed the gender-based wage gap. ‘Proactive pay equity’ differs from the ‘equal pay for equal work’ and ‘equal pay for work of equal value’ legislation as it is not based on complaints. It is the responsibility of employers to demonstrate that they are not engaged in discriminatory pay practices in any of their establishments.<sup>197</sup> While allowing comparisons across occupations, proactive pay equity is restricted to the same establishment. ‘Establishment’ has been defined as ‘all of the employees of an employer employed in a geographic division or in such geographic divisions as are agreed upon under section 14 or decided under section 15’. This definition appears to have been developed to accommodate regional differences and is somewhat complicated.<sup>198</sup>

#### 3.4.1 Equal pay for equal work

Canada introduced its equal pay legislation in 1951. Equal pay for equal work requires employees to initiate actions against their employers. This provision requires ‘substantially the same kind of work’, which is a restrictive approach as it requires that the job done by women and men had to involve substantially the same skill, effort, responsibility, and working conditions. The equal work system requires each factor to be equivalent as compared to equal value which requires a total evaluation score of factors, not the score for each factor.

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<sup>194</sup> One federal, ten provincial and three territorial districts.

<sup>195</sup> I Christie *et al* *Employment law in Canada* (1993) 284.

<sup>196</sup> The Pay Equity Acts were passed in Manitoba in 1984, Ontario in 1987, in Prince Edward Island and Nova Scotia in 1988.

<sup>197</sup> A McColgan ‘Legislating equal pay? lessons from Canada’ (1993) 22 *Industrial Law Journal* (UK) 273.

<sup>198</sup> P McDermott ‘Equal pay in Canada’ in Eyraud & Hartnell (eds) *Equal pay protection in industrialised market economies: in search for great effectiveness* ILO Office 45.

In terms of this legislation job evaluation is based on the following factors: skills, effort, responsibility, and working conditions. The employer can justify pay differentiation by pointing out defences such as seniority and a merit system. According to McDermott, the restrictive method of defining ‘substantially the same’, the complaint-based structure of the legislation, and these defences have operated to make the Canadian equal pay laws relatively ineffective, even in the limited areas where men and women do the same type of work.<sup>199</sup>

#### 3.4.2 Equal pay for work of equal value

The Canadian notion of ‘equal pay for work of equal value’ is similar to that in the United Kingdom, where ‘equal pay for work of equal value’ provides that a woman may claim to be doing work of equal value to a man, and ensure that her job is evaluated even where the employer has not voluntarily carried out a job evaluation exercise. The equal pay for work of equal value legislation was introduced in three Canadian jurisdictions.<sup>200</sup> This legislation is complaint-based, that is the employee initiates actions against the employer. Equal value also provides justification for unequal pay such as seniority and a merit system.

The methods of comparing jobs involve skill, effort, responsibility, and work conditions. Under this legislation, different jobs can be compared because each factor does not need to be equivalent. According to McDermott, the cases handled by the Canadian Human Rights Commission have resulted in a significant increase in pay for those involved but failed to reduce the wage gap for federal regulated employees, because employees were often reluctant to bring an equal pay complaint.<sup>201</sup>

#### 3.4.3 Proactive pay equity

The Ontario Province enacted the Pay Equity Act<sup>202</sup> in order to redress systemic gender discrimination in the compensation for work performed by employees in the female job classes.<sup>203</sup>

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<sup>199</sup> *Ibid* 50.

<sup>200</sup> The Federal Government, Province of Quebec and Yukon Territory.

<sup>201</sup> McDermott (note 198 above) 44.

<sup>202</sup> R.S.O. 1990 c.p-7.

<sup>203</sup> Section 4 Ontario Act of 1987.

Pay equity is an ongoing process designed to ensure that the compensation of employees in female job classes is not subjected to systemic gender discrimination.<sup>204</sup> Section 7 provides that maintaining pay equity should be a regular duty of the employer and that the employer or bargaining agent must not bargain for compensation practices that will contravene subsection (1).

All pay equity legislation includes definitions of ‘Wages’,<sup>205</sup> ‘Pay’,<sup>206</sup> or ‘Compensation’.<sup>207</sup> The Ontario’s Act covers both the public and the private sectors, as well as those employers who employ 100 or more employees, and seasonal workers excluding students employed during vacations.

The other three Acts,<sup>208</sup> however, restrict the coverage to the public sector. These include the so-called ‘narrow public sector’ which is defined primarily as the provincial government as employer of workers in the civil service.<sup>209</sup> The Ontario Act also requires all private sector employers with 100 or more employees to introduce a pay equity plan.<sup>210</sup> In terms of section 1(2) and (3), the pay equity plan must be posted in the workplace instead of being filed with the Pay Equity Commission. Since it is not mandatory to file a plan it becomes difficult to monitor the extent to which the Act is complied with.

The four standard factors traditionally used in ‘equal work of equal value’ also apply to pay equity, namely skill, effort, responsibility, and working conditions. The employers or bargaining agent may further define these four sub-factors in a way that is appropriate and effective in the workplace. The Ontario Act uses the term ‘job comparisons’ instead of ‘job evaluation’. Given the structure of Ontario’s pay equity process and its use of the four standard factors typically employed in job evaluation, it is assumed that a job evaluation methodology is used to compare jobs, namely:

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<sup>204</sup> McDermott (note 198 above) 46.

<sup>205</sup> Section 1 Manitoba Act of 1984, section 1 Prince Edward Island Act of 1988.

<sup>206</sup> Section 1(o) Nova Scotia Act of 1988.

<sup>207</sup> Section 1 Ontario Act of 1987.

<sup>208</sup> Manitoba Act of 1984, Prince Edward Island Act of 1988 and Nova Scotia Act of 1988.

<sup>209</sup> McDermott (note 198 above) 46.

<sup>210</sup> Pay Equity Commission (Ontario) *The Equal Pay Act*  
<http://www.gov.on.ca/LAB/pec/pubs/acte.htm>.

- The ‘job-to-job’ comparison method directly compares female job classes with male job classes in the same organisation to determine if they are equal or comparable in value.
- The proportional value comparison method (used where direct comparisons are not possible) indirectly compares female job classes with a group of representative male job classes in the same organisation.
- The proxy comparison method is only used by broader public sector organisations, if the latter cannot achieve pay equity using job-to-job or proportional value comparisons, and if they have a review officer’s order from the Pay Equity Commission. This method allows a comparison of female job classes in one organisation with female job classes that have achieved pay equity in another broader public sector organisation offering similar services.<sup>211</sup> The Ontario Act requires employers to raise the wages of the female job class to the lowest wage of all possible ‘comparable’ male job classes (those which have similar job evaluation results).<sup>212</sup>

The Ontario Act does not prevent differences in remuneration between a female job class and a male job class if the employer can show that the difference is the result of formal seniority systems, temporary employee training or development assignment, merit system, red circling, and skills shortages.<sup>213</sup>

The Ontario Act protects employees against intimidation or discrimination for exercising their rights under this Act. Section 32(4) allows an employee or a group of employees to remain anonymous, and the agent of the employee or group of employees shall be the party to the Hearing Tribunal.

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<sup>211</sup> Note 5 above.

<sup>212</sup> McDermott (note 198 above) 49.

<sup>213</sup> Section 8(1) Ontario Act of 1987.

In Ontario, the Pay Equity Commission was established to handle pay equity disputes. When the Pay Equity Commission receives a complaint, it is referred to the review service in which the review officer investigates the complaint. If he is unable to make an order the matter is then referred to the Hearing Tribunal.<sup>214</sup> The Ontario Act requires employers proactively to implement pay equity in their organisation within a specified time and monitor their progress by inspections.<sup>215</sup> However, employees retain the right to bring individual complaints.<sup>216</sup> In complaints base system the onus of filing a complaint rests with a particular employee or group of employees.

On the other hand, Canada has successfully narrowed the gender-based wage gap but its weakness lies in the fact that only four jurisdictions have legislation dealing with proactive pay equity. If all provinces introduce the proactive pay equity, equal pay for men and women would have been higher than it is at present. In addition, the Equal Pay Act requires that the job evaluation method employed in proactive pay equity be gender-neutral. Without a definition of gender-neutral, this causes problems in the interpretation of such term.

### 3.5 The role of unions

The involvement of unions in the equal pay issue has undoubtedly reduced the gap between male and female earnings. Eyraud states that collective bargaining has been an effective way of fighting flagrant forms of discrimination, whereas legislation was used effectively to fight against subtle forms of discrimination.<sup>217</sup> In the United Kingdom collective bargaining allows the union greater control than merely supporting an applicant's case in an industrial tribunal.<sup>218</sup> In the United States, collective bargaining has furthered the cause of pay equity. Once the union won representative rights, it attempted to address equal pay concerns in collective bargaining.

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<sup>214</sup> *Ibid* section 23.

<sup>215</sup> *Ibid* sections 14 and 15.

<sup>216</sup> Christie (note 195 above) 286.

<sup>217</sup> F Eyraud 'Equal pay: an international overview' in Eyraud & Hartnell (eds) *Equal pay protection in industrialised market economies: in search of great effectiveness* ILO Office 19.

<sup>218</sup> McCrudden (note 136 above) 153.

According to Frazer, the democratic foundations of collective bargaining in Australia are indirect because the official recognition of collective bargaining relied on the rights of registered unions to enter into agreements or to seek awards under the conciliation and arbitration system.<sup>219</sup> In Australia trade unions and women's organisations have all been significant proponents of equal pay developments in the jurisdiction. Statistics indicates that 43% of unionised workers in Australia are women.<sup>220</sup> Despite the increase in women unionisation, female rates still drop considerably below those for men. The centralised wage-fixing and high rates of unionisation have promoted women's wages.<sup>221</sup>

Unions in the United States have traditionally negotiated not only on wage rates but on how jobs should be slotted into wage grades based on notions of value.<sup>222</sup> Unions have also forced the rearrangement of jobs in a hierarchy even if women are not involved.<sup>223</sup> The decline in unionisation since the 1980s has limited the unions' scope in bargaining for equal pay and job classification.

In the United Kingdom, despite the existence of very elaborate legal procedures, the unions provide the main forum for action against wage discrimination, mainly through their assistance to individual claimants.<sup>224</sup> The union's interest in the issue of equal pay for work of equal value has been stimulated by the desire to attract more women members at a time of waning membership.

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<sup>219</sup> A Frazer 'Individualism and collectivism in agreement-making under Australian labour law' in M Sewerynski (ed) *Collective agreements and individual contracts of employment* 53.

<sup>220</sup> Australian Bureau of Statistics: Trade union statistics 30 June 1988 Cat.6323.0 (Canberra AGPS 1989): discussed in Thornton (note 169 above) 37.

<sup>221</sup> Thornton (note 169 above) 38.

<sup>222</sup> Bellace (note 27 above) 171.

<sup>223</sup> An example would be the work the United Steelworkers of America did in the basic steel industry in the late 1930s and early 1940s, cited by Bellace (note 27 above) 171.

<sup>224</sup> Eyraud (note 15 above) 46.

The Ontario Act of Canada differs from that of other jurisdictions because it places a duty on the employers to develop and implement pay equity on behalf of unorganized workers. In Canada, only unionised employees have bargaining agents who represent employees on matters relating to pay equity. Thus, only unions and employers can engage in 'good faith' bargaining, while non-unionised employees have to wait until the employer has a plan in place before they can complain.<sup>225</sup> The Ontario Act does not require a single job evaluation scheme, as each bargaining unit negotiates a separate one.

According to McDermott, pay equity negotiations and bargaining for new collective agreements could occur jointly and jurisdictional conflicts would emerge between these two undertakings.<sup>226</sup> The relationship between collective bargaining and pay equity process, however, is still unclear. The Ontario Act states that a pay equity plan 'prevails over' the provisions of all relevant collective agreements and that wage adjustment shall be 'deemed to be incorporated into and form part of the relevant collective agreements'.<sup>227</sup> Therefore only the Ontario Act in Canada gives the employer an explicit right to alter the wage relationships established by the pay equity exercise.

The industrialised countries discussed above had equal pay Acts but the promotion of equal pay for work of equal value has not yet reached its climax. This is due to the uncertainty regarding the meaning of certain terms. The resistance to accept the comparable worth doctrine is a major set-back for the promotion of equal pay for work of equal value. Priority must therefore be given to the implementation of legislation, in other words when enacting equal pay legislation, the legislature should consider the question of how to implement such legislation.

#### **4. PAY DISCRIMINATION IN SOUTH AFRICA**

South Africa does not have specific legislation concerning equal pay. The general principle has been that unequal remuneration in itself is not unfair,<sup>228</sup> but where there is a differentiation it should be on account of some factor, which does not have

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<sup>225</sup> Section 15(4)(5)(6) and (7) of Ontario Act.

<sup>226</sup> McDermott (note 198 above) 58.

<sup>227</sup> Section 13(10) of Ontario Act.

<sup>228</sup> *Transport and General Workers Union v Bayete Security Holdings* (1999) 4 BLLR 401 (LC).

as its basis generalized assumptions about the characteristics of particular groups of people.<sup>229</sup>

South Africa ratified both ILO Conventions promoting equal pay namely, Convention No. 100 of 1951<sup>230</sup> and Convention No. 111 of 1958.<sup>231</sup> The South African government has also enacted the Employment Equity Act<sup>232</sup> and the Labour Relations Act<sup>233</sup> in order to promote equality in the workplace. In the Labour Relations Act remuneration is defined in section 213 as ‘any payment in money, or in kind, or both in money and kind, made or owing to any person in return for that person working for any other person including the state’.<sup>234</sup> Therefore, any benefit the employee receives as part of the package should be equal, subject to substantive equality,<sup>235</sup> for example maternity benefits.

Article 1(1) of the ILO Convention No. 111 defines ‘discrimination’ as ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’. According to Dupper and Garbers, the idea behind the ILO’s definition is that one can distinguish between two forms of discrimination namely, direct and indirect discrimination. Both concepts originated in the United States.<sup>236</sup> Direct pay discrimination occurs when employees performing identical or equal work are rewarded differently for no other reason than race, gender or sex.<sup>237</sup> Indirect discrimination means ‘unequal payment to categories of employees in terms of seemingly neutral criteria (e.g. job descriptions) which, however, coincide substantially with differences of race, gender or other prohibited grounds of discrimination’.<sup>238</sup>

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<sup>229</sup> D Du Toit *et al* (eds) *Labour relations law: a comprehensive guide* (2000) 444.

<sup>230</sup> Ratified in 2000.

<sup>231</sup> Ratified in 1997.

<sup>232</sup> No 55 of 1998.

<sup>233</sup> No 66 of 1995.

<sup>234</sup> Section 1 of the Employment Equity Act.

<sup>235</sup> Term explained below 47.

<sup>236</sup> O Dupper & C Garbers ‘Commentary: employment discrimination’ in C Thompson & P Benjamin *South African Labour Law* CC1-32.

<sup>237</sup> Note 3 above 289.

<sup>238</sup> *Ibid* 292.



#### 4.1 Constitutional equality

The Constitution of the Republic of South Africa<sup>239</sup> provides for the right to fair labour practices in terms of section 23. Section 9 of the Constitution makes provision for equality in the Bill of Rights, which an employee may raise in the event of an equal pay dispute. In terms of section 9(1) 'everyone is equal before the law and has the right to equal protection and benefit of the law'. Furthermore, section 9(3) provides that 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. In terms of subsection (4) no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination'. Item 2(1)(a) of schedule 7 of the Labour Relations Act (repealed by section 6 of the Employment Equity Act) was enacted to prevent unfair discrimination. Differentiation on the basis of one of the grounds listed in section 9(3) is presumed to be unfair until the contrary is proved.<sup>240</sup> Even if the discrimination is unfair the Constitution provides for the limitation clause in terms of section 36.

Differentiation on the ground that is not on the list of the presumptively illegitimate grounds of differentiation in section 9(3) will constitute discrimination if it can be shown to be analogous to the grounds listed. Unequal pay for work of equal value can therefore be attacked on this ground of differentiation. In *Harksen v Lane NO*<sup>241</sup> the Constitutional Court held that the applicant must show that conduct on grounds other than those listed in section 9(3) is 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparably serious manner'.

In *Harksen*, the Constitutional Court tabulated the stages of an enquiry into a violation of the equality clause as follows:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate

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<sup>239</sup> Act 108 of 1996.

<sup>240</sup> Section 9(5).

<sup>241</sup> (1998) 1 SA 300 (CC) par 46.

government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) First, does the differentiation amount to 'discrimination'. If it is on a specified ground, then discrimination will have been established. If it is not a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) and (4).

(c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause.<sup>242</sup>

The Constitutional Court relied on the following criteria in assessing whether discrimination was unfair. First, does the differentiation discriminate? Secondly, the enquiry is into whether the discrimination has an unfair impact on those affected by it. Thirdly, the extent to which the rights of the complainant have been impaired and whether there has been impairment on his or her fundamental dignity.<sup>243</sup>

In *Larbi-Odam v MEC for Education (North-West Province)*,<sup>244</sup> the Constitutional Court found that a provincial regulation which prevented all non-citizens from being

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<sup>242</sup> *Ibid* para 53.

<sup>243</sup> *Ibid* para 51.

<sup>244</sup> (1998) 1 SA 745 (CC).

appointed into permanent teaching posts was unfair discrimination. The ground for unfair discrimination in this case is citizenship. Citizenship, though not listed, is a suspect because it is based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens. The court found that discrimination was not justified under section 36 of the limitation clause. *Hoffmann v South African Airways*<sup>245</sup> dealt with airline policy of not employing HIV-positive persons as cabin attendants. HIV status was treated as a prohibited ground of discrimination analogous to the listed grounds.<sup>246</sup> The court noted a ‘prevailing prejudice’ against HIV-positive people. In such a context, any further discrimination against them was ‘a fresh instance of stigmatisation’ and an assault on their dignity.<sup>247</sup>

Equality as a value and as a right is central to the task of transformation.<sup>248</sup> Formal equality prescribes equal treatment of individuals regardless of their circumstances, while substantive equality requires effective economic and social equality.<sup>249</sup> The Constitution embodies the notion of substantive rather than formal equity. This goes beyond the formal and equal treatment model to embrace substantive equality.<sup>250</sup>

#### 4.2 Employment Equity Act

South Africa’s first attempt to control unfair discrimination in the workplace was expressed in item 2(1)(a) of the ‘residual unfair labour practice’ in schedule 7 of the Labour Relations Act, which has now been replaced and repealed by section 6 of the Employment Equity Act. Item 2(1)(a) of schedule 7 prohibited any unfair act or omission between an employer and employee based on arbitrary grounds, including but not limited to race, ethnic or social origin, sex, sexual orientation, gender, family responsibility, political affiliation, and belief. In the case of *Leonard Dingler Employee Representative Council v Leonard Dingler and others* (the first discrimination case heard by the new Labour Court) the bounds of permissible and impermissible discrimination were considered. The employer had three separate retirement benefits funds. All members of the benefit fund were white and members

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<sup>245</sup> (2000) 11 BCLR 1235 (CC).

<sup>246</sup> HIV status is a listed ground in terms of section 6(1) of the Employment Equity Act.

<sup>247</sup> *Ibid* para 28.

<sup>248</sup> C Albertyn & B Goldblatt ‘Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 *South African Journal on Human Rights* 249.

<sup>249</sup> C Albertyn & J Kentridge ‘Introducing the right to equality in the interim constitution’ (1994) 10 *South African Journal on Human Rights* 152.

of the pension fund were black weekly-paid employees. The members of the provident fund were black monthly-paid employees. The court held that the refusal by an employer to allow black employees to join the benefit fund, membership of which was confined to whites, constitutes an unfair labour practice, even though black employees had a separate fund.<sup>251</sup>

The aim of the Employment Equity Act is to achieve equality in the workplace by eliminating unfair discrimination and implementing affirmative action in respect of race, gender and disability. The Act recognises the need for designated groups (black people, women and the disabled) to be equitably represented in all occupational categories and levels in the workplace. This is important for women because a high level of female participation usually implies that women are disproportionately represented at lower levels.<sup>252</sup> An investigation by the Labour Market Commission in 1996 found that the bottom 20% of income earners capture a mere 1.5% of the national income, whereas the wealthiest 10% of households receive 50% of the national income<sup>253</sup>. Research conducted by Deloitte & Touche Human Capital Corporation revealed that white men in top management positions filled 80% of such positions in 2000. The study also indicated that women earn 10% less than men on the same job level in the same company. However, it also showed that some companies were narrowing the racial divide, but that the gender divide is still present.<sup>254</sup>

The International Labour Organisation Community Review also notes that, although women's incomes are substantially lower than those of men, the average income for African men is less than that of white women.<sup>255</sup> According to Meintjes-Van der Walt, the problem of pay inequality is further compounded by the fact that white women and Africans are concentrated in occupations at the lower end of the remuneration spectrum. The reasons for this inequality are complex and include

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<sup>250</sup> *President of the Republic of South Africa v Hugo* (1997) 4 SA 1 (CC).

<sup>251</sup> Note 3 above 293.

<sup>252</sup> 'Pay equity: differences between women and men farmworkers' Research Report by: Community Agency for Social Enquiry (CASE) September 1999: 22.

<sup>253</sup> L Meintjes-Van der Walt 'Levelling the 'paying' fields' (1998) 19 *Industrial Law Journal* 23.

<sup>254</sup> 'White men are still SA's best paid' *Business Day* 22 May 2001:21; 'Legislation closing the equity gap in SA's companies' *Business Day* 06 June 2001:9; 'Pale males still rule workplace roost' *Cape Argus* 07 June 2001:9.

<sup>255</sup> Meintjes-Van der Walt (note 253 above) 23.

factors ranging from differentiation by employers against women to the unequal sexual division of labour in relation to housework and child care.

Section 5 of the Employment Equity Act furthermore places a duty on every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Employment policy or practice is widely defined as including recruitment procedures, advertising and selection criteria, appointment and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, disciplinary measures other than dismissal, and dismissal.<sup>256</sup>

In terms of section 6 of the Employment Equity Act discrimination on listed grounds is presumed to be unfair. However, discrimination on listed grounds will be unfair if the differentiation on that ground 'has the effect of nullifying or impairing equality of treatment in employment or occupation'.<sup>257</sup> In *Ntai and others v South African Breweries Ltd*,<sup>258</sup> the court held that discrimination on unlisted grounds can only be considered discriminatory if it is based on 'attributes and characteristics which have the potential to impair the fundamental human dignity of the applicants as human beings'. This does not mean that every employee should be paid the same but rather that the difference in pay should be based on such grounds as length of service, experience or the level of responsibility.

### *The Comparator*

Who is the comparator?<sup>259</sup> In determining equal pay, the position of an employee or job category must be compared with that of other employees or job categories.<sup>260</sup> In an equal pay claim, the employee (in this example, a female) must show that she has been paid differently to another employee employed by the same employer, and that this is based on subjective grounds, namely gender or race, etc. The Employment

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<sup>256</sup> Section 1 of the Employment Equity Act.

<sup>257</sup> Note 13 above article 1(1)(b).

<sup>258</sup> (2001) 2 BLLR 186 (LC) para 72.

<sup>259</sup> Oxford Concise Dictionary define comparator as 'a device for comparing something measurable with a reference or standard or something used as a standard for comparison'.

<sup>260</sup> Du Toit *et al* (eds) *Labour relations law: a comprehensive guide* (2003) 579.

Equity Act does not make provisions on how to determine the comparator. In *Ntai*<sup>261</sup> the applicants were black training officers who alleged race discrimination or arbitrary discrimination because they earned less than their white colleagues who performed the same work. The applicants identified two white employees as comparators. The court accepted the two white employees as comparators but held that the applicants failed to prove grounds upon which their allegation of arbitrary discrimination was based.

#### 4.3 Equal pay for equal work

The notion of 'equal pay for equal work' could imply that individuals with similar qualifications and experience should receive equal pay only when they are performing exactly the same work under identical conditions.<sup>262</sup> In *SACWU v Sentrachim Ltd and others*,<sup>263</sup> employees were dismissed after a lengthy strike. The employees alleged that the employer discriminated between black and white employees on the grounds of race by paying black employees less than white employees in the same grade. It was held that wage discrimination based on race or any other difference between employees, other than skills and experience, is an unfair labour practice.<sup>264</sup> The Supreme Court affirmed the prohibition of direct wage discrimination.<sup>265</sup> The approach in the *Sentrachim* case will not remove wage discrimination against women in 'women only occupations or against blacks in occupations' where they are predominant. The equal pay for equal work approach does not, for instance, overcome *de facto* discrimination in a situation where there is a concentration of women in jobs considered to be typically female. It is preferable to adopt the principle of equal pay for work of equal value.

#### 4.4 Equal pay for work of equal value

The principle of 'equal pay for work of equal value' is assessed on the basis of certain common criteria (skill, effort, responsibility) which are of equal value to

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<sup>261</sup> Note 258 above.

<sup>262</sup> Meintjes-Van der Walt (note 253 above) 25.

<sup>263</sup> (1988) 9 ILJ 410 (IC).

<sup>264</sup> The Industrial Court under the Labour Relations Act of 1956 pronounced 'unfair' under the general definition of unfair labour practice and the Labour Relations Act of 1995 substituted the definition of unfair labour practice with statutory provisions which expressly describe impermissible employer actions. In *Maseko v Entitlement Experts* (1997) 3 BLLR 317 (CCMA) it was held that unfair acts by employees against their employers are not justifiable under the 1995 Labour Relations Act. Grogan states that 'to succeed in an action based on an alleged unfair labour practice, an employee must prove that the conduct or practice complained of falls within the statutory definition' in (note 9 above) 228.

<sup>265</sup> *Sentrachim Ltd v John NO* (1989) 10 ILJ 249 (W) 259 C-D.

those of the comparator employed by the same employer. These values should be assessed from the point of view of work content, training and experience, complexity, and responsibility.<sup>266</sup> In *Fouche and Eastern Metropolitan Local Council*,<sup>267</sup> the employee claimed that he was discriminated against by not being paid a higher salary and that he was entitled to a higher salary by virtue of a report on executive positions that had been adopted by the bargaining council. The arbitrator found that factors such as qualifications and skills used by the employer were to be related to 'the complexity of the job'. The employees' salary levels were to be 'based on job requirements' and not on the 'performance levels of individuals'. In *Louw and another v Golden Arrow Bus Services (Pty) Ltd*,<sup>268</sup> the court dealt with the issue of racial discrimination. The applicant alleged that he was paid less than his white colleague although the work performed was equal in value. Landman J observed that:

it is necessary to distinguish clearly impermissible grounds. An unfair labour practice is only committed (even by omission) if the impermissible grounds are the cause of the discrimination. Discrimination on a particular 'ground' means that the ground is the *reason* for the complaint of disparate treatment. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference of race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less than that of his colleague, *because* of his race.

Landman J noted that English courts relied on the standard legal test for causation namely, the *sine qua non* or 'but for' test, that is would the complaint have received the same treatment but for his or her race or sex. The court found that 'it is unfair practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, for example race or ethnic origin'.<sup>269</sup> The court held that the applicant failed to prove discrimination because the content of his job was not the same as that of his white colleague.<sup>270</sup> In *Woolworths (Pty) Ltd v Whitehead*,<sup>271</sup> the applicant complained that unfair labour practice has been committed in terms of item 2(1)(a) of schedule 7 of the Labour Relations Act of 1995, where she has been unfairly discriminated against on the grounds of her

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<sup>266</sup> Mentjies-Van der Walt (note 253 above) 26.

<sup>267</sup> (1999) 8 ARB 6.12.1.

<sup>268</sup> (2000) 3 BLLR 311 (LC).

<sup>269</sup> *Ibid* para 26.

<sup>270</sup> *Ibid* para 109.

<sup>271</sup> (2000) 1 ILJ 571 (LAC).

pregnancy. Zondo J applied the ‘but for’ test and found that the applicant failed to show that, but for her pregnancy, she would have been appointed to the position despite the employer having another candidate who was better suited for the position than herself. The court held that there was no causal connection between her not being appointed and her pregnancy.<sup>272</sup> This decision illustrates that in an unequal pay dispute, the applicant has to show that there is a causal connection between her sex and the difference between her salary and that of her male colleague.

The Labour Relations Act states that discrimination was impermissible only when it is exercised against an employee on any arbitrary grounds.<sup>273</sup> In *Ntai*, the court held that the applicant failed to show that the differentiation in pay amounted to discrimination in terms of item 2(1)(a) of the Labour Relations Act. The court also held that mere arbitrary actions of an employer do not amount to discrimination.<sup>274</sup> In *Woolworths*, the court found that there was nothing arbitrary in the employer’s conduct by taking into account the applicant pregnancy in deciding whether or not to offer her a contract of permanent employment. The court accepted that the employer needed continuity in the position for an uninterrupted period of at least 12 months. Therefore, the applicant will not fulfill this requirement since she will be on maternity leave some months after her commencement of employment.<sup>275</sup>

Meintjies-Van der Walt states that the advantage of using the equal value approach is that dissimilar jobs can be compared and that this approach can therefore broaden the scope of equal pay protection.<sup>276</sup>

Meintjies-Van der Walt suggests that the following aspects should be included in the Code of Good Practice to serve as guidelines to both employers and employees in order to assess the principle of equal pay for work of equal value.<sup>277</sup>

(a) Jobs requiring equal skills in performance. According to the United States Employment Commission, skills include factors such as experience, training, education, and ability.

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<sup>272</sup> *Ibid* para 19 and 24.

<sup>273</sup> Item 2(1)(a) of schedule 7.

<sup>274</sup> Note 258 para 73.

<sup>275</sup> Note 271 para 129.

<sup>276</sup> Meintjies-Van der Walt (note 253 above) 26.

<sup>277</sup> *Ibid*.



- (b) Equal pay standards should apply to all jobs in which performance requires equal responsibility.
- (c) Where substantial difference exists in the amount or degree of effort required to be expended in the performance of jobs, an equal pay standard cannot apply even though the jobs may be equal in all other respects.
- (d) Performance under similar working conditions. In the United States the term ‘similar working conditions’ encompasses two sub-factors namely, ‘surroundings’ and ‘hazard’.

In terms of section 10 of the Employment Equity Act, unequal pay disputes based on prohibited ground should be referred to the Commission for Conciliation, Mediation and Arbitration within six months of the conduct that gave rise to the dispute. After the six months period the Commission for Conciliation, Mediation and Arbitration may permit a party to refer a dispute provided good cause is shown.<sup>278</sup> If it remains unresolved after conciliation, the dispute may be referred to the Labour Court for adjudication or the parties may consent to arbitration of the dispute. However, the Labour Court may take into account any delay on the part of the party who seeks relief in processing a dispute.<sup>279</sup> In *Lilian Dudley v The City of Cape Town and another*,<sup>280</sup> the applicant alleged that she had been unfairly discriminated in terms of section 6(1) and (2) of the Employment Equity Act. The case is relevant to pay discrimination because it provides that unfair discrimination disputes have to be referred to the Commission for Conciliation, Mediation and Arbitration.<sup>281</sup>

Section 11 of the Employment Equity Act provides for burden of proof that is ‘whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair’. When unfair discrimination alleged is on listed grounds, the employer must establish that it is fair. In *Transport and General Workers Union v Bayete Security Holdings*,<sup>282</sup> the onus of proof was reversed; the court required the employee to prove that there was something other than the fact that he was black and his higher paid colleague was white before it was prepared to conclude that the difference in their wages amounted

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<sup>278</sup> Section 10(3).

<sup>279</sup> Section 50(3).

<sup>280</sup> Case no C828/2002 (LC).

<sup>281</sup> *Ibid* para 54-57.

<sup>282</sup> Note 228 above.

to discrimination. In *Golden Arrow Bus Service*, the court held that the onus or burden of proof rests on the applicant claiming relief.

#### 4.5 Employer's defences

The Employment Equity Act does not expressly provide for pay discrimination nor for the defences. However, two general statutory defences to unfair discrimination are applicable to unequal pay claims.<sup>283</sup> In the United Kingdom, the employer has to show that the difference in pay is genuinely due to material factors, and not to a difference in sex.<sup>284</sup> The European Court of Justice allows the justification for the difference in pay only where it relates to a real business need of the employer.<sup>285</sup> If the employer adopts a discriminatory pay policy and the means chosen for achieving the objective correspond to a real need on the part of the undertaking, then such discrimination is necessary in order to enable the undertaking to function effectively. In the United States, discrimination is allowed if based on seniority, merit, productivity or any other factors except sex.<sup>286</sup>

In South Africa, the market force defence is likely<sup>287</sup> to reflect the biases of the society within which it functions, and market base will undermine the provision against discrimination.<sup>288</sup> In *Golden Arrow Bus Services*,<sup>289</sup> the Labour Court stated that market factors were accepted as one of the influences, which in combination with others may legitimately cause variation in remuneration levels, provided that they are uncontaminated. In *NUMSA and SAMANCOR Ltd (Meyerton Works)*,<sup>290</sup> the applicant filed a grievance in which he complained that his salary was lower than that of other Human Resources Officers in the same job at Meyerton Works. It was not alleged that the differentiation between the various Human Resources Officers is based on any criteria mentioned in item 2(1)(a) of Schedule 7 of the Labour Relations Act or any other inherent characteristics of classes of employees. The arbitrator had to deal with the issue of the right to equality. According to Mr.

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<sup>283</sup> Section 6(2) states '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 the a job.

<sup>284</sup> Section 1(3) of the Equal Pay Act of 1970.

<sup>285</sup> Note 137 above.

<sup>286</sup> Note 61 above.

<sup>287</sup> This means based on real and substantial grounds, there is a strong probability that the harm consequence will ensure.

<sup>288</sup> Du Toit (note 260 above) 581.

<sup>289</sup> Note 268 above para 76-82.

<sup>290</sup> 1998 7 ARB 6.7.12.

Tauber, Group Remuneration Manager of Meyerton Works, a shortage of candidates for a particular job, and the need to attract them by means of higher pay constituted an objectively justified ground for the differentiation.

The arbitrator considered the following three principles in determining equal remuneration, namely:

- (a) market forces- there was no evidence of the specific market force operating at the time of recruitment of the various Human Resources Officers;
- (b) individual competence- the competence, qualifications and experience of the Human Resources Officers were evaluated at the time of their recruitment by means of interviews, curricula vitae, and testing; and
- (c) individual worth- this is not evaluated on a regular basis in respect of employees within the NUMSA bargaining unit.

The arbitrator noted that historical factors were responsible for the differentiation in remuneration. These historical factors were the market forces that prevailed at the time of recruitment of the various Human Resources Officers, and their evaluation at that time.<sup>291</sup> No award was made in this case. The arbitrator required the parties to reach a mutually acceptable and appropriate solution only after a year; thereafter the applicant could approach the arbitrator if the discrepancy in his salary was not addressed. In *Association of Professional Teachers and another v Minister of Education and others*,<sup>292</sup> the applicant (a professional teacher and principal of a primary school) applied for a housing subsidy. Her application was rejected because she was married and her husband was in full-time employment and not permanently and medically unfit to obtain employment. The court noted that, in terms of unfair labour practice, the consideration of justification is considered together with the question of fairness and does not usually require a separate investigation. The court held that a policy which distinguishes on the basis of sex constitutes unfair labour practice as it unfairly discriminates against and offends the requirement of equal pay for equal work.<sup>293</sup> The court noted that the respondent policy was motivated by the perception that married men are primarily breadwinners. The court held that such perception is neither justified nor could it pass the test of a fair labour practice.<sup>294</sup>

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<sup>291</sup> *Ibid* 4.

<sup>292</sup> (1995) 16 ILJ 1048 (IC).

<sup>293</sup> *Ibid* 1089 para J.

<sup>294</sup> *Ibid* 1090 para A-C.

In *George v Western Cape Education Department and another*,<sup>295</sup> the applicant applied for a house owner allowance. Her application was turned down because she was a married woman whose husband was not permanently medically disabled, but was in fact a full-time university student. The employment relationship between the applicant and respondents was regulated by the Personnel Administration Manual which excludes married women from obtaining a house owner allowance. The court held that a collective agreement is not a defence to a claim of unfair discrimination.<sup>296</sup>

Since South African legislation does not expressly provide defences for unequal remuneration, there is uncertainty as to what will be accepted as a ground of justification for unequal remuneration. At present, the Labour Court must exercise its own discretion in accepting any defence raised by the employer as valid in the absence of prohibited grounds, and in the judgements refer to other jurisdictions.

#### 4.6 Disproportionate differentials

Disproportionate income difference is relevant to pay discrimination because it refers to the ratio between the remuneration of employees at different levels and in different occupation categories. Collective bargaining could be considered the most effective method of dealing with real change in equal pay practices because the Labour Court cannot simply take over wage determination in every industry. The Labour Relations Act therefore favours the voluntary and private regulation of collective bargaining.<sup>297</sup> The Labour Relations Act does not contain a statutory duty to bargain. However, parties can agree to bargain collectively. This will amount to a contractual duty to bargain.<sup>298</sup>

The legislature added section 27 of the Employment Equity Act in response to trade unions including COSATU's outcry over the wage gap. COSATU criticized the Employment Equity Bill by stating that the legislature had addressed the problem of

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<sup>295</sup> (1995) 16 ILJ 1529 (IC).

<sup>296</sup> *Ibid* 1548 J and 1549 A-C, the court followed the *Enderby* case on collective bargaining as a defence.

<sup>297</sup> Sections 21(3), 28(1), 64, 80(7).

<sup>298</sup> M Olivier N Smit E Kalula & G Leslie 'Collective agreements and individual contracts of employment in labour law - South African report' in M Sewerynski (ed) *Collective agreements and individual contracts of employment* 219.

wage inequality where two workers are in the same job grading but are paid differently based on race and gender.<sup>299</sup> However, the legislature had not paid sufficient attention in the proposed legislation to the pay difference between the highest occupational level and the lowest occupation level. The Department of Labour then proposed section 27 in response to COSATU's proposal for closing the wage gap. Section 27(1) provides that employers must submit a statement on the remuneration and benefits paid to employees in the occupational category and level of their workforce to the Employment Conditions Commission. Section 27(2) further states that if disproportionate income differentials are reflected in such statement, the employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister of Labour upon advice of the Employment Conditions Commission.

Section 27 does not define disproportionate income differentials. It does, however, create a *prima facie* inference that pay differentials established by collective bargaining are proportionate. First, the Employment Conditions Commission is under a duty to research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials.<sup>300</sup> Secondly, compliance with section 27(2) can be achieved by complying with a sectorial determination made by the Minister in terms of section 51 of the Basic Conditions of Employment Act.<sup>301</sup> Du Toit states that the Employment Conditions Commission in framing its advice 'is directed to consider a range of factors, including the ability of employers to carry on their business successfully in terms of section 54(3)(b) of the Basic Conditions of Employment Act and the likely impact of any proposed condition of employment on current employment or the creation of employment in terms of section 54(3)(h) of the Basic Conditions of Employment Act'.<sup>302</sup>

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<sup>299</sup> COSATU commented that 'a bill that attempts to bring about true equity has to address the issue (of the apartheid wage gap) and address it seriously' in 'COSATU-Statement on Employment Equity Bill and the apartheid wage gap' *Press Statement* 5 August 1998 COSATU Parliamentary Office.

<sup>300</sup> Section 27(4).

<sup>301</sup> No 75 of 1997.

<sup>302</sup> Du Toit (note 260 above) 582.

COSATU and its affiliates, together with Non-Governmental Organisations have pressed for more progress in securing the equal pay for work of equal value.<sup>303</sup> The following have been emphasised:

- (a) Skills acquired by women on the job must be highly valued and reflected in remuneration.
- (b) Incorporating the equal pay principle in collective bargaining for all full-time and part-time workers.
- (c) All casual workers, irrespective of their employment contracts, are to be covered by collective bargaining so that the above principle is respected.
- (d) Promoting and securing legislation on equal pay for equal work and work of equal value.
- (e) Upgrading low wages and salary categories in jobs traditionally held by women.
- (f) Eliminating barriers that prohibit women from entering jobs traditionally held by men.
- (g) Developing specific campaigns to promote equal pay.

No enforcement mechanism is laid down other than the general power of the Labour Court to order compliance with any provision of the Act (section 50(1)(f)). Parties engaging in collective bargaining for the purposes of this section may request disclosure of the information contained in the employer's statement on remuneration and benefits in subsection (1), subject to the employer's right not to disclose confidential or other restricted categories of information in terms of section 16(4) and (5) of the Labour Relations Act.

In terms of reducing disproportionate income differentials, trade unions have an important role to play both in terms of collective bargaining and being a watchdog in respect of designated employers reporting statements of remuneration and benefits to the Employment Conditions Commission.

## **5. FEATURES OF ANTI-DISCRIMINATION LEGISLATION**

When persons are treated differently and disadvantageously and this discrimination occurs on a prohibited ground, for example sex or race, they are protected by anti-

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<sup>303</sup> 'Gender policy' September (2000) 9:3 *The Shopsteward*.

discrimination legislation. The terms and conditions of women in a workplace may therefore in the same manner also be improved by anti-discrimination legislation.

Anti-discrimination legislation is based on the Aristotelian concept of equality, which requires 'like to be treated alike'.<sup>304</sup> To be successful in this regard the female employee must show that a male employee has been treated more favourably. This is, however, difficult for black women as they are in the most subordinate position in the workplace in which there is no comparable male in such a position. During the apartheid era, black women in South Africa experienced subordination because colour of their skin and their gender.

Anti-discrimination legislation features are namely, individualism and symmetrical treatment.<sup>305</sup> Individualism, in this instance, protects individuals or groups of individuals who can show that they are disadvantageously treated, and requires employers to treat women as individuals not as members of a particular sex. Symmetrical treatment requires that women should be treated the same as men and that men should be treated the same as women. Should problems arise, women should be acknowledged to differ biologically from men.<sup>306</sup>

### 5.1 Individualism

The principle of individualism ignores the group basis of discrimination. Anti-discrimination legislation that focuses on individuals obscures the essence of discrimination. According to Fredman, opportunities available to a person are determined according to assumptions based on her membership of a group rather than her individual needs or talents.<sup>307</sup> O'Regan states that anti-discrimination cases brought to the courts are individualised because they require an individual to complain about a particular discrimination.

Employers should focus on the characteristics of the individual. This has been entrenched in the individual approach. According to O'Regan, individual approach

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<sup>304</sup> C O'Regan 'Equality of work and the limits of law: symmetry and individualism in anti-discrimination legislation' (1994) *Acta Juridica* 68; K Wentholt 'Formal and substantive equal treatment: the limitations and the potential of the legal concept of equality' in T Leonen & PR Rodrigues (eds) *Non-discrimination law: comparative perspective* (1999) 53.

<sup>305</sup> *Ibid* O'Regan 66.

<sup>306</sup> *Ibid* 67.

requires an employer not to base his/her decision to treat a woman less favourably than a man on generally imputed characteristics or on a stereotype or on shared characteristics.<sup>308</sup>

## 5.2 Symmetrical treatment

The problem of symmetrical treatment is that it requires a woman to show that she has been treated less favourably than a male in a similar situation.<sup>309</sup> A key problem for anti-discrimination legislation arises when a disadvantaged woman cannot find a male in a similar situation, for example refusals to accord special benefits to pregnancy on the grounds that such benefits are not available to men. According to Wentholt, the need for protection of a woman in pregnancy justifies an exception to the basic rule that men and women must be treated alike.<sup>310</sup>

Pregnancy in Britain, for instance, is based on a male norm in terms of section 1(1)(a) of the Sex Discrimination Act of 1975. In the British cases, pregnant women are compared with ill men<sup>311</sup> or disabled men. In *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen*,<sup>312</sup> the European Court of Justice took a different approach by stating that ‘the most important reason for the refusal to recruit applied exclusively to one sex; because only a woman can be refused employment by virtue of pregnancy, such a refusal amounted to direct discrimination’.<sup>313</sup> Pregnancy attracts rights for its own sake; therefore it should not be compared with a male norm.

Since anti-discrimination legislation focuses on differential treatment rather than on the impact of such treatment, it causes problems.<sup>314</sup> This legislation prohibits treatment, which may favour women and undermine a systematic disadvantage. O’Regan states that anti-discrimination legislation provisions permitting affirmative

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<sup>307</sup> S Fredman ‘European community discrimination law: a critique’ (1992) *Industrial Law Journal* (UK) 132.

<sup>308</sup> O’Regan (note 304 above) 78.

<sup>309</sup> Section 1(1)(a) of British Sex Discrimination Act 1975.

<sup>310</sup> Wentholt (note 304 above) 55.

<sup>311</sup> *Hayes v Malleable Working Men’s Club and Institution* (1985) ICR 703.

<sup>312</sup> Case no C177/88 (ECJ); In *Webb v Emo Air (UK) Ltd Cargo* Case no C32/93 (ECJ), the court confirmed that there can be no question of comparing the situation of a pregnant women with that of a man similarly incapable for medical or other reason para 24.

<sup>313</sup> Fredman (note 307 above) 122.

<sup>314</sup> O’Regan (note 304 above ) 71.



action ensure that programmes aimed at ensuring equality between men and women are not unlawful.<sup>315</sup>

Anti-discrimination legislation can eradicate unequal pay between male and female employees. However, anti-discrimination legislation focuses largely on individual and symmetrical treatment which requires that women be treated the same way as men, ignoring the fact that men and women are biologically different. Courts have accepted that a male comparator is not needed when a woman has clearly been disadvantaged by the use of sex-specified criteria such as pregnancy.<sup>316</sup> The South African Constitution and Employment Equity Act expressly forbid direct and indirect discrimination and afford equal treatment of men and women, unless a distinction is based on objective and reasonable grounds such as pregnancy and affirmative action.

## 6. CONCLUSION

South Africa's women still endure wage discrimination in respect of work of equal value in the workplace. The issue needs to be addressed urgently in order for South Africa to have a stable workforce that can compete locally and internationally. The doctrine of comparable worth is an important element in promoting equal pay for work of equal value. The United States introduced the doctrine of comparable worth, which did not receive sufficient judicial support. Australia rejected the doctrine of comparable worth, including traditional factors of job evaluation such as skills, effort, responsibility, and working conditions. In South Africa, the notion of 'equal pay for work of equal value' received legislative support in item 7.3.1 of the Code of Good Practice<sup>317</sup> and in section 37 of the Public Service Act Proclamation.<sup>318</sup>

The industrial countries above have legislation dealing with equal pay whose weakness lies in the implementation of such Acts. Certain terms and concepts in these Equal Pay Acts are ambiguous, unclear and uncertain. These concepts or terms can therefore be interpreted differently by courts and tribunals, and create a loophole in promoting equal pay. The British Equal Pay Act is uncertain as to what

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<sup>315</sup> *Ibid* 72; Wentholt (note 304 above) 56, 60.

<sup>316</sup> Note 312 above.

<sup>317</sup> Code of Good Practice: Preparation, implementation and monitoring of employment equity plans (Government Notice 1394 dated 23 November 1999).

<sup>318</sup> No 103 of 1994.

constitutes a ground of justification for equal pay and resulted in employers justifying their difference in pay more easily because of the legal technicalities. These problems had prevented the principle of equal pay for work of equal value between men and women from reaching its climax.

The Constitution provides relief in unequal pay for work of equal value disputes, when the ground for differential is unlisted in terms of section 9(3) of the Constitution. The ground for differential must be analogous to the listed grounds and relates to attributes or characteristics that impact on human dignity.

To a certain extent, pay discrimination against women is eliminated by incorporating equal pay principles in collective agreements for full-time and part-time workers. Collective bargaining has always played a pioneering role in labour issues because it is more flexible than legislation as it is less general and takes innovative social practice into consideration. In the United States, the United Kingdom and Australia, unions significantly promoted the development of the 'equal pay' approach. The fundamental problem regarding reliance on collective action by female employees is the limited availability of union representatives and the fact that not all sectors are unionised. Australia has the most equal pay between men and women because of female unionisation. South African unions have significant roles to play in promoting equal pay and in assisting individual complainants, as indicated by the vital role COSATU played in the enactment of section 27 of the Employment Equity Act.

Finally, the Employment Equity Act is at present the most important vehicle in achieving equity in the workplace. The Employment Equity Act promotes equal remuneration for work of equal value in an indirect manner.<sup>319</sup> Therefore, the legislature should directly include provisions regulating unequal remuneration for work of equal value in respect of women and men in the Employment Equity Act. These should include binding provisions for work of equal value and justifications for work of unequal value, as it is to a large extent at the discretion of the courts to determine whether the employer's defences are justifiable. In giving full effect to this Act and making the Act as accessible as possible, the legislature must consider whether there will be any obstacles in implementing such provisions, in order to

ensure that South Africa does not encounter similar problems experienced in industrialized countries but, rather, to set an attractive precedent for other countries. South Africa will now comply with international standards in equal pay and rank among those countries which have successfully narrowed the wage gap.

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<sup>319</sup> Sections 5 and 6 of the Employment Equity Act.

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