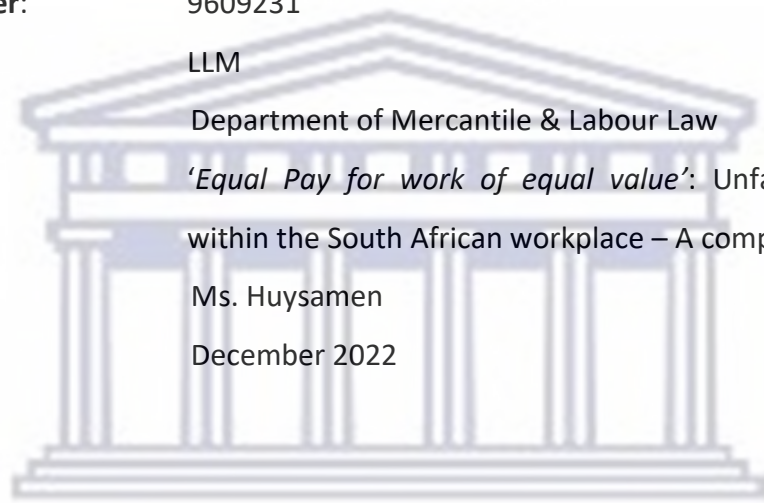


**A MINI THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF LLM: LABOUR LAW IN THE DEPARTMENT OF MERCANTILE AND LABOUR LAW, UNIVERSITY OF THE WESTERN CAPE.**

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## PLAGIARISM DECLARATION

I, Aerial Palmer, declare that the 'Principle of *Equal Pay for Work of Equal Value*: Unfair Discrimination within the South African Workplace- A comparative discussion' is my own work, that 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 acknowledged as complete reference.

Signed: Aerial Kim Palmer:

Date: 11/12/2022



Signed by Supervisor: Ms Elsabe Huysamen

Date:



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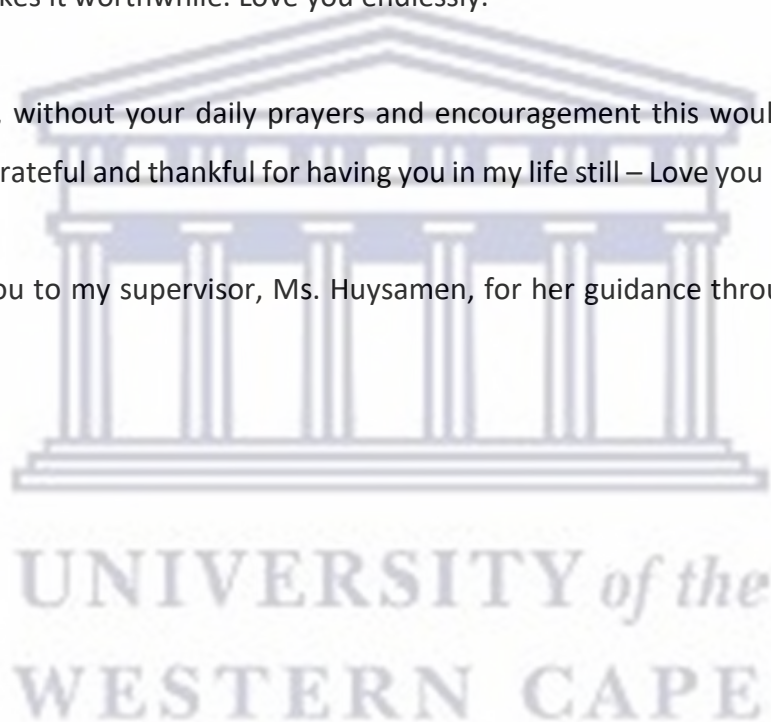
## DEDICATION AND ACKNOWLEDGEMENTS

Firstly, I would like to thank my Heavenly Father, for giving me the strength, wisdom, and knowledge to complete this degree. It is only by His grace and mercy that I could accomplish this. I am eternally grateful and thankful.

To my husband, Israel Palmer, and our daughters Taitum-Lee, Sasha and Jodi, words cannot describe my appreciation for your continuous love, support, and encouragement through this journey. I am eternally grateful and thankful. The journey was not easy but reaching the destination makes it worthwhile. Love you endlessly.

To my parents, without your daily prayers and encouragement this would not have been possible, I am grateful and thankful for having you in my life still – Love you (Jeremiah 29:11).

Lastly, thank you to my supervisor, Ms. Huysamen, for her guidance through this research journey.



## ABSTRACT

The Employment Equity Act 55 of 1998 (EEA) was amended by the Employment Equity Amendment Act 47 of 2013 (EEAA), which, amongst others, introduced sections 6(4) and 6(5) into the Act. Sections 6(4) and 6(5) of the EEAA was enacted to broaden the prohibition of unfair discrimination in the workplace and strengthen enforcement mechanisms. The amended EEA recognises inequalities in employment, occupation, and income within the labour market.

This study will focus on the principle of *equal pay for work of equal value* as incorporated in the EEA as part of anti-discrimination law in South Africa amongst others. It will consider the employers' obligations under *equal pay for work of equal value* and how section 6(4) claims might give rise to a claim of unfair discrimination for purposes of the EEA. In considering the impact gender wage discrimination has in South Africa and globally, the focus of the research will analyse the complexity of the principle of *equal pay for work of equal value* and the provision thereof in the EEA. In doing so, the application of the principle of *equal pay for work of equal value* in the jurisdictions of Australia and India will be considered.



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**KEYWORDS:** *Equal pay for work of equal value*; Direct discrimination; Employment Equity; Equality; Gender Wage Gap; International Labour Organization; Employment Equity Regulation; Fair Labour Practice; Indirect discrimination, Constitution of South Africa; Australia; India

## ABBREVIATIONS

**CCMA:** Commission for Conciliation, Mediation and Arbitration

**CONSTITUTION:** Constitution of the Republic of South Africa 108 Of 1996

**CODE:** The Code of Good Practice on Equal Pay/Renumeration for Work of Equal Value *GN 488 in GG 38837* of 1 June 2015

**EEA:** Employment Equity Act 55 of 1998

**EOWW:** Equal Opportunity for Women in the Workplace Act 1999

**ILO:** International Labour Organisation

**LC:** Labour Court

**LRA:** Labour Relations Act 66 Of 1995

**SC:** Supreme Court

**WGEA:** Workplace Gender Equality Agency



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## CHAPTER 1

### AN INTRODUCTION TO THE STUDY

#### 1.1 BACKGROUND AND PROBLEM STATEMENT

Discrimination is well embedded within the history of South Africa.<sup>1</sup> The right to fair labour practices,<sup>2</sup> equality<sup>3</sup> and dignity<sup>4</sup> were limited prior to the enactment of the Constitution of the Republic of South Africa, 1996 (the Constitution).<sup>5</sup> Labour law is interpreted as a law of fairness applicable to both employers and employees.<sup>6</sup> In order to achieve fairness, an approach capable of reaching a balance between the employment relationship and the protection of fundamental human rights must be reached.<sup>7</sup> The dignity and self-worth of an individual is directly linked to the individual's ability to contribute significantly to society, and such contribution in turn is dependent on a person's employment and career.<sup>8</sup>

Section 9 of the Constitution regulates the right to equality and prohibits unfair discrimination.<sup>9</sup> Section 9 will be discussed in further detail in Chapter 2 where *equal pay for work of equal value* as regulated in the Constitutional and International law is viewed.

The Employment Equity Act 55 of 1998 (EEA), regulates the way in which the right to equality is provided for in labour law, prohibits unfair discrimination, as set out in section 9 of the Constitution.<sup>10</sup> The EEA also makes provision for the implementation of affirmative action measures.<sup>11</sup> Employees are primarily protected against unfair discrimination in the employment context through the provisions of the EEA, supported by the Labour Relations

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<sup>1</sup> D Du Toit, S Godfrey, C Cooper, G Giles, T Cohen, B Conradie & A Steenkamp *Labour Relations Law a Comprehensive Guide* 6 ed (2015) 653.

<sup>2</sup> Section 23(1) of the of the Republic of South Africa 1996.

<sup>3</sup> Section 9 (3) of the Constitution of the Republic of South Africa 1996.

<sup>4</sup> Section 10 of the Constitution of the Republic of South Africa 1996.

<sup>5</sup> Constitution of the Republic of South Africa 1996.

<sup>6</sup> Vettori S 'The role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals' 2012.

<sup>7</sup> Vettori (2012) *PER* 102.

<sup>8</sup> Vettori (2012) *PER* 103.

<sup>9</sup> Section 9 of the Constitution of the Republic of South Africa 1996.

<sup>10</sup> Laubscher T "Equal Pay for Work of Equal Value – A South African Perspective".

<sup>11</sup> Section 2 of the EEA. "Applicants for employment are regarded as employees for purposes of the EEA."

Act 66 of 1995 (LRA),<sup>12</sup> the Employment Equity Regulations of 2014,<sup>13</sup> and the Code of Good Practice on Equal Pay for Work of Equal Value GN 448.<sup>14</sup>

The EEA was amended by the Employment Equity Amendment Act 47 of 2013<sup>15</sup> (EEAA), which amongst others, introduced sections 6(4) and 6(5) into the Act.

This study will focus on the newly introduced principle of *equal pay for work of equal value* into the EEA<sup>16</sup> as part of anti-discrimination law in South Africa. It will consider employers' obligations under *equal pay of work of equal value* and how section 6(4)<sup>17</sup> claims might give rise to a claim of unfair discrimination for purposes of the EEA.

## 1.2 SIGNIFICANCE OF THE PROBLEM

Section 6(4) into the EEA was enacted to directly regulate unequal remuneration for work of equal value within the South African employment context.<sup>18</sup> Prior to the introduction of section 6(4) the EEA contained no specific provision which regulated equal pay claims. Equal pay claims had to be brought in terms of section 6(1) of the EEA which prohibits unfair discrimination on a number of listed or arbitrary grounds.<sup>19</sup>

While *equal pay for work of equal value* claims can be based on any of the grounds listed in section 6(1) of the EEA, internationally such claims are most often based on allegations of gender discrimination and are commonly argued in response to gender pay gaps.<sup>20</sup> Many countries highlight pay inequalities between men and women in national reports on the

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<sup>12</sup> Section 187(1)(f) 'a dismissal is automatically unfair if the employer, in dismissing the employee, if the reason for the dismissal is – that the employer unfairly discriminated against an employee, directly or indirectly, on an arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.

<sup>13</sup> Employment Equity Regulations 2014 GN R595 GG 37873.

<sup>14</sup> Code of Good Practice on Equal Pay for Work of Equal Value GN488 of 2015.

<sup>15</sup> Section 6(4) and 6(5) of the Employment Equity Amendment Act 47 of 2013.

<sup>16</sup> Section 6(4) and 6(5) of the EEAA.

<sup>17</sup> Section 6(4) of the EEA 1998, amended in 2013.

<sup>18</sup> Employment Equity Amendment Act 2013.

<sup>19</sup> Ebrahim S 'Equal Pay for Work of equal value in terms of the Employment Equity Act 55 of 1998'.

<sup>20</sup> 'Equal Pay Compensation Discrimination' [www.eeoc.gov](http://www.eeoc.gov). Retrieved 27 March 2018.

gender pay gap.<sup>21</sup> The gender pay gap or gender wage gap can be defined as ‘the average difference between the remuneration for men and women who are working.’<sup>22</sup> Women are generally paid less than men. While South Africa is still in the early stages of implementing the principle of *equal pay for work of equal value*, many companies/employers have already taken steps to identify pay inequality at all levels. Many of the steps taken have been focussed towards addressing gender pay inequality.<sup>23</sup>

This research thus focuses on the principle of *equal pay for work of equal value* as introduced into the EEA, which is conceptualised in South African labour law.<sup>24</sup>

### 1.3 RESEARCH QUESTION

The research question this study intends to answer is when the principle of *equal pay for work of equal value* as provided in the EEA could give rise to an unfair discrimination claim in terms of section 6(4) of the Employment Equity Amendment Act (EEAA).<sup>25</sup>

### 1.4 AIMS OF THE RESEARCH

As stated in section 1.2 above, the aim of the research is to provide insights in the implementation of the principle of *equal pay for work of equal value* as enacted in sections 6(4) and 6(5) of the amended EEA.<sup>26</sup> This will be done through considering the gender wage gap as example of possible unfair discrimination claims under *equal pay for work of equal value* principles.

In considering the impact gender wage discrimination has in South Africa and globally, the focus of the research will analyse the complexity of the principle of *equal pay for work of*

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<sup>21</sup> The World Economic Forum - <https://www.weforum.org/agenda/2022/03/6-surprising-facts-gender-pay-gap/>.

<sup>22</sup> [https://en.wikipedia.org/wiki/Gender\\_pay\\_gap](https://en.wikipedia.org/wiki/Gender_pay_gap). (accessed 24 April 2019).

<sup>23</sup> Richer, R: Director PwC- <https://www.pwc.co.za/en/press-room/gender-pay-gap.html>. (accessed 7 April 2019).

<sup>24</sup> Employment Equity Act 55 of 1998.

<sup>25</sup> Employment Equity Amendment Act 55 of 1998.

<sup>26</sup> Employment Equity Act 55 of 1998.

*equal value* and the provision thereof in the EEA,<sup>27</sup> including the jurisdictions of Australia and India.

## 1.5 LITERATURE REVIEW

The research is founded on the right to equality and fair labour practices as provided for in the Constitution. In order to achieve this, the application of the principle of *equal pay for work in equal value* in the jurisdictions of South Africa, Australia and India will be explored.

### 1.5.1 South Africa

Research has shown a discrepancy in pay/remuneration between genders,<sup>28</sup> commonly referred to as the gender wage gap. The gender wage gap as part of *equal pay for work of equal value* must be understood in the context of the EEA's<sup>29</sup> implementation of the right to equality as provided for in section 9 of the Constitution.<sup>30</sup>

In the case of *Pioneer Foods v Workers Against Regression (WAR)*<sup>31</sup> the issue was whether length of service was a justifiable reason for paying employees performing the same functions differently. The Labour Court (LC) held 'that even if the differentiation were found to be arbitrary, and discriminatory, it was in any event not unfair.'<sup>32</sup> The importance of this case is the view by the court that differentiation in remuneration of people performing the same work on the basis of length of service does not if itself amount to arbitrary or unfair discrimination.

The LC remarked in the case of *Mangena v Fila South*<sup>33</sup> 'that in the context of an *equal pay for work of equal value* claim that it does not have expertise in job grading and in the

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<sup>27</sup> Employment Equity Amendment Act 55 of 1998.

<sup>28</sup> The Gender Wage Gap: 2017; *Earnings Differences by Gender, Race, and Ethnicity*  
<https://iwpr.org/people/ariane-hegewisch-m-phil/>.

<sup>29</sup> Employment Equity Act 55 of 1998.

<sup>30</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>31</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) & others* 19 April 2016 (LC) 687/15.

<sup>32</sup> *Pioneer Foods (Pty) Ltd* para [76] page 20-21 Pioneer Foods.

<sup>33</sup> *Mangena v Fila South* 2009 12 BLLR 1224.



allocation of value to particular occupations.<sup>34</sup> Even though the principle of *equal work for work of equal value* is complex there should be an understanding that the EEA does not expressly prohibit unequal pay for work of equal value. The EEA merely prohibits discriminatory practices which includes unequal pay.<sup>35</sup> In *Leonard Dingler Employee Representative Council v Leonard Dingler*<sup>36</sup> the employer made different contributions to the retirement benefit funds available to black and white employees. It was argued that the employer was (indirectly) unfairly discriminating on the basis of race. It was held by the LC that 'this amounted to unfair discrimination which constituted an unfair labour practice as set out in item 2(1)(a) of the repealed schedule 7 of the LRA'.<sup>37</sup>

In *Louw v Golden Arrow*<sup>38</sup> the Labour Court (LC) held it is an 'unfair practice to pay different wages for *equal work or work of equal value* if the reason or motive is direct or indirect discrimination based on arbitrary grounds or the listed grounds, i.e., race or ethnic origin'.<sup>39</sup> The applicant failed to establish that his work and that of the comparator were of equal value. The advantage of using the equal value approach is that unrelated jobs can be compared. It can also widen the scope of equal pay protection.<sup>40</sup>

### 1.5.2 Australia

The application for equal pay for women was explicitly rejected in 1912, in the case of *Rural Worker's Union v Mildura*.<sup>41</sup> The Commissioner rejected the union's argument for ending the differential between male and female basic wages for reasons that the family component was still considered as the determinative of family working arrangements. The test was reformulated in terms of *equal pay for work of equal value*. The focus was moved to the

<sup>34</sup> *Mangena v Fila South* para 15 page 12-13.

<sup>35</sup> Nomagugu H, Commentary on South Africa's Position regarding Equal Pay for Work of Equal Value, 11 Law Democracy & Dev. 69 (2007).

<sup>36</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler* 1998 (19) ILJ 285 (LC).

<sup>37</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler* 1998 (19) ILJ 285 (LC) accessed via <https://www.saflii.org/za/cases/ZALAC/2003/7.pdf> para 8.

<sup>38</sup> *Louw v Golden Arrow Bus Services* 2000 21 ILJ 188 (LC).

<sup>39</sup> *Louw v Golden Arrow Bus Services* at para [23] 196-F.

<sup>40</sup> Meintjes- Van der Walt (fn139 above) 26.

<sup>41</sup> *Rural Worker's Union v Mildura Branch of the Australian Dried Fruits Association (Fruit pickers case)* 6 CAR 61 (1912).

*value of work* performed. A single rate was paid for an occupational group or classification and the *value of work* was considered in terms of the award wage instead of the terms of the employer. The nature of the work performed became determinative and not the sex of an employee.

The principle of *equal pay for equal work* was introduced in Australia in 1969. New South Wales was the first Australian state to incorporate Convention 100<sup>42</sup> through its Industrial Arbitration (Female Rates) Amendment Act.<sup>43</sup> In terms of this Act, adult employees regardless of gender were to be paid *equal pay* for performing work of the same or a like nature and of *equal value*.

Equal pay claims are now provided for in terms of the Fair Work Act 2009, which replaced the Workplace Relations Act 1996, the Equal Opportunity for Women in the Workplace Act 1999, and the Workplace Gender Equality Act 2012.<sup>44</sup>

### 1.5.3 India

The Indian Constitution of 1949<sup>45</sup> recognises the principle of *equal pay for work of equal value* for both women and men and the right to work.<sup>46</sup> Articles 39 to 51 of the Constitution of India envisage 'that all states ideally direct their policy towards securing *equal pay for equal work* for men and women ensuring both have the right to adequate means of livelihood'.<sup>47</sup> The Articles are inserted as Directive Principles of State Policy of India in the Constitution. The Directive Principles are not enforceable by any court they are, however, essential to the governance of the country and state. There is a duty on the state to consider

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<sup>42</sup> The Equal Remuneration Convention, 1951.

<sup>43</sup> Industrial Arbitration (Female Rates) Amendment Act 42 of 1958.

<sup>44</sup> The Workplace Gender Equality Act 2012 aimed at improving gender equality (including equal remuneration between men and women) in Australian workplaces.

<sup>45</sup> Articles 14 and 39(d) in the Constitution of India 1949.

<sup>46</sup> Articles 39(d) and 41 of the Constitution of India 1949. These Articles are inserted as Directive Principles of State Policy.

<sup>47</sup> Constitution of India 1949.

them while enacting laws.<sup>48</sup> In 1962 the Supreme Court of India declared ‘the principle of equal pay for equal work incapable of being enforced in a court of law’.<sup>49</sup>

India, a member of the ILO, ratified the Equal Remuneration Convention No 100 of 1951, which addresses the issue of *equal pay* between men and women for *equal work* without mentioning *equal value*. The Indian legislature seems aware of the importance of not only creating awareness but to effectively implement the legislative enactments.<sup>50</sup> To comply with *equal pay*, an employer is prohibited from reducing the rate of any worker, thereby preventing a levelling down of wages.<sup>51</sup> The Equal Remuneration Act of 1976<sup>52</sup> was enacted, which has been repealed by the Code of Wages of 2019, with the aim of providing equal remuneration to both male and female workers preventing gender discrimination in all matters relating to employment and employment opportunities.

## 1.6 RESEARCH METHODOLOGY

The research was conducted by reviewing literature published through primary and secondary sources. The primary source used includes the Constitution of the Republic of South Africa, legislation such as the Employment Equity Act, Employment Equity Amendment Act, Labour Relations Act. Secondary sources including articles in journals, academic books, newspapers web publications as well as those from primary sources such policies, laws, case law and international conventions were also used.

International sources from Australia and India were used since for the comparative study.

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<sup>48</sup> Devi, Kovuru (January 1, 2000). *Women’s Equality in India: A Myth or Reality?* Pp49-50 ISBN 81-7141- 563-6.

<sup>49</sup> *Kishori Mohanlal Bakshi v Union of India*, A.I.R 1962 S.C 1139.

[http://www.companyliquidator.gov.in/12/jud\\_sc/OFFICIALpercentLIQUIDATORpercent.percent.pdf](http://www.companyliquidator.gov.in/12/jud_sc/OFFICIALpercentLIQUIDATORpercent.percent.pdf).

<sup>50</sup> TUC Report 2008, Gender (in) equality in the labour market: an overview of global trends and developments Retrieved, 18th July 2009 from ITUC Report online via access.

[http://www.ituc-csi.org/IMG/pdf/GAP-09\\_EN.pdf](http://www.ituc-csi.org/IMG/pdf/GAP-09_EN.pdf).

<sup>51</sup> Article 3(2).

<sup>52</sup> Equal Remuneration Act, 1976, Article 3(1).



## 1.7 CHAPTER OUTLINE

While this chapter serves as the introduction and background to the study, chapter two will discuss *equal pay for work of equal value* as regulated within the South African Constitution and international law.

Chapter three thereafter considers the legislative provision of the principle of *equal pay for work of equal value* in South African employment law, and when an employer will be held to have unfairly discriminated against an employee on the basis of this provision. The chapter will also provide an overview of the gender wage gap as example of a possible equal pay for work of equal value claim. Focus will be on section 6(4) of EEA *equal pay for work of equal value*.

Chapter four provides an overview of the principle of *equal pay for work of equal value* within the jurisdictions of Australia and India.

Finally, chapter five concludes the study in respect of the implementation of *equal pay for work of equal value* principles.



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## CHAPTER TWO

### ***EQUAL PAY FOR WORK OF EQUAL VALUE AS REGULATED WITHIN CONSTITUTIONAL LAW AND INTERNATIONAL LAW***

#### **2.1 INTRODUCTION**

This chapter will focus on the protection against unfair discrimination as provided for in the Employment Equity Act,<sup>53</sup> the Labour Relations Act<sup>54</sup> and rulings made at arbitration or the Labour Court. An understanding of the legislative development of employment equity rights in South Africa, and specifically that relating to the principle of *equal pay for work of equal value* focussing on gender wage gap, is important so as to fully understand the discussions under the remaining chapters.

#### **2.2 BACKGROUND**

Prior to the enactment of the Constitution of the Republic of South Africa, 1996 (the Constitution)<sup>55</sup> the right to fair labour practice,<sup>56</sup> equality<sup>57</sup> and dignity<sup>58</sup> were limited. South Africa, prior to becoming a democratic country, was seen to be one of the most unequal societies in the world<sup>59</sup> with a wicked system of law.<sup>60</sup> The wickedness, as an example,

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<sup>53</sup> Employment Equity Act, 55 of 1998.

<sup>54</sup> Labour Law Act 1995.

<sup>55</sup> Constitution of the Republic of South Africa 1996.

<sup>56</sup> Section 23(1) of the Constitution.

<sup>57</sup> Section 9 (3) of the Constitution.

<sup>58</sup> Section 10 of the Constitution.

<sup>59</sup> A Chaskalson 'From wickedness to equality: The moral transformation of South African law' (2003) 1 *International Journal of Constitutional Law* 590.

<sup>60</sup> Chaskalson 590.

controlled where South Africans lived,<sup>61</sup> was born,<sup>62</sup> educated,<sup>63</sup> who they married<sup>64</sup> and what jobs they did.<sup>65</sup>

Statistics shows that white South Africans (predominantly men) earn nearly three times the average wage of black South Africans, even though the latter group constitutes three-quarters of the work force population.<sup>66</sup> Inequality continues to exist in the workplace. It is particularly women, specifically those from historic disadvantaged groups, which remain the most unequal in the workplace, particularly in as far as wage gap discrimination.<sup>67</sup>

The end of the apartheid era was signified with the adoption of the interim Constitution<sup>68</sup> which incorporated the right to equality, which right was retained in the final Constitution.

### 2.3 THE CONSTITUTIONAL RIGHT TO EQUALITY

The right to equality as provided for in section 9 of the Constitution is often described as the most 'revolutionary' right.<sup>69</sup> In the case of *Minister of Finance v Van Heerden*<sup>70</sup> it was held that the 'achievement of equality goes to the bedrock of our constitutional architecture.'<sup>71</sup> The achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against

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<sup>61</sup> The Group Areas Act 1950, provided for the segregation of different racial groups in different areas resulting in several forced removals. L Platzky & C Walker *The surplus people: Forced removals in South Africa* (1985).

<sup>62</sup> Population Registration Act 30 of 1950.

<sup>63</sup> The Bantu Education Act of 1953 transferred responsibility for the administration of black education to the Department of Native Affairs. Under this Act, separate education systems for whites and black people were established.

<sup>64</sup> The Immorality Act of 1950 and Prohibition of Mixed Marriages Act of 1949 proscribed interracial sex, marriage, and other forms of contact.

<sup>65</sup> Mines and Works Act 1911, which institutionalised discrimination in the workplace as it reserved certain jobs for whites only in the workplace. See also the Mines and Works Amendment Act 25 of 1926 which provided that certificates of competence in skilled trades were only granted to whites and coloureds.

<sup>66</sup> South Africa Labour and Development Research Unit – University of Cape Town 2014-2015 available at <http://microdata.worldbank.org>.

<sup>67</sup> Du Toit D, Godfrey S, Cooper C, Giles G, Cohen T, Conradie B & Steenkamp A *Labour Relations Law A Comprehensive Guide* 6 ed (2015) 653.

<sup>68</sup> Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 1.

<sup>69</sup> J de Waal *et al the Bill of Rights handbook* (2001) 2.

<sup>70</sup> *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC).

<sup>71</sup> *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) para 22.

which all law must be tested for constitutional consonance'.<sup>72</sup> The Constitution aims for social justice which aids in the restoration of past injustices caused by the preceding government regime during the apartheid era. In achieving this, the Constitution has gone beyond the mere notion of formal equality. It allows for the identical treatment to the notion of substantive equality, which recognises that social differentiation exists as a result of past injustices.<sup>73</sup> It may be argued that South Africa's greatest experience was constitutionalising inequality.<sup>74</sup>

### 2.3.1 The Constitution

It is insufficient for the Constitution merely to provide, through the Bill of Rights, that statutory provisions which have caused unfair discrimination in the past are eliminated. Historically vulnerable individuals and/or groups are 'not able on their own to use political power to secure favourable legislation for themselves and are accordingly almost exclusively reliant on the Bill of Rights for their protection'.<sup>75</sup> Historic unfair discrimination frequently has ongoing negative consequences for those concerned, which if not addressed and remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.<sup>76</sup>

The Constitution, largely through sections 9 and 23,<sup>77</sup> paved the way towards addressing the inequality and discrimination that exists in the South African labour market. Section 9 of the Constitution which incorporates the right to equality states that:

- (1) 'Everyone is equal before the law and has the right to equal protection and benefits of the law.'

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<sup>72</sup> *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) para 22 – 'some academic writers draw attention to the place of the right to equality as a constitutional value, which goes beyond the individual or personal affront of the claimant' See Albertyn and Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 SAJHR 248 at 273-3.

<sup>73</sup> *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC).

<sup>74</sup> *Prinsloo v Van Der Linde & Another* 1997 (6) BCLR 756 (CC) para 20.

<sup>75</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC) para 25.

<sup>76</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC).

<sup>77</sup> Act 108 of 1996.

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

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

(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.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair’.

As far as worker rights specifically are concerned, section 23(1) of the Constitution makes provision for ‘everyone to have the right to fair labour practices’.<sup>78</sup> Fair labour practices are argued to include a wide range of employment rights, including the right not to be subjected to unfair discrimination.<sup>79</sup> Section 23<sup>80</sup> does not only govern labour legislation and common law it impacts all other provisions of the Bill of Rights and the Constitution.

The Constitution guarantees the right of ‘equality’ for all South Africans,<sup>81</sup> which includes the right not to be discriminated directly or indirectly on grounds listed provided where the discrimination is fair.<sup>82</sup> Owing to the equality clause, the position of women and certain disadvantaged groups in the workplace is more favourable now than in the past. The reason

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<sup>78</sup> Section 23(1) of the Constitution.

<sup>79</sup> Grogan J ‘*Employment Rights* 2010:74. *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.5. and Grogan 2010: 92 also mentions that unfair discrimination may result in an unfair labour practice even though the 1998-EEA does not formally designate unfair discrimination as an unfair an unfair labour practice.

<sup>80</sup> Constitution Act 108 of 1996.

<sup>81</sup> Papacostantis H and Mushariwa M, ‘The Impact of Minority Status in the Application Affirmative Action: *Naidoo v Minister of Safety and Security* 2013 5 BLLR 490 (LC)’. *PER/PELJ* 2016(19)- DOI.

<sup>82</sup> Section 9(3) of the Constitution Act 108 of 1996.



for the favourability in the workplace now, is due to the development of legislation which was enacted to promote Constitutional values.<sup>83</sup>

Section 23,<sup>84</sup> in summary, provides that the history of unfair labour practice regulation and the values of the Constitution are taken into consideration. The Constitution envisaged to prevent and prohibit the repetition of a system that was representative of unfairness in the employment relationship. All employment relationships should therefore be subject to the scrutiny of the constitutional right to fair labour practices.<sup>85</sup>

The Labour Relations Act 66 of 1995 and the Basic Conditions Employment Act 75 of 1997 gives effect to the rights as set out in section 23 of the Constitution.<sup>86</sup> The Employment Equity Act 55 of 1998 prohibits unfair discrimination as provided for in section 9 of the Constitution.<sup>87</sup> The LRA,<sup>88</sup> BCEA<sup>89</sup> and EEA<sup>90</sup> must be interpreted as following the Constitution.<sup>91</sup> This right was provided with the knowledge that discrimination against people who are members of designated groups<sup>92</sup> experienced significant group disadvantage and harm historically. The purpose of section 8<sup>93</sup> was to build and entrench inequality amongst different groups in our society.

Sections 8 (1), sub-sections (2) and (4) of the interim Constitution<sup>94</sup> states that:

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<sup>83</sup> Section 187 of the LRA 66 of 1995 which makes provision for unfair dismissals. Additionally, the EEA 55 of 1998 makes provision for anti-discrimination in the workplace.

<sup>84</sup> Section 23(1) of the Constitution Act 108 of 1996.

<sup>85</sup> Conradie M A *'Critical Analysis of the Right to Fair Labour Practice'* (published LLM thesis, University of the Free State, 2013) 231.

<sup>86</sup> Section 23(1) of the Constitution Act 108 of 1996 stipulates that 'Everyone has the right to fair labour practices.'

<sup>87</sup> Act 108 of 1996.

<sup>88</sup> Labour Relations Act 66 of 1995.

<sup>89</sup> The Basic Conditions of Employment Act 75 of 1997.

<sup>90</sup> Employment Equity Act 55 of 1998.

<sup>91</sup> Section 3(b) of the Employment Equity Act, section 3(b) of the Labour Relations Act and section 2(a) of the Basic Conditions Employment Act has the same effect.

<sup>92</sup> *'Designated groups'* means black people, women, and people with disabilities in terms of the Employment Equity Act.

<sup>93</sup> Interim Constitution Act 200 of 1993.

<sup>94</sup> Act 200 of 1993.

‘Every person shall have the right to equality before the law and to equal protection of the law.

No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, or language.

Prima facie proof of discrimination on any of the grounds specified in sub-section (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that sub-section, until the contrary is established.’

The Constitutional drafters accepted that equality for all was necessary to rectify discrimination against certain groups. The primary objective of section 8 was thus to prohibit and remedy unfair discrimination.<sup>95</sup>

The 1996 (final) Constitution now provides that ‘[e]veryone is equal before the law and has the right to equal protection and benefit of the law, and equality includes the full and equal enjoyment of all rights and freedoms.’<sup>96</sup>

### 2.3.2 Case Law

When examining employment equity laws in South Africa, both statutes and case law should be taken into consideration. The Constitutional court must prior to examining cases of equality consider certain factors. Where an applicant is able to establish prima facie discrimination based on one of the listed grounds<sup>97</sup> the onus would be on the respondent to prove that discrimination was fair. Where discrimination is not based on a listed ground, then the claimant relying on an unlisted classification is required to prove that they were adversely affected by a specific distinction and the distinction is unfair.<sup>98</sup> In the case of *Harksen v Lane NO and Others*<sup>99</sup> it was held that the ‘discrimination complained of by Mrs

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<sup>95</sup> Section 8(1), (2) and (4) of the interim Constitution Act 200 of 1993.

<sup>96</sup> Section 9 (1) and sub section (2) of the Constitution of 1996.

<sup>97</sup> Section 9(3) of the Constitution of 1996.

<sup>98</sup> *Harksen v Lane NO and Others* (CCT9/97) (1997) ZACC 12; 1997 para 47.

<sup>99</sup> *Harksen v Lane NO and Others* (CCT9/97) (1997) ZACC 12; 1997.



Harksen does not fall within the specified grounds contained in section 8(2).<sup>100</sup> The onus thus lies with the complainant of persuading the court on a balance of probabilities that the discrimination is unfair.<sup>101</sup>

In some case law equality rights are more difficult to prove in comparison to other constitutional rights. There are times where the Constitutional court has granted a favourable order to the minority persons seeking recognition or redress for discrimination whereas, at other times the court has been inconsistent in its deliberations in equality rights cases.<sup>102</sup> The Constitutional courts test in determining the alleged violation of the right to equality is to go through the section 9<sup>103</sup> internal test and, only if the discrimination is not internally justified, then the Constitutional court will proceed to the section 36<sup>104</sup> limitation clause enquiry.<sup>105</sup>

In the case of *Prinsloo v Van Der Linde*<sup>106</sup> the Constitutional court held that 'if each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by resort to section 33,<sup>107</sup> or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability of fairness of just about the whole legislative programme and almost all executive conduct. The courts would be compelled to review the reasonableness of the fairness of every classification of rights, duties, privileges, immunities, benefits, or disadvantages flowing from any law. It is necessary to identify the criteria that separates legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory<sup>108</sup> in the constitutional sense.'<sup>109</sup>

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<sup>100</sup> Section 8 of the Interim Constitution Act 200 of 1993.

<sup>101</sup> *Harksen v Lane NO and Others* para 60.

<sup>102</sup> Smith A 'Equality constitutional adjudication in South Africa' (2014). *African Human Rights Law Journal* vol 14(2), 609-632.

<sup>103</sup> Act 108 of 1996.

<sup>104</sup> Act 108 of 1996.

<sup>105</sup> *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998(3) BCLR 257 para 35. See also Smith A 'Equality constitutional adjudication in South Africa' (2014) *African Human Rights Law Journal* vol 14(2), 609-632.

<sup>106</sup> *Prinsloo v Van Der Linde & Another* 1997 (6) BCLR 759 (CC).

<sup>107</sup> Constitution 1996.

<sup>108</sup> *Prinsloo v Van Der Linde & Another* 1997 (6) BCLR 759 (CC) para 17.

<sup>109</sup> *S v Ntuli* [1995] ZACC 14; 1996 (1) SA 1207 (CC); 1996(1) BCLR 141 (CC) para 19.

In the case of *KwaZulu-Natal & Others v Pillay*<sup>110</sup> the Constitutional court granted an exemption to what appeared to be facially - neutral regulations serving as a valuable purpose but which had a marginalising effect.<sup>111</sup> This case is an exception to where indirect discrimination was condemned, and which can be categorised as 'jurisprudence of difference'.<sup>112</sup>

There is a duty on judges to ensure that the courts play a pivotal role in social transformation.<sup>113</sup> The Judiciary need to adopt a contextual, robust, and vigilant approach to equality and other rights adjudication which will mitigate and contribute to helping achieve the constitutional goal of equality which will 'allow all people to participate and enjoy all their rights equally'.<sup>114</sup>

## 2.4 SUBSTANTIVE V FORMAL EQUALITY

In the case of *Brink v Kitshoff*,<sup>115</sup> the first equality case adjudicated under the interim Constitution,<sup>116</sup> the court committed itself to adopting a substantive notion of equality.

In *Brink*<sup>117</sup> the formal equality claim was straightforward. The disadvantageous treatment was substantially sufficient based on one of the listed prohibited grounds, namely sex. The court held that '[a]lthough in our society, discrimination on grounds of sex has not been visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. Such discrimination is unfair: It builds and entrenches inequality amongst different groups on our society.'<sup>118</sup> Formal equality is the notion that for fairness to exist all individuals should be treated equally at all times.<sup>119</sup>

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<sup>110</sup> *MEC for Education: KwaZulu-Natal & Others v Pillay* Case CCT 51/06 (2007) ZACC 21.

<sup>111</sup> Smith A 'Equality constitutional adjudication in South Africa' (2014) African Human Rights Law Journal.

<sup>112</sup> Du Plessis L 'Religious freedom and equality as celebration of difference: A significant development in recent South African constitutional law' (2009) 12 Potchefstroom Electronic Law Journal 10 18.

<sup>113</sup> Smith A 'Equality constitutional adjudication in South Africa' (2014) African Human Rights Law Journal.

<sup>114</sup> *MEC for Education: KwaZulu-Natal & Others v Pillay* Case CCT 51/06 (2007) ZACC 21 para 73.

<sup>115</sup> *Brink v Kitshoff* 1996 (6) BCLR 752 (CC).

<sup>116</sup> Interim Constitution Act 200 of 1993.

<sup>117</sup> *Brink v Kitshoff* 1996 (6) BCLR 752 (CC)

<sup>118</sup> *Brink v Kitshoff* para 42.

<sup>119</sup> Currie and De Waal 'The Bill of Rights Handbook.'

In a country such as South Africa with a history of inequality under the apartheid regime, substantive equality is sought, with the aim of redressing the inequalities of the past.<sup>120</sup>

Fairness as provided for in the Constitution is centred round substantive fairness, i.e., the law should treat individuals as substantive equals. Substantive equality allows for laws and policies to rectify the subordination of individuals who historically suffered, and continues to suffer, social, political, or economic disadvantage, such as Blacks, women, and people with disabilities.<sup>121</sup> Fairness as provided for in the Constitution is centred round substantive fairness, i.e., the law should treat individuals as substantive equals. In the *President of the Republic of South Africa v Hugo*<sup>122</sup> it was held that in order to 'determine whether the discrimination is unfair it is necessary to recognise that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality'.

Substantive equality emphasises the importance of recognising the cultural, political, and legal choices of social groups and recognising diversity and difference.<sup>123</sup> This would be done by implementing affirmative action measures as provided for in section 9 of the Constitution,<sup>124</sup> which is set out in Chapter III of the Employment Equity Act 55 of 1998 (EEA).

The test for unfairness is based on the impact of the discrimination by the complainant. No violation of section 9(2)<sup>125</sup> will exist where at the stage of enquiry no differentiation is found to be unfair.<sup>126</sup>

## 2.5 THE INTERNATIONAL LABOUR ORGANISATION (ILO)

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<sup>120</sup> Smith, A 'Constitutionalising equality: The South African experience' (2008) 9 *International Journal of Discrimination and the Law* 201.

<sup>121</sup> Smith, A. Equality constitutional adjudication in South Africa. *Afr. Hum. rights law j.* 2014. 'Black people' has a generic term which means Africans, Coloureds, and Indians in terms of the Employment Equity Act. 'Designated groups' means black people, women, and people with disabilities in terms of the Employment Equity Act.

<sup>122</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SALR (CC) 41 para 112.

<sup>123</sup> Smith A 'Equality constitutional adjudication in South Africa' (2014) *African Human Rights Law Journal*.

<sup>124</sup> Section 9 of the Constitution Act 108 of 1996.

<sup>125</sup> Act 108 of 1996.

<sup>126</sup> Smith A 'Equality constitutional adjudication in South Africa' (2014) *African Human Rights Law Journal*.

The right to equality is not only enshrined in the Constitution but is a universal accepted right.<sup>127</sup> This is evidenced through standards set by the International Labour Organisation (ILO) and other international instruments. These instruments include the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>128</sup> UN Declaration of Human Rights,<sup>129</sup> Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women,<sup>130</sup> International Covenant on Civil and Political Rights,<sup>131</sup> International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights.<sup>132</sup> South Africa is a member state of the ILO, which promotes social protection and working opportunities. The ILO Convention 100 addresses unequal pay for work of equal value and obliges member states to give effect to the principle of *equal remuneration for work of equal value*.<sup>133</sup> Further to Convention 100,<sup>134</sup> Convention 111 eliminates all forms of discrimination in respect of employment and occupation.<sup>135</sup>

South Africa's international law obligations are of utmost importance. Section 39(1) of the Constitution<sup>136</sup> must be considered when interpreting the Bill of Rights. Section 39(1) of the Constitution states that:

- (1) 'When interpreting the Bill of Rights, a court –
  - (a) Must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.
  - (b) Must consider international law; and
  - (c) May consider foreign law.'

<sup>127</sup> United Nations General Assembly 1948.

<sup>128</sup> United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979: <http://www.un.org/womenwatch/daw/cedaw/>

<sup>129</sup> United Nations General Assembly 1948.

<sup>130</sup> Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women 1999: <https://www.refworld.org/docid/3b00f29a24.html>.

<sup>131</sup> International Covenant on Civil and Political Rights 1966, United Nations: available at <https://www.refworld.org/docid/3ae6b36c0.html>

<sup>132</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.

<sup>133</sup> Equal Remuneration Convention 100 of 1951.

<sup>134</sup> Equal Remuneration Convention 100 of 1951.

<sup>135</sup> Discrimination (Employment and Occupation) Convention.111 of 1958.

<sup>136</sup> Act 108 of 1996.



When interpreting any legislation ‘every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation.’<sup>137</sup> Section 3(d) of the EEA<sup>138</sup> makes specific provision to international law obligations concerning ‘Discrimination in respect of Employment and Occupation’.<sup>139</sup> The Convention states that member states should formulate a national policy for the prevention of ‘discrimination in employment and occupation’ concerning work of *equal value*.<sup>140</sup> It is thus compulsory to interpret the EEA<sup>141</sup> and LRA<sup>142</sup> in compliance with international law obligations of South Africa.<sup>143</sup>

## 2.6 LEGISLATIVE PROTECTION OF EQUALITY IN EMPLOYMENT

### 2.6.1 Labour Relations Act 66 of 1995 (LRA)

Employees are primarily protected against unfair discrimination in the employment context through the provisions of the EEA,<sup>144</sup> supported by the LRA.<sup>145</sup> Section 187(1)(f) of the LRA stipulates:

‘A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5<sup>146</sup> or, if the reason for the dismissal is –  
(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status, or family responsibility.’

<sup>137</sup> Section 233 of the Constitution.

<sup>138</sup> Employment Equity Amendment Act.

<sup>139</sup> Equal Remuneration Convention, 1951 (No.100) Convention 111.

<sup>140</sup> *Mangena & Others v Fila SA (Pty) Ltd* 2010 31 ILJ 662 (LC) para 5.

<sup>141</sup> Section 3(c) of the EEA.

<sup>142</sup> Section 3(d) of the LRA.

<sup>143</sup> Section 232 of the Constitution.

<sup>144</sup> EEA 55 of 1998.

<sup>145</sup> LRA 66 of 1995.

<sup>146</sup> Section 5 of the LRA confers protections relating to the ‘right to freedom of association and on members of workplace forums.’

The LRA aims to promote economic development, social justice, labour peace and democracy in the workplace<sup>147</sup>. It sets out to achieve this by fulfilling the primary objectives of the Act, which gives effect to and regulate the fundamental rights conferred by section 27 of the Constitution. One of the fundamental rights would include the right to fair labour practices.<sup>148</sup>

### **2.6.2 Employment Equity Act 55 of 1998 (EEA)**

The main objective of the EEA is to promote equal opportunity and fair treatment, and prohibit unfair discrimination, in the workplace.<sup>149</sup> To achieve this the EEA provides protection against unfair discrimination and the implementation of affirmative action measures.<sup>150</sup> The EEA is the primary way in which the right to equality, as set out in section 9 of the Constitution,<sup>151</sup> is provided for in labour law.

In 2013 section 6 of the EEA was amended by the Employment Equity Amendment Act 47 of 2013. The amendments included amongst others, sections 6(4) and 6(5). These respective sections were enacted to broaden the prohibition of unfair discrimination in the workplace and strengthen enforcement mechanisms and will be discussed in detail in chapter 3.

Section 6 (1) of the EEA encourages employers to implement measures which identify and eliminate unfair discrimination in the workplace.<sup>152</sup> In the case of *Piliso v Old Mutual Life Assurance Co (SA) Ltd*<sup>153</sup> the court held 'that there is no doubt that employers are required to take steps in advance and to be proactive in the elimination and prevention of unfair discrimination'. i.e., the EEA imposes a duty on employers to pre-empt discrimination in the workplace, rather than merely respond to it.<sup>154</sup> The EEA places an obligation on employers

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<sup>147</sup> Chapter 1 of the LRA 66 of 1995.

<sup>148</sup> Section 23 of the Labour Relations Act 66 of 1995.

<sup>149</sup> Employment Equity Act 55 of 1998.

<sup>150</sup> Section 2(a) and (b) of the Employment Equity Act 55 of 1998.

<sup>151</sup> Laubscher T 'Equal Pay for Work of Equal Value – A South African Perspective'.

<sup>152</sup> Chapter II section 5 of the EEA.

<sup>153</sup> *Piliso v Old Mutual Life Assurance Co (SA) Ltd* 2007 28 ILJ 897 (LC) para 77.

<sup>154</sup> Fergus and Collier 2014 *SAJHR* 486-487.

to comply with procedural obligations to ensure equal treatment and opportunity within the workplace to all employees.<sup>155</sup>

All employees, not only designated groups<sup>156</sup> as defined in the EEA,<sup>157</sup> are protected against unfair discrimination in the workplace. This includes unfair discrimination in respect of *equal pay* within the workplace.<sup>158</sup> In order to determine whether an unfair discrimination claim exists within the workplace as far as *equal pay for work of equal value* is concerned, the following questions need to be answered: i) are the jobs that are being compared the same, substantially the same or of equal value?; ii) is there a difference in the terms and conditions of employment, including remuneration, of employees in the jobs that are being compared?; iii) if there are differences in the terms and conditions of employment, can these be justified on fair and rational grounds.<sup>159</sup> In the case of *Naidoo v Minister of Safety and Security*<sup>160</sup> it was held that ‘even though the appointment and promotion of employees fell within the prerogative of employers, they were nonetheless constrained by law. It correctly stated that both the Labour Relations Act 66 of 1995 and the EEA require that employers treat employees fairly and do not unfairly discriminate on the basis of race and /or gender.<sup>161</sup> It was further held that the court will intervene if it found that a decision of an employer was irrational, ‘capricious or arbitrary, or displayed bias, malice or fraud, or [even of the employer] failed to apply his or her mind, or unfairly discriminated.’<sup>162</sup>

Unfair discriminatory allegations can be rebutted by an employer by proving that the behaviour in question does not fall within the provisions held in section 6 of the EEA. The effect of the amendment is simply that discrimination on any ground affecting human dignity constitutes unfair discrimination. In the event of the listed grounds discrimination is

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<sup>155</sup> Section 13(2)(a) of the Employment Equity Act 55 of 1998.

<sup>156</sup> ‘Designated groups’ means black people, women, and people with disabilities.

<sup>157</sup> Chapter III of the EEA.

<sup>158</sup> Chapter II of the EEA.

<sup>159</sup> Roodt H, Schoeman Law Inc, ‘The Wage War: Equal Pay for Work of Equal Value’ available at <https://www.polity.org.za/article/the-wage-war-equal-pay-for-work-of-equal-value-> (2018).

<sup>160</sup> *Naidoo v Minister of Safety and Security* 2013 5 BLLR 490 (LC)

<sup>161</sup> *Naidoo* paras 68-69

<sup>162</sup> *Naidoo* para 70.



presumed and any other arbitrary ground that affects human dignity requires that the complainant must define the ground and has the burden of proof.<sup>163</sup>

### 2.6.3 The Employment Equity Regulations of 2014

The Employment Equity Regulations of 2014<sup>164</sup> (hereafter referred to as ‘the Regulations’), which accompanied the 2013 amendments to the EEA, define work of equal value, duties of the designated employer, enforcement mechanisms, general administrative matters and equal pay provisions as set out in items 2 to 7 of the Regulations. The EEA must be read together with the Regulations<sup>165</sup> and the Code of Good Practice on equal pay for work of equal value.<sup>166</sup> The Regulations and the Code set out guidelines which determine whether *work is of equal value* and will be discussed in further detail in chapter 3.

The EEA places an obligation on employers to conduct reviews on existing recruitment and employment policies.<sup>167</sup> These reviews are not limited to remuneration only. It includes benefits, rewards, performance evaluations and employment equity.<sup>168</sup> Employers are advised to be proactive in mitigating the risk of any successful claims and equal pay claims.<sup>169</sup>

### 2.6.4 Sections 6(4) and 6(5) of the Employment Equity Act of 1998

Within the amended EEA section 6(4) essentially provides for three causes of action in respect of *equal pay for work of equal value* unfair discrimination claims. Such unfair discrimination claims are: i) unequal pay for performing the same work; ii) unequal pay for performing substantially the same work; and iii) unequal pay for performing work of equal value.<sup>170</sup> Section 6(4) emphasises the principle of *equal pay for work of equal value* and

<sup>163</sup> *S Ndudula & others v Metrorail* (2017) 7 BLLR 706 (LC).

<sup>164</sup> Employment Equity Regulations 2014 GN R595 GG 37873.

<sup>165</sup> Employment Equity Regulations 2014 GN R595 in GG 37873 of 1 August 2014.

<sup>166</sup> Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 in GG 38837.

<sup>167</sup> Sections 13 and 19 of the Employment Equity Act.

<sup>168</sup> Section 7 of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value.

<sup>169</sup> Cliffe Dekker Hofmeyr Inc ‘Employment Equal Pay’ 2022 available at

<https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/Employment-Equal-Pay-Brochure.pdf>.

<sup>170</sup> Ebrahim S ‘Equal Pay for Work of equal value in terms of the Employment Equity Act 55 OF 1998: Lessons from the International Labour Organisation and the United Kingdom’ *PER/PELJ* 2016 (19) DOI.

prohibits the differentiation in terms and conditions of employment between employees of the same employer performing the same or substantially the same work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1).<sup>171</sup> With this amendment the principle of *equal pay for work of equal value* was for the first time directly provided for as a prohibited ground of unfair discrimination.<sup>172</sup>

Section 6(5) allows the Minister of Labour to prescribe criteria and methodology for assessing work of equal value after consultation with the Commission for Employment Equity.<sup>173</sup> This was done through the introduction of the Code which provides practical guidance to both employers and employees regarding the application of the principle of *equal pay for work of equal value* in the workplace.<sup>174</sup>

The amended EEA recognises inequalities in employment, occupation, and income within the labour market. The EEA aims to promote equality, eliminate unfair discrimination, ensure implementation of employment equity, and achieve a diverse workforce.<sup>175</sup>

Labour law is portrayed as a law of fairness applicable to both employers and employees.<sup>176</sup> In order to achieve fairness, a balance between the employment relationship and protection of fundamental human rights must be achieved.<sup>177</sup> The dignity and self-worth of an individual is directly linked to the individual's ability to contribute meaningful to society, and such contribution in turn is dependent on a person's employment and career.<sup>178</sup>

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<sup>171</sup> Section 6(4) of the EEA.

<sup>172</sup> Section 6(4) of the EEA.

<sup>173</sup> The Minister published the Employment Equity Regulations 2014 *GN R595 in GG 37873* of 1 August 2014.

<sup>174</sup> *GN 448 in GG 38837* of 1 June 2015 (the Code).

<sup>175</sup> Employment Equity Amendment Act 2013.

<sup>176</sup> Vettori S 'The Role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals' (2012).

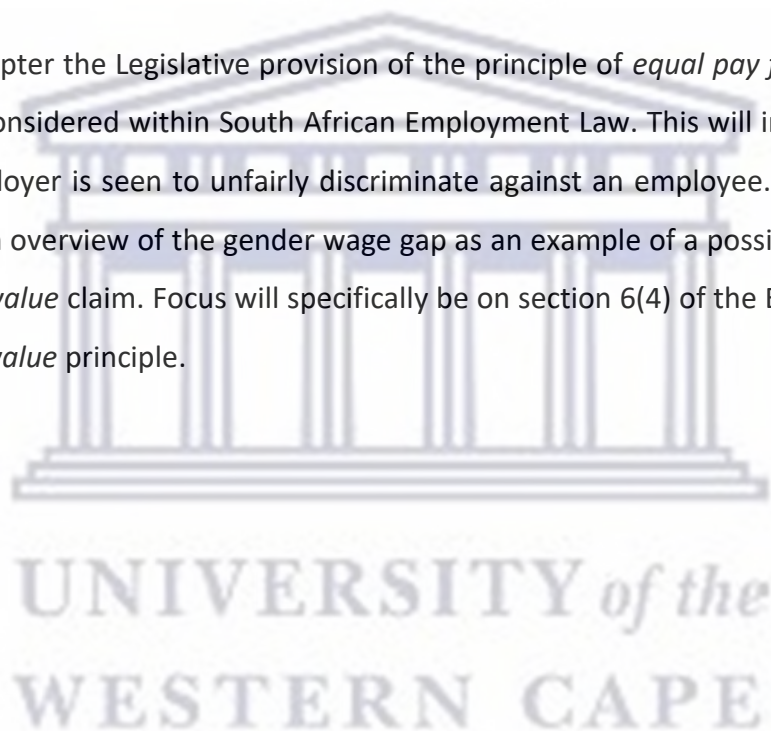
<sup>177</sup> Vettori S (2012) *PER* 102.

<sup>178</sup> Vettori S (2012) *PER* 103.

## 2.7 CONCLUSION

Women, and previously disadvantaged groups remain the focus of inequality i.e., wage gap discrimination within the workplace.<sup>179</sup> The group of individuals have come a long way, especially when considering the evolution of *equal pay for work of equal rights* i.e., employment rights.<sup>180</sup> These individuals continue to be exposed to discrimination against them as historically seen and continue to be seen.<sup>181</sup> The legislator has attempted to remedy the situation by attempting to safeguard women and disadvantaged individuals against wage gap discrimination.

In the next chapter the Legislative provision of the principle of *equal pay for work of equal value* will be considered within South African Employment Law. This will include looking at where an employer is seen to unfairly discriminate against an employee. The chapter will also provide an overview of the gender wage gap as an example of a possible *equal pay for work of equal value* claim. Focus will specifically be on section 6(4) of the EEA *equal pay for work of equal value* principle.



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<sup>179</sup> 'The Status of Women in the South African Economy' page 65 para 4.3.4 (2015) available at [https://www.gov.za/sites/default/files/qcis\\_document/201508/statusofwomeninsaeconomy.pdf](https://www.gov.za/sites/default/files/qcis_document/201508/statusofwomeninsaeconomy.pdf)

<sup>180</sup> 'The Status of Women in the South African Economy' page 24 (2015).

<sup>181</sup> 'The Status of Women in the South African Economy' page 24 (2015).

## CHAPTER THREE

### LEGISLATIVE PROVISION OF THE PRINCIPLE *EQUAL PAY FOR WORK OF EQUAL VALUE* IN SOUTH AFRICAN EMPLOYMENT LAW

#### 3.1 INTRODUCTION

Against the background of the discussion in chapter 2, this chapter will focus on the provisions of the EEA<sup>182</sup> relevant to the principle of *equal pay for work of equal value*. The EEA was enacted to give effect to the constitutional right to equality<sup>183</sup> in conjunction with the general right to fair labour practices under section 23(1) of the Constitution.<sup>184</sup> Employees are primarily protected against unfair discrimination in the employment context through the provisions of the EEA,<sup>185</sup> supported by the Labour Relations Act 66 of 1995 (LRA).<sup>186</sup>

This chapter will further focus on the legislative incorporation of *equal pay for work of equal value* provision into the EEA as part of its unfair discrimination protection. This will be done against the backdrop of the gender wage gap as an example of possible unfair discrimination under section 6(4) of the EEA.<sup>187</sup>

#### 3.2 EQUALITY UNDER SOUTH AFRICAN EMPLOYMENT LAW

##### 3.2.1 Labour Relations Act 66 of 1995 (LRA)

The main objective of the LRA, as discussed in section 2.6.1, is to promote economic development, social justice, labour peace and democracy in the workplace.<sup>188</sup> This forms part of a broader legislative scheme in South Africa which provides for the enactment of

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<sup>182</sup> EEA 55 OF 1998.

<sup>183</sup> See EEA preamble.

<sup>184</sup> Section 23(1) of the Constitution.

<sup>185</sup> Employment Equity Act 55 of 1998.

<sup>186</sup> Labour Relations Act 66 of 1995.

<sup>187</sup> EEA 55 OF 1998.

<sup>188</sup> Chapter 1 of the Labour Relations Act 66 of 1995.

constitutional rights in labour law, such as the right to fair labour practices as guaranteed under section 23 of the Constitution.<sup>189</sup> And the right to equality under section 9. In doing so the LRA protects employees, amongst others, against unfair dismissals and unfair labour practices.

Section 186 of the LRA<sup>190</sup> defines what is regarded as a dismissal, whilst section 187 contains a list of grounds on which dismissals will be deemed automatically unfair.<sup>191</sup> An automatically unfair dismissal is a dismissal for which there can be no justification by the employer<sup>192</sup> and, as such, an employee claiming such dismissal does not have to prove the unfairness thereof.<sup>193</sup> As example, the labour court (LC) in the matter of *Allpass v Mooikloof Estates (Pty) Ltd*<sup>194</sup> held that 'dismissal because of HIV status is discrimination prohibited by s 187 (1)(f) and is therefore an automatically unfair dismissal.'

The only defences available against an automatically unfair dismissal are those provided for under section 187(2). Section 187(2) provides that a dismissal under section 187(1)(f) may be fair where the dismissal was as a result of the inherent requirements of the job, or if age was the reason for the dismissal, the employee had reached the agreed or normal retirement age.<sup>195</sup>

### 3.2.2 Employment Equity Act 55 of 1998 (EEA)

The EEA, as discussed in section 2.6.2, is the primary statute with regards to equality in employment. It prohibits unfair discrimination in the workplace and guarantees equal opportunity and fair treatment to all employees.<sup>196</sup> To achieve this, the EEA provides protection against unfair discrimination and the implementation of affirmative action measures.<sup>197</sup>

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<sup>189</sup> Act 108 of 1996.

<sup>190</sup> Labour Relations Act 66 of 1995.

<sup>191</sup> See para 2.6.1 above.

<sup>192</sup> Except under the extremely limited circumstances provided in s 187(2) of the LRA.

<sup>193</sup> Du Toit D, Godfrey S *et al Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 433.

<sup>194</sup> *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre (JS178/09)* [2011] ZALCJHB 7.

<sup>195</sup> *Karen Beef Feedlot v Randall* (2010) JOL 24897 (LC), the court held 'that the onus is on the employer to prove the facts that determine the normal retirement age of the company'.

<sup>196</sup> Chapter I section 2 of the Employment Equity Act 55 of 1998.

<sup>197</sup> Section 2(a) and (b) of the Employment Equity Act 55 of 1998. See para 2.6.2 above.



Prior to the amendment to the EEA in 2013,<sup>198</sup> 'arbitrary ground' was not included in section 6(1).<sup>199</sup>

In the case of *Duma v Minister of Correctional Services & Others*<sup>200</sup> the court found 'that the employee was unfairly discriminated due to a pay difference i.e., equal pay for equal work, based on an arbitrary ground.'<sup>201</sup> In the case of *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others*<sup>202</sup> which followed on from the *Duma*<sup>203</sup> case the court upheld an appeal against a CCMA decision by finding that 'there was not any unfair pay discrimination based on any other arbitrary ground.'<sup>204</sup>

In both the cases of *Duma*<sup>205</sup> and *Pioneer Foods*<sup>206</sup> the findings demonstrated that the test for determining unfair pay discrimination based on an arbitrary ground requires more than a mere differentiation in the workplace. When determining unfair (pay) discrimination on an arbitrary ground there must be an element to potentially impair fundamental human dignity or would otherwise affect the individual in a comparably serious manner.<sup>207</sup>

<sup>198</sup> Employment Equity Amendment Act 47 of 2013.

<sup>199</sup> 'For differing views as to the meaning and scope of the inclusion of 'arbitrary' under section 6(1) of the EEA see: <https://www.hoganlovells.com/en/publications/unfair-discrimination-speak>  
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/employment/employment-alert-10-april-discrimination-on-arbitrary-grounds-what-does-this-mean-.html>  
<https://ceosa.org.za/discrimination-disputes-based-on-arbitrary-grounds-under-the-eea-and-lockdown/>

Talita Laubscher et al, 'Equal pay for equal work' (2014) *Bowman Gilfillan Attorneys* the learned author advised employers 'to carefully scrutinize their pay practices in order to ensure that any disparity [remuneration – including employment benefits, terms, and conditions of employment] is objectively justifiable and does not give rise to an attack based on any of the listed grounds, or other arbitrary grounds'.

<sup>200</sup> *Duma v Minister of Correctional Services & Others* (2016) 6 BLLR 601 (LC).

<sup>201</sup> *Duma v Minister of Correctional Services & Others* the court confirmed that the arbitrariness has long been recognised as one of the hallmarks of discrimination.' 'The facts before the court took place prior to the amendments of the EEA. The court applied the principles of law that were analogous, at the time, to the amendments that are now in effect.' See also [PAY DISCRIMINATION - Themis Law \(themislawchambers.co.za\)](http://www.themislawchambers.co.za)

<sup>202</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others* (C687/15) (2016) ZALCCT 14.

<sup>203</sup> *Duma v Minister of Correctional Services & Others* (2016) 6 BLLR 601 (LC).

<sup>204</sup> See para 1.5.1 above and *Piliso v Old Mutual Life Assurance Co (SA) Ltd* 2007 28 ILJ 897 (LC) para 77.

<sup>205</sup> *Duma v Minister of Correctional Services & Others* (2016) 6 BLLR 601 (LC).

<sup>206</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others* (C687/15) (2016) ZALCCT 14.

<sup>207</sup> Naidoo V 'Equal Pay for Equal Work based on any other arbitrary Ground, in terms of the Employment Equity Amendment Act of 2013 – Pay Discrimination' available at <https://www.themislawchambers.co.za/pay-discrimination>.

With the amendment of the Employment Equity Act the principle of *equal pay for work of equal value* was for the first time directly provided for as a prohibited ground of unfair discrimination.<sup>208</sup>

### **3.3 EQUAL PAY FOR WORK OF EQUAL VALUE UNDER THE EEA**

#### **3.3.1 Section 6(4) of the EEA: Equal Pay for Work of Equal Value**

The Employment Equity Amendment Act (EEAA) 47 of 2013 amended section 6 of the EEA to include sub-section section (4) which states that:

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

Regulation 6 assesses whether work is of equal value:

- (1) 'In considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria:
- a) the responsibility demanded of the work, including responsibility for people, finances and material;
  - b) the skills, qualification, including prior learning and experience required to perform the work, whether formal or informal;
  - c) physical, mental, and emotional effort required to perform the work; and
  - d) to the extent that is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.

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<sup>208</sup> Section 6(4) of the EEA.



- (2) In addition to the criteria specified in sub-regulation (1) any other factors indicating the value of the work may be considered in evaluating work, provided the employer shows that the factor is relevant to assessing the value of the work.
- (3) The assessment undertaken in terms of sub-regulation (1) and (2) must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or any arbitrary ground that is prohibited in terms of section 6(1) of the Act.<sup>209</sup>

The publication of the Employment Equity Regulations<sup>210</sup> and the Code of Good Practice on *equal pay for work of equal value*<sup>211</sup> assisted in the implementation of the principle of *equal pay for work of equal value* as provided for in the EEA. The Code should be read in conjunction with the Constitution and all relevant legislation, including the LRA,<sup>212</sup> the BCEA,<sup>213</sup> and the Promotion of Equality and Prevention of Unfair Discrimination.<sup>214</sup> The Regulations and the 'Code' sets out the criteria for assessing work of *equal pay for work of equal value* as well as the grounds of justification for any discrepancy in remuneration.

The requirements for such a claim will be discussed more fully below.

### 3.3.1.1 'Difference in terms and conditions of employment'

Section 6(1) stipulates that any 'difference in terms and conditions' of employment based on a listed or arbitrary ground, whether directly or indirectly, will trigger the protection provided by section 6(4). Section 6(4)<sup>215</sup> will however not be violated where there is a justifiable reason for the difference in treatment.<sup>216</sup> In the case of *Louw v Golden Arrow Bus Services*<sup>217</sup> the Labour Court held 'mere differential treatment of persons from different races was not *per se* discriminatory on the ground of race unless the difference in race was

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<sup>209</sup> Item 6 of the Employment Equity Regulations 2014.

<sup>210</sup> 2014 GN R595 GG 37873.

<sup>211</sup> Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 in GG 37873.

<sup>212</sup> LRA 66 OF 1995 as amended.

<sup>213</sup> The Basic Conditions of Employment Act, 75 of 1997 as amended.

<sup>214</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

<sup>215</sup> Employment Equity Act.

<sup>216</sup> Labour Relations Amendment Act no 6 of 2014.

<sup>217</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC).

the reason for the unequal treatment.<sup>218</sup> It is, however, unfair labour practice to pay different wages of *equal work or work of equal value* if the reason or motive, being the cause for doing so, is direct or indirect discrimination on arbitrary grounds or the listed grounds.<sup>219</sup> In the case of *Mia v Minister of Justice*<sup>220</sup> the court found that to determine whether there is discrimination, it must be determined whether there was differentiation and if so, was it discrimination and if so, was it unfair.<sup>221</sup>

The EEA's Regulations<sup>222</sup> provides guidance in respect of applying section 6(4). Regulation 5 specifically sets out the methodology for assessing a claim of work of equal value.<sup>223</sup> It states that 'it must be established whether any difference in terms and conditions of employment, including remuneration constitutes unfair discrimination.'<sup>224</sup>

Regulation 3 stipulates that:

- (1) 'An employer must, in order to eliminate unfair discrimination, take steps to eliminate differences in terms and conditions of employment, including remuneration of employees to perform work of equal value if those differences are directly or indirectly based on a listed ground or any arbitrary ground that is prohibited by section 6(1) of the Act.
- (2) Without limiting sub-regulation (1), an employer must ensure that employees are not paid different remuneration for work of equal value based on race, gender, or disability.'<sup>225</sup>

Regulation 7 stipulates that where there is a difference in the terms and conditions of employment, including remuneration it is not unfair discrimination if the difference is fair and rational, and based on any one or a combination of the following grounds:<sup>226</sup>

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<sup>218</sup> *Louw v Golden Arrow Bus Services* 2000 21 ILJ 188 (LC) para 26.

<sup>219</sup> *Louw v Golden Arrow Bus Services* 2000 21 ILJ 188 (LC) para 23.

<sup>220</sup> *Mia v Minister of Justice* (2002) 23 ILJ 884 (LAC).

<sup>221</sup> *Mia v Minister of Justice* (2002) 23 ILJ 884 (LAC) para 2

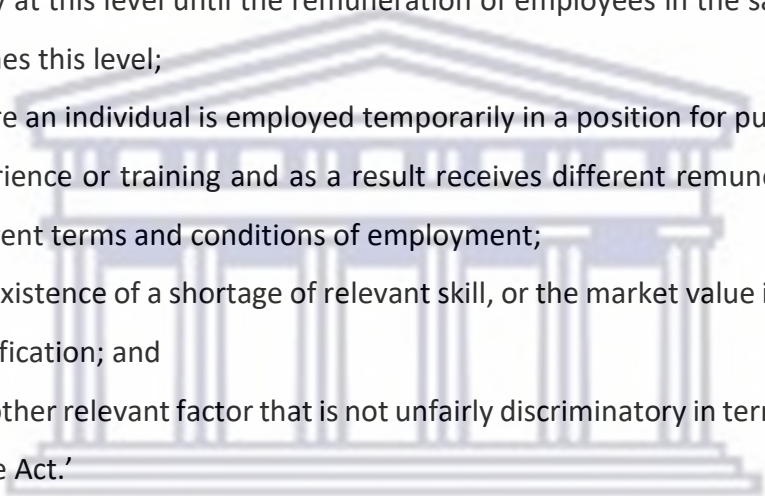
<sup>222</sup> Employment Equity Regulations GN R595 in gg 37873 of 1 August 2014.

<sup>223</sup> Regulation 5(1)(a).

<sup>224</sup> Regulation 5(2).

<sup>225</sup> Item 3 of the Employment Equity Regulations, 2014.

<sup>226</sup> Regulation 7 of the Employment Equity Regulation 2014.

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- a) 'Seniority or length of service of the individuals;
  - b) Qualifications, ability, competence, or potential above the minimum acceptable levels required for the performance for the job;
  - c) The performance, quantity of work, provided that employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied;
  - d) Where an employee is demoted as a result of organisational restructuring or for other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;
  - e) Where an individual is employed temporarily in a position for purposes of gaining experience or training and as a result receives different remuneration or enjoys different terms and conditions of employment;
  - f) The existence of a shortage of relevant skill, or the market value in a particular job classification; and
  - g) Any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act.'

In the case of *SA Chemical Workers Union v Sentrachem Ltd*<sup>227</sup> one of the applicants alleged wage discrimination between its black and white employees who were employed on the same grade or engaged in the same work. The Industrial Court held 'there is no doubt that wage discrimination based on race, or any difference there than skills and experience was unfair labour practice. The employer acknowledged pay discrimination as alleged and removed it within a period of six months as directed by the court.'<sup>228</sup> This case makes it clear that skills and experience are objective and fair factors which would justify pay differentiation and further where there is discrimination, employers will be ordered to remove the pay discrimination.<sup>229</sup>

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<sup>227</sup> *SA Chemical Workers Union v Sentrachem Ltd* 1988 9 ILJ 410 IC.

<sup>228</sup> *SA Chemical Workers Union v Sentrachem Ltd* 1988 9 ILJ 410 IC 412F, 429F, 430E-F, 439H.

<sup>229</sup> *SA Chemical Workers Union v Sentrachem Ltd* 1988 9 ILJ 410 IC.

In the case of *South African Municipal Union v Nelson Mandela Bay Municipality*<sup>230</sup> the applicant complained that (i) she was remunerated at a lower salary than the two men appointed at the same time she was, and (ii) one of the assistant directors was on grade 16 and remunerated at that grade whilst she was remunerated at grade 15. The allegation was based on differential treatment as a result of gender. The LC had to determine whether the difference in grading and remuneration amounted to unfair discrimination on the listed ground of gender. A causal nexus between gender and differentiation on the basis of the listed ground i.e., gender had to be proven which the applicant failed to prove.<sup>231</sup>

In the case of *Fouche and Eastern Metropolitan Local Council*<sup>232</sup> the employee claimed that he was discriminated against by not being paid a higher salary and that he was entitled to higher remuneration 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'.<sup>233</sup> The employees' salary should be 'based on job requirements' and not on the 'performance levels of individuals'.<sup>234</sup>

Where an employer bases its defence on one or more of the aforesaid factors to justify differentiation in terms and conditions of employment, such differentiation should not be declared as being unfair.<sup>235</sup>

### 3.3.1.2 'Between employees of the same employer'

Regulation 4<sup>236</sup> stipulates that work is of equal value if it:

- (1) 'Is the same as the work of another employee of the same employer if their work is identical or interchangeable.

<sup>230</sup> *South African Municipal Union obo Tetyana v Nelson Mandela Bay Municipality* (2016) 2 BLLR 202 (LC),

<sup>231</sup> *South African Municipal Union obo Tetyana v Nelson Mandela Bay Municipality* (2016) 2 BLLR 202 (LC) para 37.

<sup>232</sup> *IMATU obo Fouche and Eastern Metropolitan Local Council* 1999 5 BALR 601 (IMSSA).

<sup>233</sup> Page 604 of [1999] 5 BALR 601 (IMMSA).

<sup>234</sup> Page 604 of [1999] 5 BALR 601 (IMMSA).

<sup>235</sup> Section 6 (2)(b) of the EEA.

<sup>236</sup> Item 4 of the Employment Equity Regulation 2014.



- (2) Is substantially the same work as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable.
- (3) Is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7.<sup>237</sup>

For purposes of section 6(4) a complainant must prove that he/she is an 'employee'<sup>238</sup> and the comparator is an 'employee'<sup>239</sup> and that they are both employed by the 'same employer.'<sup>240</sup> Employees employed by different employers but in the same industry would not be able to claim in terms of section 6(4) as a result of pay comparison between them. The comparator must be doing the 'same' or 'similar work' or *work of equal value* as that of the complainant of the same employer.<sup>241</sup>

In the case of *Mangena v Fila South Africa (Pty) Ltd*,<sup>242</sup> the court looked beyond the employing legal entity. The court held that a comparison must be made between a complainant and comparator when using the phrase '*between employees of the same employer*'. If the basis, as example, for alleged discrimination is based on race, then the complainant and comparator would be from different race group; if alleged unfair discrimination is based on sex, then the complainant and the comparator would be of different genders.<sup>243</sup>

In the case of *Unitrans Supply Chain Solutions v Nampak Glass*<sup>244</sup> the court recognised and gave effect to an employment relationship. It recognised a party as the true employer regardless of the labels attached by the parties, and despite the confines of any contract

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<sup>237</sup> Item 4 of the Employment Equity Regulations 2014.

<sup>238</sup> Section 9 of the Employment Equity Act 55 of 1998 provides for purposes of ss 6, 7 and 8, the term 'employee' includes applicants for employment.

<sup>239</sup> Section 6(4) refers to the phrase '*between same employees*' of the same employer.

<sup>240</sup> Section 6(4) of the EEA.

<sup>241</sup> *Mias v Minister of Justice & Others* [2001] JOL 9132 (LAC) par.28.

<sup>242</sup> *Mangena & Others v Fila South Africa (Pty) Ltd and others* (2010)12 BLLR 1224 (LC) par.6

<sup>243</sup> Laubscher, T *Equal Pay for work of Equal Value* – A South African Perspective ILJ 2016.

<sup>244</sup> *Unitrans Supply Chain Solutions (Pty) Ltd & Another v Nampak Glass (Pty) Limited and Others* (2014) 35 ILJ 2888 (LC) par 24.



between them.<sup>245</sup> Employees performing the ‘same’ or ‘similar work’ or work of equal value, employed in separate legal entities would not necessarily be able to avoid liability under section 6(4). Particular where the employing entities forms part of the same corporate group of companies.<sup>246</sup>

### 3.3.1.3 ‘Performing the same or substantially the same work or work of equal value’

The principle of *equal pay* would equally apply to work that is the ‘same’, ‘substantially the same’ or of equal value, when compared to an appropriate actual comparator of the same employer. For a section 6(4) claim to be lodged successfully against a comparator the complainant must prove that the comparator performed ‘the same’ or ‘substantially the same’ work or work of equal value. Regulation 4(1) of the EEA Regulations<sup>247</sup> defines work as ‘substantially the same’ if the work is identical and interchangeable.<sup>248</sup>

In the case of *Ntai v South African Breweries Limited*<sup>249</sup> three black employees compared themselves to two white employees. All employees were training officers at the employer’s Training Institute. The allegation was based on the applicants earning less than the comparators on the alleged ground of race. The court accepted that the applicants had made a prima facie case but dismissed the claim on the basis that the difference in pay was based on factors other than race<sup>250</sup> and that the differentiation in pay was not discriminatory. The applicants failed to prove on a balance of probabilities that the reason for the different

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<sup>245</sup> The Labour Court was asked to consider the application of section 97 of the Labour Relations Act to the expiry of the warehousing agreement between Unitrans Supply Chain Solutions and Nampak Glass and the subsequent appointment of TMS Group Industrial Services to henceforth perform these services to Nampak Glass. Unitrans Supply Chain Solutions held the contractual right to perform the services, the employees who were utilised in the performance of the service was all employed by a wholly owned subsidiary, Unitrans Household Goods Logistics (Pty) Limited. The Labour Court held *inter alia* as follows; [24] ‘There is therefore support on the undisputed evidence for the conclusion that the first and second applicants ought for present purposes to be as a single entity (sic)’.

<sup>246</sup> Laubscher, T *Equal Pay for work of Equal Value* – A South African Perspective page 16.

<sup>247</sup> Regulation 4(1) of the EEA Regulation 2014 GN in GN R595 in GG37873 of 1 August 2014.

<sup>248</sup> See 3.2.1.2 above.

<sup>249</sup> *Ntai & Others v South African Breweries Limited* (2001) 22 ILJ 214 (LC) par 1-5.

<sup>250</sup> *Ntai & Others v South African Breweries Limited* para 56 ‘the size of the gap can be attributed to the remuneration history of the comparators where the regrading of their jobs in 1992 and factors other than races, such as their experience (seniority) and accumulative performance related increases appear to have played an important part.’

salaries was based on race.<sup>251</sup> In the case of *Mangena v Fila South Africa (Pty) Ltd*<sup>252</sup> the court held that the complainant failed to establish that he performed the 'same' work as performed by the comparator, and that the factual foundation that is necessary to sustain a claim of equal pay for equal work simply does not exist.<sup>253</sup> The complainant claiming equal pay for work of equal value must lay a proper factual foundation of the work performed by himself and that of the comparator to enable the court to make an assessment as to what value should be attributed to the work. The factual foundation might include evidence of *skill*,<sup>254</sup> *effort*,<sup>255</sup> *responsibility*,<sup>256</sup> and the *like*<sup>257</sup> in relation to the work of both the claimant and the comparator.<sup>258</sup>

To determine whether work is the 'same' or 'substantially the same', the actual duties performed by the complainant and the comparator must be considered.<sup>259</sup>

### 3.4 JUSTIFICATION AND BURDEN OF PROOF FOR AN ALLEGED SECTION 6(4) BREACH

#### 3.4.1 Justification

Where an employer bases his/her defence on one or more of the factors mentioned to justify differentiation in 'terms and conditions' of employment, such differentiation should not be biased against any employee. The differentiation must be applied proportionally.<sup>260</sup>

Regulation 7 of the Employment Equity Regulations prescribes reasonable factors that could allow for differences in wages.<sup>261</sup> These reasonable factors can render the terms and conditions of employment 'fair and rational'.<sup>262</sup> In the case of *Pioneer Foods (Pty) Ltd v*

<sup>251</sup> *Ntai & Others v South African Breweries Limited* (2001) para 2-3, 5, 25,21,57.

<sup>252</sup> *Mangena & Others v Fila South Africa (Pty) Ltd and others* 2010 12 BLLR 1224 (LC).

<sup>253</sup> *Mangena & Others v Fila South Africa (Pty) Ltd and others* 2010 12 BLLR 1224 (LC) par 14.

<sup>254</sup> *Mangena & Others* paras 6 and 15.

<sup>255</sup> *Mangena & Others* paras 6 and 15.

<sup>256</sup> *Mangena & Others* paras 6 and 15.

<sup>257</sup> Meintjes – Van der Walt, L 1998 ILJ 26 stated that 'the evaluation of job content is normally based on four criteria, namely skill, responsibility, physical and mental effort, and the conditions under which the work is performed.'

<sup>258</sup> *Mangena & Others v Fila South Africa (Pty) Ltd and others* 2010 12 BLLR 1224 (LC) par 15.

<sup>259</sup> Employment Equity Regulations 2014 and Employment Equity Act.

<sup>260</sup> See 3.2.1.1 above- Regulation 7 of the Employment Equity Regulations 2014.

<sup>261</sup> See 3.3.1.1 above.

<sup>262</sup> Regulation 7 of the Employment Equity Regulations,2014.

*Workers Against Regression*<sup>263</sup> the seniority (length of service) factor was the fore in the Labour court. The LC on appeal reversed an arbitration award in which the Commissioner found that paying newly appointed drivers at an 80% rate for the first two years of employment as opposed to the 100% rate paid to drivers amounted to unfair discrimination in pay. The Commission for Conciliation, Mediation and Arbitration regarded the factor of seniority as a ground of discrimination as opposed to a ground justifying pay differentiation.<sup>264</sup> The *Pioneer Foods* case is one of the first reported cases from the LC dealing with the new equal pay legal framework.<sup>265</sup>

In the case of *NUMSA and SAMANCOR Ltd (Meyerton Works)*<sup>266</sup> the arbitrator had to deal with the issue of the right to equality where 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 was based on any criteria mentioned in item 2 (1)(a) of Schedule 7 of the LRA or any other inherent characteristics of classes of employees.<sup>267</sup> The employer's justification for paying higher pay was due to a shortage of candidates for a particular job and the need to attract them was by means of a higher pay which constituted an objectively justified ground for the differentiation.

The arbitrator considered three principles in determining equal remuneration namely;

- i) 'Market forces'<sup>268</sup> there was no evidence of the alleged market force operating at the time of recruitment of the various Human Resources Officers.

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<sup>263</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 ZALCCT 14.

<sup>264</sup> Ebrahim S " Equal Pay in Terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression* 2016 ZALCCT 14" *PER / PELJ* 2017(20) – DOI available at <http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1524>

<sup>265</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016.

<sup>266</sup> *NUMSA and SAMANCOR Ltd (Meyerton Works)* 1998 7 ARB 6.7.12

<sup>267</sup> Hlongwane N 'Commentary on South Africa's position regarding equal pay for work of equal value' available [http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/1426/Hlongwane\\_LLM\\_2004.pdf?sequence=1](http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/1426/Hlongwane_LLM_2004.pdf?sequence=1)

<sup>268</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 (3) BLLR 311 (LC) 'the LC stated that market forces could be accepted as one of the influences, which in combination with others may legitimately cause variation in remuneration levels, provided that they are uncontaminated by prohibited ground of discrimination.'

- ii) Individual competence - the competence, qualification and experience of the Human Resources Officers were evaluated at the time of their recruitment by means of interviews, *curricula vitae*, and testing; and
- iii) Individual worth - was not evaluated on a regular basis in respect of employees within the NUMSA bargaining unit.'

The arbitrator 'noted the historical factors was responsible for the differentiation in remuneration.' The 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. No award was made.<sup>269</sup>

Employers relying on one of the prescribed factors must be able to demonstrate that the factor relied upon triggered the difference.<sup>270</sup> Employers need to ensure that where there is differential treatment that there is a justifiable reason for it.<sup>271</sup>

### 3.4.2 Burden of Proof

Section 11 of the EEA stipulates that 'whenever unfair discrimination is alleged in terms of the Act, the employer against whom the allegation is made must establish that it is fair.'

Section 11 regulates the burden of proof in unfair discrimination cases which stipulates that:

- (1) 'If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-
  - (a) did not take place as alleged; or
  - (b) is rational and not unfair or is otherwise justifiable.
- (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
  - (a) the conduct complained of is not rational.

<sup>269</sup> NUMSA and SAMANCOR Ltd (Meyerton Works) 1998 7 ARB 6.7.12:4.

<sup>270</sup> Regulation 7 of the Employment Equity Regulations 2014.

<sup>271</sup> McKenzie B, 'War on wages: Discrimination is not always unfair' accessed via <https://www.lexology.com/library/detail.aspx?q=1462ebee-8208-4a79-ac3f-5ac38b47eee9>



(b) the conduct complained of amounts to discrimination; and the discrimination is unfair.<sup>272</sup>

In the case of *Mangena & Others v Fila*<sup>273</sup> the court observed work as 'similar in nature where any differences are infrequent or of negligible significance as a whole and held that the factual foundation that is necessary to sustain a claim of *equal pay for work of equal work* simply did not exist.'<sup>274</sup>

In a CCMA case, *Sasol Chemical Operations (Pty) Ltd v CCMA and others*,<sup>275</sup> the LC had to evaluate the evidentiary burden placed on employees who contend that they have been subjected to unfair discrimination during their employment.<sup>276</sup> The employee did not pass the hurdle in section 11(1) of the EEA to discharge the evidential burden relating to discrimination on the ground of race. The employee did not discharge the evidentiary burden to link difference in remuneration to race. The award must be set aside and replaced with an award that Sasol did not unfairly discriminate against the employee.<sup>277</sup>

Allegations of unfair discrimination will not succeed if not supported, even if the burden of proving fairness is placed on the employer. Employees has a duty to provide sufficient evidence in support of his/her claim 'to cast doubt on' the employer's explanation or 'to show that there is more likely reason than that of the employer.'<sup>278</sup>

In the case of *Transport and General Workers Union v Bayete Security Holdings*<sup>279</sup> the employee needed 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

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<sup>272</sup> Employment Equity Act 55 of 1998.

<sup>273</sup> *Mangena & Others v Fila South Africa (Pty) Ltd and others* 2010 12 BLLR 1224 (LC).

<sup>274</sup> *Mangena & Others v Fila South Africa (Pty) Limited and Others* at par 9.

<sup>275</sup> *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2018) ZALCJHB 2680/16.

<sup>276</sup> *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2018) ZALCJHB 2680/16 para 10.

<sup>277</sup> *Sasol Chemical Operations (Pty) Ltd v CCMA and others* (2018) ZALCJHB 2680/16 para 38.

<sup>278</sup> Du Toit et al, *Labour Law through the Cases* (LexisNexis, Issue 21, of 2018) at EEA-37 s.v.

<sup>279</sup> *Transport and General Workers Union v Bayete Security Holdings* (1999) 20 ILJ 1117 (LC) 'the employee was appointed to a marketing position after serving the employer as a security guard. The employer appointed the comparator at a higher salary than that of the employee. The claimant claimed that the difference in their salaries amounted to unfair discrimination in that the comparator lacked experience in the security industry.'



difference in their wages amounted to discrimination.<sup>280</sup> The court held ‘that the employee failed to prove that the difference in salary levels was based on race or any other arbitrary criterion.’<sup>281</sup>

### 3.5 CONCLUSION

Section 6 of the EEA is the foundation of the prohibition of unfair discrimination in the workplace. The amendment of the Employment Equity Act broadened section 6<sup>282</sup> by including *equal pay* claims in the context of unfair discrimination. It places an obligation on all employers to ‘promote equal’ opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.<sup>283</sup>

In the case of *Harksen v Lane*<sup>284</sup> the Constitutional Court ‘held that the applicant must show that a provision which discriminates 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 comparable serious manner.’<sup>285</sup> This case has been the leading test regarding discrimination. Although this case does not deal specifically with employment issues it resulted in the test for discrimination used by the Labour Courts.<sup>286</sup> This test, however, does not apply directly in the context of employment since the amendment of the EEA.<sup>287</sup>

There should be a clear differentiation amounting to discrimination, not only discrimination but unfair discrimination.<sup>288</sup> If there is no differentiation, then there would be no infringement of the Constitution.<sup>289</sup> Section 9 of the Constitution will be contravened where

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<sup>280</sup> *Transport and General Workers Union v Bayete Security Holdings* para 7.

<sup>281</sup> Hlongwane N ‘Commentary on South Africa’s position regarding equal pay for work of equal value’ p71 para 3.

<sup>282</sup> Section 6(4) of the Employment Equity Amendment Act 2014.

<sup>283</sup> South African Employment Equity Guide 2013 ‘Discrimination’ is not defined in the EEA however the Oxford dictionary defines it as ‘the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, or sex’ <http://oxforddictionaries.com>

<sup>284</sup> *Harksen v Lane* 1997 (11) BCLR 1489.

<sup>285</sup> *Harksen v Lane* para 48.

<sup>286</sup> Du Toit D *Labour Relations Law* 660. Cooper C ‘The Boundaries of Equality in Labour Law’ (2004) 25 *ILJ* 813 – 825. Additionally, the industrial courts utilised the *Harksen v Lane* case as these courts were bound by the *stare decisis* as it holds persuasive value.

<sup>287</sup> Du Toit D ‘Protection against Unfair Discrimination: Cleaning up the Act?’ (2014) 35 *ILJ* 2623 2634.

<sup>288</sup> The *Harksen v Lane* test is discussed with reference to para 53.

<sup>289</sup> Section 9(1) of the Constitution

there is a differentiation based on a listed ground and unfairness will be presumed. If the differentiation is not a listed ground,<sup>290</sup> then unfairness must be proven by the individual alleging discrimination and such discrimination to be unfair. Where unfair discrimination is found in the differentiation then sections 9(3) and 9(4) of the Constitution will be deemed to be violated. In the *Harksen* case the discrimination test determined whether the less favourable treatment was unjust.<sup>291</sup>



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<sup>290</sup> Section 6(1) of the EEA provides that “no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic, or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground”

<sup>291</sup> Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 106.

## CHAPTER FOUR

### AN OVERVIEW OF THE PRINCIPLE OF EQUAL PAY FOR WORK OF EQUAL VALUE WITHIN THE JURISDICTIONS OF AUSTRALIA AND INDIA

#### 4.1 INTRODUCTION

Chapter 2 revealed the statutory principle of *equal pay for work of equal value* as introduced into the EEA.<sup>292</sup> Chapter 3, further, revealed the fairness around the principle of *equal pay for work of equal value* which remains complex within South Africa. The aim of this chapter is to consider the principle of *equal pay for work of equal value* within the jurisdictions of Australia and India and the way in which the principle is provided for in both jurisdictions. In both jurisdiction's women, specifically, continue to be treated unfavourably in the workplace, particularly in as far as wage discrimination is concerned. Such comparative overview could provide insights into ways in which the principle could be successfully implemented in South Africa, while also highlighting pitfalls to avoid.

#### 4.2 AUSTRALIA

##### 4.2.1 Background

In 1907 the Commonwealth Court of Conciliation and Arbitration,<sup>293</sup> which was established by the Commonwealth Conciliation and Arbitration Act 1904, determined that *fair and reasonable* wages for unskilled male workers were required to constitute a living wage.<sup>294</sup> A *family or living wage* had to be an amount deemed as sufficient to support a family.<sup>295</sup> In the matter of *Ex parte H.V. Mckay*<sup>296</sup> it was held that in order for an employer to pay an employee a fair and reasonable wage meant paying a wage that 'met the normal needs of an average

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<sup>292</sup> Employment Equity Act 55 of 1998.

<sup>293</sup> H.B. Higgins, *A New Province for Law and Order*, Dawsons of Pall Mall, London, 1968.

<sup>294</sup> *Ex parte H.V. Mckay* (1907) 2 CAR 1 commonly referred to as the *Harvester case*.

<sup>295</sup> *Ex parte H.V. Mckay*; 'a skilled worker would receive an additional margin for their skills, regardless of the employer's capacity to pay.'

<sup>296</sup> *Ex parte H.V. Mckay* (1907) 2 CAR page 1 -25.

employee.<sup>297</sup> Fair and reasonable wages had to be determined according to the need of a male worker and not according to the worker's value to the employer.<sup>298</sup> The decision provided the foundation for national minimum wage determination. The question around what was considered to be *fair and reasonable wages* for a female worker stemmed from this decision.

In 1912 the application for *equal pay* for women was explicitly rejected in *Rural Worker's Union v Mildura Branch of the Australian Dried Fruits Association*.<sup>299</sup> It was held that women should only be awarded the full male rate where there was a risk of cheap female labour displacing men. At the time it was believed that men, not women, had the obligation to provide for their wives and children.<sup>300</sup> It was only in the 1919 case of *Federated Clothing Trades of the Commonwealth of Australia v Archer Union*<sup>301</sup> that the fixing of female wages to that of their male counterparts was determined. The decision of this case did not only result in the fixing of equal wages for Australian woman but allowed for the assessment of better working conditions.<sup>302</sup> The gender pay discrepancy, thereafter, narrowed to 75 percent with World War II when women stepped into jobs vacated by men. This percentage rate was accepted as the standard.<sup>303</sup>

The working force participation of women actively increased between 1950's and 1960's.<sup>304</sup> Women were segregated in the workforce into specific jobs or, barred from some and in most instances paid less than men for the same job.<sup>305</sup> Although women were considered

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<sup>297</sup> *Ex parte H.V. McKay* (1907) 2 CAR 1.

<sup>298</sup> *Ex parte H.V. McKay* (1907) 2 CAR 1.

<sup>299</sup> *Rural Worker's Union and the South Australian United Labourers Union v Mildura Branch of the Australian Dried Fruits Association and others (Fruit pickers case)* 6 CAR 61 (1912) page 61-68; 'based on the principle of 'fair and reasonable wage for a female worker' in the *Harvester case*'.

<sup>300</sup> *Fruit pickers Case* (1912) 6 CAR 61.

<sup>301</sup> *Federated Clothing Trades of the Commonwealth of Australia v Archer* (1919) 13 CAR 647 Case 1919 (known as the *Clothing Trades Case*).

<sup>302</sup> O' Conner L 'Australian fatigue Management Requirements from 1919- The Commonwealth Arbitration of Federated Clothing' 2019 available at <https://www.linkedin.com/pulse/australian-fatigue-management-requirements-from-1919-liam-o-connor>

<sup>303</sup> National Security (Female Minimum Wages) Regulations and the *Basic Wage Case* 1949 -1950 AU NBAC N21-2186.

<sup>304</sup> Australian Bureau of Statistics Trends available at <http://www.abs.gov.au> (accessed Dec 2011).

<sup>305</sup> <https://research-repository.griffith.edu.au>

essential within the workforce in some occupations, their paid work was regarded as lesser to that of men. The primary role of women was that of housewife and motherhood.<sup>306</sup>

In the case of *Aboriginal Stockmen*,<sup>307</sup> the only example to date in the Australian jurisdiction of a racially based pay differentiation. The case concerned Aborigines employed on cattle stations in Australia's northern territories. The stockmen in question were specifically excluded from the award covering white employees working on the cattle stations. The union's claim sought to have the aborigines included under the white employee's award, thus increasing rates of pay and altering the aborigines' conditions of employment. The employers asked that the award be applied to the few aborigines who were 'relatively skilled', while not contradicting the union's claims. The employers stressed that their claims were not based on racial grounds but on *work of value*. The Commission held in the settlement that the industrial dispute was that all adult male employees were entitled to be paid a basic wage unless they were classified in some special category, such as slow workers. The Commissioner accepted the employers' un-contradicted evidence that aborigines work was considerably less value than that of the white employee but granted *equal pay*.<sup>308</sup> In essence this was a concept of *equal pay* for unequal work; however, the Commissioner was not prepared to take steps in ensuing gender-based claims.

In 1969 the Australian Conciliation and Arbitration Commission (ACAC) accepted the implementation of the principle of *equal pay for equal work* based on certain guidelines.<sup>309</sup> The commissioner acknowledged that putting the principle into practice would be complex;<sup>310</sup>

'While we accept the concept of *equal pay for equal work* implying as is it does the elimination of discrimination based on sex alone, we realise that the concept is difficult of precise definition and even more difficult to apply

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<sup>306</sup> Australian Journal of Social Issues Vol.45 No.1 Autumn 2010 p118.

<sup>307</sup> *Aboriginal Stockmen* 113 C.A.R 651 (1966).

<sup>308</sup> 113 C.A.R 669. The Commission stated "[t]here must be one Industrial law, similarly applied, to all Australians, aboriginal or not."

<sup>309</sup> *Equal Pay Case* 1969.

<sup>310</sup> Risse L '50 years after the historic equal pay decision, the legacy of women's work' remains, available at <http://www.canberratimes.com.au> (accessed 23 June 2019).



with precision'.<sup>311</sup>

The commissioner continued that the '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'.<sup>312</sup> The principle only applied immediately to women doing the exact same work as men, and employed predominantly in male occupations which lead to one in five working women benefitting from this.<sup>313</sup> In 1972 the commissioner rejected the 1912<sup>314</sup> and 1969 principles and applied only one wage rate applicable to both males and females and stated;

'In light of present circumstances, we consider that it is better for us to state positively a new principle. In our view the concept of 'equal pay for equal work' is too narrow in today's world and we think the time has come to enlarge the concept of 'equal pay for equal work value'. This means that award rates for all work should be considered without regards to the sex of the employee.'<sup>315</sup>

During the 1970's the weekly minimum female wages increased from 73 percent to 93 percent of men as the new equal pay principles were implemented.<sup>316</sup>

#### **4.2.2 Equal pay for work of equal value**

New South Wales was the first Australian state to incorporate the International Labour Organisation (ILO) Convention No. 100<sup>317</sup> through the Industrial Arbitration (Female Rates)

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<sup>311</sup> *Equal Pay Case* 1969-page 1156.

<sup>312</sup> *Equal Pay Case* 1969 paragraph (3) page 1158.

<sup>313</sup> 1969 *Equal Pay Case* page 1158 and Risse L '50 years after the historic 'equal pay' decision, the legacy of 'women's work remains' accessed by <https://www.canberratimes.com.au> June 23 2019.

<sup>314</sup> *Fruit pickers Case* (1912) 6 CAR 61.

<sup>315</sup> *National Wage and Equal Pay Cases* (1972) 147 CAR 172 at 178.

<sup>316</sup> Hamilton RS 'Waltzing Matilda and the Sunshine Harvester Factory: The early history of the Arbitration Court, the Australian minimum wage, working hours and paid leave/Fair Work Australia' 2011.

<sup>317</sup> The Equal Remuneration Convention, 1951. Australia ratified the Equal Remuneration Convention in 1974.

Amendment Act.<sup>318</sup> The Act provided that all employees, regardless of gender, were to be paid equal for 'performing work of the same or like nature and of equal value'.<sup>319</sup>

In 1969 the *Australasian Meat Industry Employees Union v Allied Trades Federation of Australia*<sup>320</sup> promoted the principle of *equal pay for work of equal value* for women alongside men. However, by accepting the principle in theory the practicality thereof would be complex. The principle of *equal pay* would thus only apply where women did exactly the same work as men and where they were employed predominantly in male occupations.<sup>321</sup> The Commonwealth Arbitration Commission unanimously accepted the principle of *equal pay for equal work*. It stated that '[t]his Commission cannot escape its own history, including the history of the Court, even if it wanted to'.<sup>322</sup> The Commission granted *equal pay for equal value* in the following nine propositions if male and female employees were working under the same terms;

- (i) 'The male and female employees concerned must be adults, should be working under the terms of the same determination or award.
- (ii) It should be established that certain work covered by the determination or award is performed by both males and females.
- (iii) The work performed by both the males and females under such determination or award should be of the same or similar 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.
- (iv) For the purpose of determining whether the female employees are performing work of the same of similar nature and of equal value as the male employees, the Arbitrator, or the Commissioner, as the case may be, should in additions to any other relevant matter, take into consideration whether the female employees

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<sup>318</sup> Industrial Arbitration (Female Rates) Amendment Act 42 of 1958.

<sup>319</sup> Industrial Arbitration Act 1940 – 1980, section 88D which was repealed. The Act was more restrictive than the broad scope of Article (b) of the ILO Convention No.100, which defined equal remuneration' regardless of sex as 'rates of remuneration established without discrimination based on sex'.

<sup>320</sup> *Australasian Meat Industry Employees Union v Allied Trades Federation of Australia*, (Equal Pay case 1969) 127 – Commonwealth Arbitration Reports 1142.

<sup>321</sup> *Equal Pay Case 1969*, Sir Richard Kirby Archives. Retrieved 13 January 2017.

<sup>322</sup> *Equal Pay Case*, 127 C.A.R. AT 1156.

performing the same or similar work as male employees and doing the same range and volume of work as male employees and under the same conditions.

- (v) Consideration should be restricted to work performed under the determination or award concerned.
- (vi) In cases where males and females are doing work of the same or similar nature and 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 classification should not be of a generic nature covering a wide of variety of work.
- (vii) In considering whether males and females are performing work of the same or similar nature and of equal value, consideration should not be restricted to the situation in one establishment but should be extended to the general situation under the determination or award concerned, unless the award or determination applies to only one establishment.
- (viii) The expression of 'equal value' should not be construed as meaning 'of equal value to the employer' but as of equal value, at least from the point of view of wage or salary assessment.
- (ix) Notwithstanding the above, equal pay should not be provided by application of the above principles where the work in question is essentially or usually performed by females but is work for which male employees may also be employed'.<sup>323</sup>

In 1996 the Workplace Relations Act,<sup>324</sup> which has been repealed by the Fair Work Act 2009, made provision for equal remuneration to be paid to men and women workers performing work of equal value. The term *equal remuneration for work of equal value* refers to rates of remuneration established without discrimination based on sex.<sup>325</sup>

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<sup>323</sup> *Equal Pay Cases*, 127 C.A.R. at 1158. See also Shaw A, Mcphail R, Ressa S -*Employment Relations* (2<sup>nd</sup> edition) 2018. See also Chapter 1, Division 3 (4)(1)(a) and chapter 2 of the Fair Work Act 2009 – 'A registered agreement is a collective agreement under the *Fair Work Act 2009*, which sets out the terms and conditions of employment. The approval of these agreements is required by the FW Commission, employer, and employee. Any party seeking to vary the agreement need to make application to the FW Commission'.

<sup>324</sup> The Workplace Relations Act 1996 Part VIA, Division 2.

<sup>325</sup> The Workplace Relations Act 1996 including ILO 100, Article 2 repealed by the Fair Work Act 2009.

By 1998 however, women in Australia were still paid less than men for doing the same work of equal value.<sup>326</sup>

### 4.2.3 EXISTING LEGISLATION

In terms of the Workplace Relations Act of 1996 'equal remuneration for work of equal value' is to give effect to International Conventions and Recommendations.<sup>327</sup> The 'equal remuneration for work of equal value' term refers to equal remuneration for men and women workers for work of equal value.<sup>328</sup> The Workplace Relations Act of 1996 has been repealed by the Fair Work Act in 2009.

#### 4.2.3.1 Equal Opportunity for Women in the Workplace (EOWW) Act<sup>329</sup>

The legislation was first enacted as the Affirmative Action (Equal Opportunity for Women) Act 1986. In 1999 it was reviewed, amended, and renamed the Equal Opportunity for Women in the Workplace Act 1999. In 2012 the Act was amended again and renamed the Workplace Gender Equality Act.

#### 4.2.3.2 Fair Work Act 2009

The Fair Work Act is the foundation of all standards and regulations for employment that governs Australia's workplace. The laws prohibiting discrimination based on gender, and which provide equal remuneration for work of equal value,<sup>330</sup> have not been able to remove the gender pay gap.<sup>331</sup> Differences in remuneration arising for work of equal value remain a

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<sup>326</sup> H Hughes 'equal pay for work of equal value: moving towards, or away from, wage justice for women?' (1998) Issues 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.html>.

<sup>327</sup> Anti-Discrimination Conventions, the Equal Remuneration Recommendation, 1951 (No. 90) and the Discrimination (Employment and Occupation) Recommendation, 1958 (No.111).

<sup>328</sup> Anti-Discrimination Conventions, the Equal Remuneration Recommendation, 1951 (No. 90) and the Discrimination (Employment and Occupation) Recommendation, 1958 (No.111).

<sup>329</sup> Equal Opportunity for women in the Workplace (EOWW) Act 1999.

<sup>330</sup> Part 2-7 of the *Fair Work Act 2009*.

<sup>331</sup> *Fair Work Amendment (Gender Pay Gap) Bill 2015* submission 13.

reality.<sup>332</sup> The aim of the Fair Work Act<sup>333</sup> is to provide a balanced framework for productive workplace relations which promotes national economic prosperity and social inclusion for all Australians, i.e., the right to be free from unlawful discrimination.

The Act specifically makes provision for:

- (i) 'Terms and conditions of employment,
- (ii) Rights and responsibilities of employees.
- (iii) Compliance with and enforcement of the Act.
- (iv) The administration of the Act by establishing the Fair Work Commission and the Fair Work Ombudsman.<sup>334</sup>

There are various legal remedies available where gender pay gap is a result of gender-based discrimination, namely:

- i) 'The Sex Discrimination Act<sup>335</sup> which provides 'that discrimination on the basis of sex, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, family responsibilities, sexual orientation, gender identity and intersex status is unlawful'. Discrimination in employment, including remuneration is covered by the law.
- ii) The Workplace Gender Equality Agency (WGEA), recommends that '[p]ay equity is achieved when women and men performing the same roles or roles of comparable value receive the same remuneration'.<sup>336</sup>
- iii) The Fair Work Act part 2-7 creates a statutory scheme to improve differences in remuneration for work that is of equal or comparable value as a legal remedy.

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<sup>332</sup> *Fair Work Amendment (Gender Pay Gap) Bill* 2015.

<sup>333</sup> Chapter 1, Division 2 (3) (a-g) of the Fair Work Act 2009.

<sup>334</sup> Chapter 1, Division 3 (4) (a-e) of the Fair Work Act 2009.

<sup>335</sup> *The Sex Discrimination Act* 1984.

<sup>336</sup> McSorley L Workplace 'Gender Equality Agency, Case study 2015': Research showcasing leading practice at the Commonwealth Bank <https://www.wgea.gov.au/publications/gender-equality-business-case>



There is an obligation on employers to achieve gender pay fairness by introducing initiatives that responds to the specific needs of the workplace.<sup>337</sup> Employers need to provide assurance that areas where equal opportunity may be improved, they design and implement policies and practices to achieve such improvement.

In order to achieve the equality within the workplace, employers need to:

- (i) 'Provide *equal pay for work of equal or comparable value*.
- (ii) Remove barriers to the full and equal participation of women in the workplace.
- (iii) Access all occupations and industries, including leadership roles, regardless of gender.
- (iv) Eliminate discrimination on the basis of gender, particularly in relation to family and caring responsibilities.'<sup>338</sup>

Consideration with regards to, skills, flexibility, quality of work, gender pay equity audit reviews, salary comparisons etc. should be considered.<sup>339</sup>

#### **4.2.3.3 Fair Work Amendment Act 2015**

The Fair Work Amendment Act<sup>340</sup> amended provisions of the Fair Work Act by removing restrictions on employee's rights to disclose the amount of, or information about, their pay or earnings and prohibit employers from taking adverse action against employees for disclosing such information. Senator Larissa Waters<sup>341</sup> commented in her speech on the Fair Work Amendment (Gender Pay Gap) Bill 2015, that, '[w]omen will sometimes only discover that they are being paid less than their male colleagues after talking to a co-worker...when pay is set in secret by individual negotiation, women are at a disadvantage. While there is no evidence to suggest that women's abilities to negotiate are any different from men's, research show women's negotiations are often less successful. Research suggest that

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<sup>337</sup> *The Fair Work Act* part 2-7 2009.

<sup>338</sup> Australian Government Workplace Gender Equality Agency <https://www.wgea.gov.au/what-we-do/employer-of-choice-for-gender-equality>

<sup>339</sup> *The Fair Work Act* part 2-7 2009.

<sup>340</sup> Fair Work Amendment Act 2015.

<sup>341</sup> Fair Work Amendment (Gender Pay Gap) Bill 2015; Second Reading (accessed 17 September 2015) <https://www.openaustralia.org.au/senate/?id=2015-09-17.36.1>.

women are less likely to ask for a raise or negotiate aggressively and are more likely to be judged unfairly by managers.’

The Fair Work Amendment (Gender Pay Gap) Bill 2015 removed the legal prohibitions on workers discussing their own pay. Workers have since been allowed to tell their colleagues what they are paid if they wish to and prohibits employers from taking adverse action against employees for disclosing such information.<sup>342</sup> Pay variation may differ for many reasons, even where people have the same job, role, or occupation.<sup>343</sup>

The gender pay gap is used as a measure of women’s disadvantages in employment and reducing the gap is a common goal of many nations’ gender equality policies.<sup>344</sup>

#### 4.2.3.3 Workplace Gender Equality Act of 2012

In 2012 the Australian government introduced legislation into Parliament to retain and improve the Equal Opportunity for women in the Workplace (EOWW) Act,<sup>345</sup> including the Equal Opportunity for Women in the Workplace Agency.<sup>346</sup> The Equal Opportunity for Women in the Workplace Agency<sup>347</sup> is a statutory authority whose objective is to administer the Equal Opportunity for Women through education to achieve equal opportunity for women.<sup>348</sup> The Equal Opportunity for Women in the Workplace Act 1999 was amended and renamed the Workplace Gender Equality Act. The main objective of the WGEA<sup>349</sup> is to:

- i) ‘Improve and promote equality for both men and women in the workplace.
- ii) Support employers to remove barriers to the full and equal participation of women in the workplace.<sup>350</sup>

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<sup>342</sup> Fair Work Amendment (Gender Pay Gap) Bill 2015.

<sup>343</sup> The Australian Chamber of Commerce and Industry ‘*Inquiry into the Fair Work Amendment (Gender Pay Gap) Bill*’ 2015 (Cth) – 17 February 2016 <https://www.aph.gov.au/DocumentStore.ashx?id=0d30448a-2cdc-4496-9121-43b892037d0f&subId=409051>

<sup>344</sup> Charlesworth S & Macdonald F ‘Australia’s Gender Pay Equity Legislation: How New, How Different, What Prospects?’ *Cambridge Journal of Economics*, (2015) PP 421-40 <https://www.jstor.org/stable/24694999>

<sup>345</sup> Equal Opportunity for women in the Workplace (EOWW) Act 1999.

<sup>346</sup> Equal Opportunity for Women in the Workplace Agency 1999.

<sup>347</sup> Equal Opportunity for Women in the Workplace Agency 1999.

<sup>348</sup> Part III Section 10 of the *Equal Opportunity for women in the Workplace (EOWW) Act* 1999.

<sup>349</sup> Workplace Gender Equality Act 2012.

<sup>350</sup> Workplace Gender Equality Act 2012, section 2A(a).

- iii) Promote, amongst employers, the elimination of discrimination on the basis of gender in relation to employment and in the workplace.
- iv) Foster workplace consultation between employers and employees on issues concerning gender equality.
- v) Improve the productivity and competitiveness of Australian business through the advancement of gender equality in employment and in the workplace'.<sup>351</sup>

In 2019 the Senate Committee on Finance and Public Administration conducted a gap analysis in terms of gender segregation in the workplace and the impact on women's economic inequality.<sup>352</sup> Nine recommendations were made by the Senate Committee, namely:

- i) 'Developing and implementing national policy framework in order to achieve gender pay equity in Australia.
- ii) Amend the Fair Work Act 2009 to improve capacity to address equal remuneration.
- iii) The government to conduct a comprehensive consultation process with expert stakeholders to achieve these reforms.
- iv) The government to restore and protect the budget of the Pay Equity Unit that was previously established as part of the Fair Work Commission.
- v) Provide guidance and awareness on gender - sensitive careers and training institutions.
- vi) Undertake a national evaluation of all programs and initiatives associated with the increasing number of girls in STEM education.<sup>353</sup>
- vii) Conduct a review of recent gender pay reporting initiatives.
- viii) Conduct a review of labour force data with particular attention to job classifications used by the Australian Bureau of Statistics.

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<sup>351</sup> Workplace Gender Equality Act 2012 section 2A (c).

<sup>352</sup> 'Spotlight on the gender pay gap' in Australia, gender pay gap series – no.8 available at <https://www.bakermckenzie.com/-/media/files/insight/publications/2018/06/spotlight-on-the-gender-pay-gap-in>

<sup>353</sup> STEM education means 'science, technology, engineering, and mathematics' it is an approach to learning and development that integrates into the areas mentioned.

ix) 'Time Study' recommended regularly'.<sup>354</sup>

#### 4.2.3.4. Fair Works Commission and Ombudsman

The Fair Work Commission and Fair Work Ombudsman are both independent bodies and separate government organisations, regulated by the Australian workplace relations system with distinctive roles. The duties of the Commission, an independent national workplace relations tribunal, include administering the Fair Work Act<sup>355</sup> and the Fair Work Regulations of 2009; reviewing legislation, including updating entitlements and national minimum wages; and operating as a tribunal to hear claims and declare rulings. Both the Fair Work Act and the Fair Work Regulations<sup>356</sup> governs the employer and employee relationship in Australia.<sup>357</sup> The Fair Work Act and Fair Work Regulations provide a safety net of minimum entitlements, enabling flexible working arrangements and fairness at work and prevent discrimination against employees.<sup>358</sup> The Fair Work Act requires the Fair Work Commission to consider the principle of *equal remuneration for work of equal or comparable value* in the setting and adjusting of minimum wages including the adjustment of modern awards.<sup>359</sup> The decisions delivered by the Commission are binding and must be adhered to.<sup>360</sup>

The Fair Workers Commission must make equal remuneration orders which is 'considered appropriate to ensure that, employees to whom the order will apply, is *equally remunerated for work of equal or comparable value*'.<sup>361</sup> The Fair Work Ombudsman enforces compliance with the Fair Work Act and related legislation including awards and registered agreements. The objective of the Fair Work Ombudsman is to govern and investigate allegations of breaches in the workplace and initiate legal proceedings.<sup>362</sup>

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<sup>354</sup> Spotlight on the gender pay gap' in Australia, gender pay gap series – no.8 available at <https://www.bakermckenzie.com/-/media/files/insight/publications/2018/06/spotlight-on-the-gender-pay-gap-in> .

<sup>355</sup> Fair Work Act 2009.

<sup>356</sup> Fair Work Regulations 2009.

<sup>357</sup> [Legislation - Fair Work Ombudsman](https://www.fairwork.gov.au/about-us/legislation); <https://www.fairwork.gov.au/about-us/legislation>.

<sup>358</sup> [Legislation - Fair Work Ombudsman](https://www.fairwork.gov.au/about-us/legislation); <https://www.fairwork.gov.au/about-us/legislation>.

<sup>359</sup> S134 (1)(e) of the *Fair Work Act*.

<sup>360</sup> Chapter 1, Division 3 (4)(1)(d) and chapter 5 of the *Fair Work Act* 2009.

<sup>361</sup> Section 302 (1) *Fair Work Act*.

<sup>362</sup> *Fair Work Act* 2009.



### 4.3 CONCLUSION

The national policy in Australia, which is found in legislation and case law, has undergone major changes over the past 60 years.<sup>363</sup> There was legally sanctioned discrimination against women, in the 1950's, which was ideal for men in full time work.<sup>364</sup>

Today, women have more options in employment and equal opportunity, equal with men, than they did in the 1950's.<sup>365</sup> The women of the 1950's daughters who entered into employment in the 1970's and 1980's benefited from the changes to policies of no discrimination in the workforce.<sup>366</sup> There was no discrimination on grounds of sex and equal pay as these grounds of discrimination was fought for by their mothers.<sup>367</sup> Granddaughters of the women of the 1950's who entered into the workforce in the 1990's found a change in legislation to promote equal opportunity for all women in employment.<sup>368</sup> Women still work for males within the workforce i.e. male managers, as legal provisions for equal opportunity has not translated fully into reality for all women.<sup>369</sup> Gender segregation of jobs in Australia remains an attribute in the labour market.<sup>370</sup> In the WGEA case study of *Kimberley – Clark Australia Pty Ltd* on gender segregated industries data has shown no decrease in gender wage gap.<sup>371</sup>

Australia may be a leading example in adopting equality in employment. It has received authoritative recognition in numerous judicial decisions.<sup>372</sup> In *Australian Postal Commission*

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<sup>363</sup> Strachan G 'Still working for the man? Women's employment experiences in Australia since 1950 2010; *Australian Journal of Social Issues* <http://hdl.handle.net/10072/36422>

<sup>364</sup> Strachan G 'Still working for the man? Women's employment experiences in Australia since 1950 2010; *Australian Journal of Social Issues* <http://hdl.handle.net/10072/36422>.

<sup>365</sup> *Australian Journal of Social Issues* Vol.45 No.1 Autumn 2010

<sup>366</sup> Strachan G 'Still working for the man? Women's employment experiences in Australia since 1950 2010; *Australian Journal of Social Issues* p118.

<sup>367</sup> Lake M. *Getting Equal: The History of Australian Feminism*, Sydney: Allen and Unwin (1999) 214 – 30.

<sup>368</sup> *Australian Journal of Social Issues* p118

<sup>369</sup> *Australian Journal of Social Issues* Vol.45 No.1 AUTUMN 2010 p119

<sup>370</sup> Workplace Gender Equality Act 2012.

<sup>371</sup> 'Gender segregation in the workplace and its impact on women's economic equality' accessed via [https://humanrights.gov.au/sites/default/files/AHRC\\_Submission\\_Inquiry\\_Gender\\_Segregation\\_Workplac\\_e2017.pdf?%20qa=2.226956121.575424975.1599183506-2050072554.1590363388](https://humanrights.gov.au/sites/default/files/AHRC_Submission_Inquiry_Gender_Segregation_Workplac_e2017.pdf?%20qa=2.226956121.575424975.1599183506-2050072554.1590363388)

<sup>372</sup> Afroza Begum, 'Implementing Women's Equal Right to Employment in Bangladesh: A Comparative Judicial Approach with Special Reference to India, Canada and Australia', 11 *Canberra L. Rev* 1 (2012)



(APC),<sup>373</sup> the Court of Appeal, examined the adverse impact of APC's neutral policies on two women where they were denied permanent appointments due to their lack of medical fitness – a specified body weight measured by height and specified in the APC's policy. The Court favoured them by observing that the requirements may fairly measure the skills of all candidates but operate to disqualify women because of their inherent physical characteristics.<sup>374</sup> In *Municipal Officers' Association of Australia & Anor*<sup>375</sup> the Equal Opportunity Commission maintained that '[formal] equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities in the political, economic, social, cultural or any other field of public life'.



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<sup>373</sup> *Dao v Australian Postal Commission* (1987) 162 CLR 317, 318.

<sup>374</sup> *Dao v Australian Postal Commission*. See also *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 166, 205- 208.

<sup>375</sup> *Municipal Officers' Association of Australia & Anor* (1991) EOC (92-344) 78, 399. See also, *Australian Journalist Association* (1988) EOC (92-224) 77,124, 126. The Commission observed that the under representation of women in the AJA itself suggest that something more than the mere equal opportunity is required to attain the equal result of participation in its affairs.

## INDIA

### 4.4 BACKGROUND

The female labour participation rate in India between 1901 to 1951 was between 28 percent and 34 percent. This rate was higher than the level of participation observed in 1990.<sup>376</sup> This rate however varies from state to state within India.

The gender pay equity in India was a growing concern due to an increase in instances of discriminatory pay scales for the same type of work.<sup>377</sup> The lack of comprehensive and transparent wage policy for all sectors of the economy was evident and raised the concern around equal pay.<sup>378</sup>

Some of the factors contributing to the existing gender pay gap in India:

- i) 'Occupational preferences where female participation in the paid labour market is low in India and primarily concentrated in rural areas, for example, in the agricultural sector.<sup>379</sup> In the north of India the rural areas observation within labour is divided on the basis of gender. For example, in the agricultural sector certain activities have been allocated specifically to women,<sup>380</sup> such as drying and storing of grain, while ploughing and harvesting are only performed by men.<sup>381</sup> This is seen as mere preference and not a rule. Female labour participation has, however, been seen to be higher in sectors involving personal services and care work, and higher in informal sectors.<sup>382</sup> The Human Development Report, 1995 reported that women spend two-

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<sup>376</sup> Esteve-Volart B, 'Gender Discrimination and Growth: Theory and Evidence from India' (2004). 'Regions in northern India (observed to be more patriarchal) have lower participation rates for women than the states in southern India, where women have more freedom to participate in the formal economy.'

<sup>377</sup> Rathore S 'Equal Pay for Equal Work – A Paradigm Shift' International Journal of Legal Science & Innovation (ISSN 2581-9453) 2019 available at <https://www.ijlsi.com/equal-pay-for-equal-work-a-paradigm-shift> *Equal Pay for Equal Work- A Paradigm Shift - IJLSI*

<sup>378</sup> Section 4 of the Equal Remuneration Act 1976 emphasis equal pay for equal work and bared the employer from reversing pay scales in order to obtain equilibrium.

<sup>379</sup> 'Women, Work and the Economy: Macroeconomic Gains from Gender Equity': Staff discussion Note, IMF 2013.

<sup>380</sup> Martha C, Glover J, Chen M 'Women, Culture and Development: A Study of Human Capabilities' 1995 Clarendon Press.

<sup>381</sup> Dewin S, *Closing the Gender Wage gap in Indian Agriculture* 2014.

<sup>382</sup> Mishra A, Ahamad T, Pandey J, 'The Status of Women Workers in the Unorganized Sector' 2014 – Newman International Journal of Multidisciplinary Studies vol 1 Issue 12 pp 72-79.

thirds of their working time on unpaid work where men spend only one-fourth of their time towards unpaid labour.<sup>383</sup>

- ii) Education and training have been strongly in favour of men as they are raised with the expectation of being bread earners.<sup>384</sup> Women are viewed as 'future homemakers' for whom education may not be as essential.<sup>385</sup> The education and training rate of women in India is much lower than that of men. This has been observed by the rate of girls dropping out of school.<sup>386</sup>
- iii) Cultural barriers where women have been excluded from the paid labour market based on discrimination of labour.<sup>387</sup> Where attempts were made to seek gainful employment by women, from rural India, outside their homes they would be forced to give up their property rights. They were forced to leave their villages they lived in.<sup>388</sup> Paid work was not a feasible option even if to sustain themselves due to the existing norms.<sup>389</sup> For example, 'childcare is viewed as a women's job, women often take part-time jobs or time off during careers to take care of their families. Upon returning to work they are often paid lower wages than their male colleagues. Full time paid women earned 34 percent less than men in general.<sup>390</sup> The pay gap increased even further to part time working women to almost less than 42 percent.<sup>391</sup> All women in India, regardless of having children or not, still faced pay discrimination as they are viewed as potential mothers<sup>392</sup> who may require a break from work in the future.<sup>393</sup>

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<sup>383</sup> Human Development Report (HDR) is an annual report published by the Human Development Report Office of the United Nations Development Programme (UNDP).

<sup>384</sup> Preet R 'Understanding Gender Inequalities in Wages and Incomes in India.' The Indian Journal of Labour Economics, Vol 48 No 2. 2005.

<sup>385</sup> Preet R 'Understanding Gender Inequalities in Wages and Incomes in India'. The Indian Journal of Labour Economics, Vol 48 No 2. 2005.

<sup>386</sup> Mishra A, Ahamad T, Pandey J, 'The Status of Women Workers in the Unorganized Sector' 2014.

<sup>387</sup> Martha C, Glover J, Chen M 'Women, Culture and Development: A Study of Human Capabilities' 1995.

<sup>388</sup> Martha C, Glover J, Chen M 'Women, Culture and Development: A Study of Human Capabilities' 1995.

<sup>389</sup> Martha C, Glover J, Chen M 'Women, Culture and Development: A Study of Human Capabilities' 1995.

<sup>390</sup> Anand L, Varkkey B, Kirde R 'Gender Pay Gap in the Formal Sector: Preliminary Evidence from Paycheck India Data' 2012 – WageIndicator Data Report.

<sup>391</sup> Anand L, Varkkey B, Kirde R 'Gender Pay Gap in the Formal Sector: Preliminary Evidence from Paycheck India Data' 2012 – Wage Indicator Data Report.

<sup>392</sup> Goldberg D, Hill J 'Bind the Pay Gap', American Association of University Women Educational Foundation 2007.

<sup>393</sup> Anand L, Varkkey B, Kirde R 'Gender Pay Gap in the Formal Sector: Preliminary Evidence from Paycheck India Data' 2010

#### 4.5 PRINCIPLE OF EQUAL PAY FOR EQUAL WORK

The Indian Constitution of 1949 is regarded as the supreme law of the land that protects the rights of individuals and restricts the violation of people's rights.<sup>394</sup>

The Constitution recognises the principle of *equal pay for equal work* for both women and men, including the right to work.<sup>395</sup> Embedded in the Constitution are articles relating to the principle *equal pay for equal work*. These Articles are inserted as Directive Principles of State Policy of India (DPSP) in the Constitution.<sup>396</sup> The State directed their policy towards securing *equal pay for equal work* for both men and women in the Constitution.<sup>397</sup>

The Constitution guarantees 'equality before law or equal protection of the laws within the territory of India'.<sup>398</sup> The primary objective of the Constitution is to provide security to all its citizens including women justice, social economic and political, liberty of thought, expression, belief, faith, and promote the people of India assuring dignity of individuals for all citizens including women.<sup>399</sup> Article 39(d) of the Constitution,<sup>400</sup> states that the State shall in particular, direct its policy towards securing;

- a) 'That the citizen, men, and women equally, have the right to an adequate means of livelihood.
- b) That the ownership and control of the material resources of the community are so distributed as best to subserve the common good.
- c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.
- d) There is equal pay for equal work for both men and women.'

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<sup>394</sup> <https://www.ijlsi.com/equal-pay-for-equal-work-a-paradigm-shift> *Equal Pay for Equal Work- A Paradigm Shift - IJLSI*

<sup>395</sup> Articles 14 and 39(d) in the Constitution of India 1949. These Articles are inserted as Directive Principles of State Policy.

<sup>396</sup> Constitution of India 1949.

<sup>397</sup> Constitution of India 1949.

<sup>398</sup> Article 14 of the Constitution of India 1949 states 'The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.'

<sup>399</sup> Constitution of India 1949. DR. Zaheeruddin: 'Equal Remuneration to Men and Women,' Awards Digest, Vol XXXII-11-12, Nov – Dec.,2006, p272.

<sup>400</sup> Article 39(d) of the Constitution of India 1949.

The principle of *equal pay for equal work* is not expressly implied as a constitutional or fundamental right in India. It has been described, however, through the interpretations of Articles 14, 15 and 16 of the Constitution of India.<sup>401</sup> In the case of *Kishori Mohanlal Bakshi vs Union of India*<sup>402</sup> the principle of *equal pay for equal work* was considered, however, the Supreme Court announced the guidelines for *equal pay for equal work* 'unequipped for being implemented in the court of law.' In the case of *Mackinnon Mackenzie and Co Ltd vs Audrey D'Costa and Others*,<sup>403</sup> the principle of *equal pay for equal work* was acknowledged where a claim for equal remuneration for Lady Stenographers and Male Stenographers lead to equivalent compensation for both male and female stenographers. The Supreme Court held 'that the differential pay scales were in violation of the provision of the Act.'<sup>404</sup>

## 4.6 LEGISLATIVE FRAMEWORK

### 4.6.1 MINIMUM WAGES ACT 1948

The Minimum Wages Act, 1948 aimed to protect workers from exploitation by ensuring they were paid the minimum wage necessary to meet their basic needs and maintain their productivity. It ensured that there were no pay differences between men and women.<sup>405</sup>

### 4.6.2 EQUAL REMUNERATION ACT 1976

The aim of the Equal Remuneration Act<sup>406</sup> was to provide equal remuneration to men and women workers, preventing discrimination based on gender in all matters relating to

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<sup>401</sup> Article 14,15 and 16 of the Constitution of India 1949, 'guarantees fundamental rights of equality before law, protection against any kind of discrimination and equal opportunities in the matters of public employment.'

<sup>402</sup> *Kishori Mohanlal Bakshi vs Union of India*, A.I.R. (1962) S.C. 1139. This case got due acknowledgment in 1987 through the case of *Mackinnon Mackenzie*, the issue, in this case was of equivalent compensation for both male and female stenographers.

<sup>403</sup> *Mackinnon Mackenzie and Co. Ltd. vs. Audrey D'Costa and Others* (1987) 2 SCC 469.

[http://www.ilo.org/public/english/employment/qems/eo/law/india/case\\_law.htm](http://www.ilo.org/public/english/employment/qems/eo/law/india/case_law.htm).

<sup>404</sup> *Mackinnon Mackenzie and Co. Ltd. vs. Audrey D'Costa and Others* (1987) 2 SCC 469.

<sup>405</sup> <https://www.lawyersclubindiacom/articles/is-equal-pay-for-equal-work-a-fundamental-right-in-india>.

<sup>406</sup> The Equal Remuneration Act 1976 provides that 'no employer shall pay to any worker, employed by him in an establishment or employment, remuneration at rates less favourable than those at which remuneration is paid to workers' of the opposite sex performing the same work or work of a similar nature.'



employment and employment opportunities. Women were provided the opportunity with a right to demand equal pay and any inequality with respect to recruitment processes, job training, promotions, and transfers within the workplace.<sup>407</sup> This Act was a major step toward the principle of *equal pay for equal work* as it ensured no discrimination takes place between men and women and that women were treated fairly and equally.<sup>408</sup>

#### 4.6.3 CODE ON WAGES 2019

The Equal Remuneration Act 1976, the Payment of Wages Act of 1936, the Minimum Wages Act of 1948, and the Payment of Bonus Act of 1965 were all replaced by the Code on Wages 2019.<sup>409</sup>

The enactment of the Code was deemed as an opportunity for India to fill the wage gap in the legal regime dealing with pay equality.<sup>410</sup> The Code seeks to bring about uniformity in the provisions of minimum wages and timely payment of wages to all employees.<sup>411</sup> The Code prohibits gender discrimination in matters relating to wages and recruitment of employees for the same work or work of similar nature.<sup>412</sup> The only exception to this is where employment of women in such workplaces are prohibited/restricted under the laws.<sup>413</sup> 'Work of similar nature' is defined as 'work for which the skill, effort, experience and responsibility required are the same'.<sup>414</sup>

The Supreme Court have ruled in the case of *State of Punjab and Ors v Jagjit and ors*,<sup>415</sup> prior to the enactment of the Code on Wages, that an 'employee engaged for the same work cannot be paid less than another who performs the same duties and responsibilities and

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<sup>407</sup> Section 4 and 5 of the Equal Remuneration Act 1976.

<sup>408</sup> <https://www.lawyersclubindia.com/articles/is-equal-pay-for-equal-work-a-fundamental-right-in-india>

<sup>409</sup> Code on Wages 2019 (Code).

<sup>410</sup> Code on Wages 2019 (Code).

<sup>411</sup> <https://www.mondaq.com/india/employee-benefits-compensation/856716/code-on-wages-2019-key-features-and-highlights>

<sup>412</sup> Section 3 of the Code on Wages 2019.

<sup>413</sup> Section 3(2)(ii) of the Code on Wages 2019.

<sup>414</sup> Section 2(v) of the Code on Wages 2019.

<sup>415</sup> *State of Punjab and Ors v Jagjit and ors* (2016) par 55.

certainly not in a welfare state'.<sup>416</sup> In India any type of action contrary to what is set out in the judgement <sup>417</sup> would be considered demeaning and strikes at the very core of human dignity.<sup>418</sup>

## 4.7 CASE LAW

### 4.7.1 EQUAL PAY FOR EQUAL VALUE

The right to *equal pay for equal work* has been demonstrated as a fundamental right through various judicial precedents as seen below.

In the case of *Jaipal v State of Haryana*<sup>419</sup> the Supreme Court held 'that however the principle of *equal pay for work of equal value* would apply on the basis of comparable work it doesn't imply that it ought to be completely identical in all regards.'. For example, a casual or temporary worker playing out similar obligations, other required duties & functions are qualified for a similar compensation as paid to a permanent worker. So also, the distinction in method of choice won't influence the use of the teaching of equivalent pay for equivalent work if both classes of people perform comparable capacities and obligations under the same employer'. The constitutional principle of *equal pay for equal work* has been upheld by Indian courts with respect to temporary employees verses permanent employees in the government sector.<sup>420</sup> Temporary employees performing similar duties and functions as permanent employees are entitled to draw wages at same level with similarly placed permanent employees.<sup>421</sup> The principle is required to be applied in all cases where the same work is being performed irrespective of the class of employees.<sup>422</sup>

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<sup>416</sup> *State of Punjab and Ors v Jagjit and ors* (2016), the SC further observed that 'India being a signatory to the International Covenant on Economic, Social and Cultural Rights, 1966, there is no escape from the obligations thereunder un view of the different provisions of the Constitution.'

<sup>417</sup> *State of Punjab and Ors v Jagjit and ors* (2016).

<sup>418</sup> Bharadhwaj H, 'Equal Pay for Equal Work' available at [https://www.legalserviceindia.com/Equal\\_Pay\\_for\\_Equal\\_Work\\_\(legalserviceindia.com\)](https://www.legalserviceindia.com/Equal_Pay_for_Equal_Work_(legalserviceindia.com)), 'anyone who is compelled to work at a lesser wage does not do so voluntarily he or she does so to provide food and shelter to his or her family, at the cost of his or her self - respect and dignity, at the cost of his or her self-worth, and at the cost of his or her integrity.'

<sup>419</sup> *Jaipal & others v State of Haryana and others* (1988) 3 SCC 354.

<sup>420</sup> [https://www.mondaq.com/Equal\\_Pay\\_For\\_Equal\\_Work\\_In\\_India:\\_Wage\\_Discrimination\\_Between\\_Permanent\\_And\\_Temporary\\_Employees\\_Disallowed\\_-\\_Employee\\_Benefits\\_&\\_Compensation\\_-\\_India\\_\(mondaq.com\)](https://www.mondaq.com/Equal_Pay_For_Equal_Work_In_India:_Wage_Discrimination_Between_Permanent_And_Temporary_Employees_Disallowed_-_Employee_Benefits_&_Compensation_-_India_(mondaq.com))

<sup>421</sup> *State of Punjab and Ors. V Jagjit Singh and ors* 2016

<sup>422</sup> 'Pay Equity Laws in India' – L&E Global Knowledge Centre 2021 available at <https://knowledge.leglobal.org/pay-equity-laws-in-india/>

In the case of *Randhir Singh v Union of India*<sup>423</sup> the Supreme Court held that the principle of *equal pay for equal work* though not a fundamental right is a constitutional goal and therefore capable of enforcement through constitutional remedies under Article 32.<sup>424</sup> In the case of *Jeet Singh v Municipal Corporation of Delhi*,<sup>425</sup> the Supreme Court overturned the differences of pay scales of drivers in Delhi Police Force and Delhi Administration and Central Government, as it relied on Article 39(d).<sup>426</sup> The principle of *equal pay for equal work* can there for not be restricted. The right to *equal pay for equal work* as found in Article 39, must be read in conjunction with the equality clause enshrined in Articles 14 and 16 of the Constitution.<sup>427</sup>

In the case of *Markendeya v State of Andhra Pradesh*<sup>428</sup> the difference in pay scale, between graduate supervisors holding a degree and non-graduate supervisors being diploma and license holders, was raised and upheld. The Court held 'that on the basis of difference in educational qualifications such difference in pay scale was justified and would not offend Article 14 and 16.'<sup>429</sup> There are two classes of employees performing identical or similar duties and carry out the same functions with the same measure of responsibility having the same academic qualifications, should therefore be entitled to equal pay.'

In the case of *Federation of A.I Custom and Central Excise Stenographers (Recog.) v Union of India*,<sup>430</sup> the Supreme Court emphasized that equal pay must depend on the 'nature of the work done' and not 'mere volume of work' as 'there may be qualitative difference as regard reliability and responsibility'. Functions may be the same, but responsibilities make a difference.<sup>431</sup>

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<sup>423</sup> *Randhir Singh v Union of India* 1982 AIR 879 SCR (3) 298.

<sup>424</sup> Constitution of India 1949.

<sup>425</sup> *Jeet Singh v Municipal Corporation of Delhi* (1986) Supp SCC 560.

<sup>426</sup> *Mew a Ram Kanojia v A.I.L.M.S.* (1989) 2 SCC 235.

<sup>427</sup> Constitution of India.

<sup>428</sup> *V. Markendeya & Ors vs State of Andhra Pradesh* (1989) A.I.R. 1308, (1989) SCR (2) 422.

<sup>429</sup> Article 14 of the Constitution of India 1949, guarantees 'equality before law and equal protection of laws within the territory of India'. Article 16 (1) ensure 'equality of opportunity for all citizens including women in matters relating to employment or appointment to any office under the state', Article 16(2) prohibits 'discrimination in respect of any employment or office under the state on the ground, inter alia, of sex.'

<sup>430</sup> *Federation of A.I Custom and Central Excise Stenographers (Recog.) vs Union of India* AIR 1988 SC 1291: (1988) 3 SCC 91.

<sup>431</sup> *Federation of A.I Custom and Central Excise Stenographers (Recog.) vs Union of India* AIR 1988.

Indian legislature is aware of the importance of not only creating awareness but to effectively implement the legislative enactments.<sup>432</sup> In the matter of *State of MP vs RD Sharma*<sup>433</sup> the court ruled that while *equal pay for equal work* is not a fundamental right vested with every employee, it is considered a constitutional goal that the government must accomplish.<sup>434</sup>

#### 4.8 CONCLUSION

India is one of the fastest growing economies in the world and aims at becoming an economic superpower.<sup>435</sup> However, it will not be possible for India to reach this point, unless they are able to achieve *equal pay for equal work*. Unequal pay for equal work still exists despite various efforts by legislature and judiciary.<sup>436</sup> *Equal pay for work of equal value* is needed to close gender pay gap.<sup>437</sup>

Various laws have been enacted and various decisions by the courts have led to the recognition of *equal pay for equal work* as a fundamental right.<sup>438</sup> Women are being equipped through the Skill India Mission with market relevant skills to bridge the learning-livelihood gap and the gender gap.<sup>439</sup>

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<sup>432</sup> TUC Report 2008, Gender (in) equality in the labour market: an overview of global trends and developments Retrieved, 18th July 2009 from ITUC Report online via access [http://www.ituc-psi.org/IMG/pdf/GAP-09\\_EN.pdf](http://www.ituc-psi.org/IMG/pdf/GAP-09_EN.pdf).

<sup>433</sup> *State of MP vs RD Sharma* (2022).

<sup>434</sup> *State of MP vs RD Sharma* (2022, in this case a retired Principal Chief Conservator of Forests (PCCF) filed a writ petition in the Delhi High Court after the Government of India denies his application to revise his pension from Rs37,750 to Rs40,000 as per the new rules. The High Court passed the order in his favour and on being aggrieved by the same State, file an appeal to the SC. The SC held that the HC had misconstrued the Apex Court's judgement in the *State of Punjab vs Jagjit Singh*. It emphasized that this was the duty if the executive and not the judiciary, of equating postings and determining pay scales. The courts are not there to intervene in such complicate matters unless there was a major mistake made in determining a pay scale for a certain post.

<sup>435</sup> *India is fastest growing major economy: Check where US, China, others stand - Business News (indiatoday.in)* Debjit Sinha New Delhi April 21, 2022.

<sup>436</sup> Sahni M - *Equal Pay for Equal Work in India*, 2018 IJLMH|Volume 2, Issue 1|ISSN: 2581-5369 pg10 accessed <https://www.ijlmh.com>

<sup>437</sup> Walter D and Ferguson S, 'The gender pay gap, hard truths and actions needed' 2022 accessed via [https://www.asiapacific.unwomen.org/en/stories/op-ed/2022/09/the\\_gender\\_pay\\_gap\\_hard\\_truths\\_and\\_actions\\_needed|UN\\_Women-Asia-Pacific](https://www.asiapacific.unwomen.org/en/stories/op-ed/2022/09/the_gender_pay_gap_hard_truths_and_actions_needed|UN_Women-Asia-Pacific)

<sup>438</sup> Gupta N, *Equal pay for equal work and success of pay equity legislation*, August 2020 <https://www.Equalpayforequalworkandsuccessofpayequitylegislation-ipladers>

<sup>439</sup> Walter D and Ferguson S, 'The gender pay gap, hard truths and actions needed' 2022.



The real issue is not how much pay gap exists but that after 34 years of passing the Equal Remuneration Act there is still a wage gap.<sup>440</sup> The gender gap is slowly narrowing, however at the rate it is currently going, the progress rate to close this gap will take more than 70 years.<sup>441</sup> The policy of ensuring *equal pay for equal work* must be accompanied by an adequate mechanism for its implementation in order for it to be realized.<sup>442</sup> The principle of *equal pay for equal work* must be advocated strongly and promoted by government.<sup>443</sup> In order for equal pay for equal work to be achieved there is a need to have transformative equal pay policies and collective bargaining agreements.<sup>444</sup>

The formalisation of jobs is a necessity as the country constantly struggles with its inability to create jobs in the formal sector. Any changes in the conditions of women have to be accompanied by change in societal attitude, the need for mindset to change is immense and have a long way to go.<sup>445</sup> One of the objectives of the UN Sustainable Development Goals<sup>446</sup> is 'achieving full and productive employment and decent work for all women and men, including young people and persons with disabilities and equal pay for work of equal value by 2030.'<sup>447</sup> Closing the gender gap is key to achieving social justice for working women, as well as economic growth for India as a whole.'<sup>448</sup>

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<sup>440</sup> Bhattacharya B, Kedia B: '*Unequal Pay for Equal Work – Prevailing Form of Gender Discrimination in India*' International Journal of Social Science & Management 2013.

<sup>441</sup> Walter D and Ferguson S, 'The gender pay gap, hard truths and actions needed' 2022.

<sup>442</sup> Mazumdar D, Sarkar S, '*Globalization, Labour Markets & Inequality in India*', Asian Law Publishers, New Delhi, 2008.

<sup>443</sup> Shroff V, '*Gender Pay Gap in India – Legal Considerations*', <https://www.shrm.org>.

<sup>444</sup> Dipshi Swara, Senior Associate and Legal Editor, LawSikho <https://www.Equal pay for equal work and success of pay equity legislation - iPleaders>

<sup>445</sup> Mili J, Huang Y, Hartmann H, Hayes J, '*The Impact of Equal Pay on Poverty and Economy*', 2017 retrieved from <https://iwpr.org/publications/impact-equal-pay-poverty-economy/>

<sup>446</sup> UN Sustainable Development Global Goal 8 established by the United Nations General Assembly 2015, 'Progress on the Sustainable Development Goals: The gender snapshot' 2022 accessed at [https://www.unwomen.org/United Nations Entity for Gender Equality and the Empowerment of Women \(UN Women\) Department of Economic and Social Affairs \(DESA\)](https://www.unwomen.org/United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) Department of Economic and Social Affairs (DESA))

<sup>447</sup> UN Sustainable Development Global Goal 8 established by the United Nations General Assembly 2015, Progress on the Sustainable Development Goals: The gender snapshot 2022.

<sup>448</sup> UN Sustainable Development Global Goal 8 established by the United Nations General Assembly 2015, Progress on the Sustainable Development Goals: The gender snapshot 2022.



## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. INTRODUCTION

Twenty-eight years after the start of democracy, South Africa remains one of the most unequal countries in the world according to a World Bank report<sup>449</sup> 2018. The country is deemed to be more divided now than pre-1994, having arguably failed to bridge the divide that historically existed.<sup>450</sup> It has been reported that previously disadvantaged South Africans hold fewer assets, have fewer skills, earn lower wages and are more likely to be unemployed today.<sup>451</sup> These levels of inequality appear to be passed down from generation to generation.

The Constitution of South Africa, enacted in 1996, provides that each and 'everyone has a right to equality and fair labour practices'.<sup>452</sup> It regulates the right to equality and prohibits unfair discrimination.<sup>453</sup> Against the aforesaid constitutional protection, this study focused on the principle of *equal pay for work of equal value* in the context of unfair discrimination within South Africa as introduced in the Employment Equity Act.<sup>454</sup> The objective of this study was to examine how the principle of *equal pay for work of equal value* gives rise to an unfair discrimination claim in terms of section 6(4) of the EEA,<sup>455</sup> the legislative changes impacting gender wage discrimination and how the principle is implemented in South Africa, Australia and India.

The gender wage gap was predominantly used as an example in discussing the notion of *equal pay for work of equal value*.

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<sup>449</sup> 'The poverty and equity portal is the World Bank Group's comprehensive source for the latest data on poverty, inequality and shared prosperity' available <http://Povertydata.worldbank.org/Poverty/home> (2018).

<sup>450</sup> Katy Scott, CNN <https://edition.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html> (2019).

<sup>451</sup> World Bank Report on poverty and inequality in South Africa 2018 available at <https://www.worldbank.org/en/home>

<sup>452</sup> Section 23(1) of the Constitution of the Republic of South Africa 1996.

<sup>453</sup> Section 9 of the Constitution of the Republic of South Africa 1996.

<sup>454</sup> Employment Equity Act 55 of 1998.

<sup>455</sup> Employment Equity Act 55 of 1998.

The Constitution,<sup>456</sup> Labour Relations Act<sup>457</sup> and Employment Equity Act<sup>458</sup> attempt to protect all employees within the workplace. The Labour Relations Act<sup>459</sup> affords women, including disadvantaged groups<sup>460</sup> the right not to be unfairly discriminated against. This read together with the International Treaties which contribute towards protecting women and disadvantaged groups and promoting their employment rights.

Notwithstanding, the aforementioned legislative provisions and conventions, while the law formally seems to provide substantial protection, practically the rights to *equal pay for work of equal value* is not fully protected.<sup>461</sup> This is an indication that the implementation of the law is lacking.<sup>462</sup>

## 5.2 SUMMARY OF LEGISLATIVE MEASURES IN SOUTH AFRICA, AUSTRALIA & INDIA:

### 5.2.1 South Africa

Section 6(1) of the EEA<sup>463</sup> prohibits unfair discrimination in employment policies or practices and was the original section under which unequal pay claims were brought. A section 6(4) claim lodged by a complainant will not succeed in a claim for *equal pay* if the complainant cannot prove that there is an actual discrepancy between the complainant's wages and that of the comparator.<sup>464</sup>

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<sup>456</sup> Act 108 of 1996.

<sup>457</sup> LRA 66 of 1995.

<sup>458</sup> EEA 55 OF 1998.

<sup>459</sup> Section 187(1)(f) 'a dismissal is automatically unfair if the employer, in dismissing the employee, if the reason for the dismissal is – that the employer unfairly discriminated against an employee, directly or indirectly, on an arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.LRA

<sup>460</sup> 'Designated groups' means black people, women, and people with disabilities.

<sup>461</sup> Item 1.1 of the Code.

<sup>462</sup> Professor Bosch, A and Diedericks, L – 'Equal Pay for Equal Work – The Law is not Enough' (accessed via <https://ipm.co.za/2022/09/20/equal-pay-for-equal-work-the-law-is-not-enough-2/>)

<sup>463</sup> Section 6(1) of the EEA.

<sup>464</sup> Sinthemba C, Legal Practitioner at HSG Attorneys 'Unfair discrimination in the workplace: Unequal pay for equal work' accessed via <https://www.polity.org.za/article/unfair-discrimination-in-the-workplace-unequal-pay-for-equal-work-2021-06-28>.

In 2013 the EEA was amended by the Employment Equity Amendment Act,<sup>465</sup> which, amongst others, introduced sections 6(4) and 6(5) into the EEA. Section 6(4) was enacted into the EEA to directly regulate unequal remuneration for work of equal value within the South African employment context.<sup>466</sup> As discussed in chapter 3 above, it is evident that the requirements for establishing a claim under section 6(4) are proving: i) a difference in terms and conditions of employment; ii) between employees of the same employer; iii) performing the same or substantially the same work or work of equal value.<sup>467</sup>

*Equal pay for work of equal value* is a complex area of employment and not easily understood.<sup>468</sup> 'The legislation expressly outlaws unfair discrimination in respect of pay for work that is substantially the same or of equal value and provides remedies for employees who experiences such discrimination. Given the high level of protection in the law, the failure of the majority of section 6(4) claim cases is contrary to what one would expect.'<sup>469</sup>

Research has shown that a sophisticated legal framework does not necessarily translate to equality to elimination of discrimination in practice.<sup>470</sup> The legislation needs to be backed up by support mechanisms that enable employees to give effect to their rights.<sup>471</sup> Even though the principle of *equal work for work of equal value* is complex there should be an understanding that the EEA does not expressly prohibit unequal pay for work of equal value. The EEA merely prohibits discriminatory practices which includes unequal pay.<sup>472</sup>

Since the enactment of the Employment Equity Act in 1998, the Commission for Conciliation, Mediation and Arbitration, labour courts and the Labour Appeal Court have seen a total of 26 pay discrimination claims brought to them.<sup>473</sup> Only 3 out of the 26 were found in the employee's favour. The reason for the section 6(4) claims failing was due to the employees not able to prove that a difference amounted to unfair discrimination on grounds prohibited by law, including race and gender. Employers however were able to prove that that the pay

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<sup>465</sup> Employment Equity Amendment Act 47 of 2013.

<sup>466</sup> See para 1.2 above.

<sup>467</sup> See para 1.1 above.

<sup>468</sup> Ebrahim S 'Equal Pay for Work of equal value in terms of the Employment Equity Act 55 of 1998'

<sup>469</sup> Professor Bosch, A and Diedericks, L – '*Equal Pay for Equal Work – The Law is not Enough*'

<sup>470</sup> Professor Bosch, A and Diedericks, L – '*Equal Pay for Equal Work – The Law is not Enough*' [EQUAL PAY FOR EQUAL WORK – THE LAW IS NOT ENOUGH - IPM](#)

<sup>471</sup> Professor Bosch, A and Diedericks, L – '*Equal Pay for Equal Work – The Law is not Enough*'

<sup>472</sup> Nomagugu H, Commentary on South Africa's Position regarding Equal Pay for Work of Equal Value, 11 Law Democracy & Dev. 69 (2007).

<sup>473</sup> Professor Bosch, A and Diedericks, L – '*Equal Pay for Equal Work – The Law is not Enough*'

discrimination allegation was fair, on legally permitted grounds such as qualifications, work performance, length of service.<sup>474</sup>

Studies has shown that South Africa's progressive anti-discrimination legislation on its own is not sufficient to help employees enforce their right to *equal pay for equal work*.

As much as there is an obligation placed on employers as set out in the legislation,<sup>475</sup> there is a lack of awareness, understanding and support to employees on pursuing a case for pay discrimination.<sup>476</sup>

### 5.2.2 Australia

Legislation concerning the principle of *equal pay for equal work* was introduced in Australia in 1969. New South Wales was the first Australian state to incorporate Convention 100<sup>477</sup> through the Industrial Arbitration (Female Rates) Amendment Act.<sup>478</sup> In terms of this Act,<sup>479</sup> adult employees regardless of gender were to be paid *equal pay* for performing work of the same or a like nature and of *equal value*.

The Fair Work Act of 2009 read together with the Fair Work Amendment Act 2015, is the primary piece of legislation that governs Australia's workplace. It is the foundation of all standards and regulations for employment. The rules and obligations for employers and employees outlined in the Fair Work Act is known as the national workplace relations system. The aim of the Fair Work Act<sup>480</sup> is to provide a balanced framework for productive workplace relations which promotes national economic prosperity and social inclusion for all Australians, i.e., the right to be free from unlawful discrimination.<sup>481</sup> The Fair Work Act, when considering the principle of *equal pay for work of equal value* makes reference to; (i) terms

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<sup>474</sup> Professor Bosch, A and Diedericks, L – 'Equal Pay for Equal Work – The Law is not Enough'

<sup>475</sup> EEA 55 of 1998.

<sup>476</sup> *Equal Pay for Equal Work – The Law is not Enough* (accessed via <https://ipm.co.za/2022/09/20/equal-pay-for-equal-work-the-law-is-not-enough-2/>) Research found by Stellenbosch Business School, 2022.

<sup>477</sup> The Equal Remuneration Convention, 1951.

<sup>478</sup> Industrial Arbitration (Female Rates) Amendment Act 42 of 1958.

<sup>479</sup> Industrial Arbitration (Female Rates) Amendment Act 42

<sup>480</sup> Chapter 1, Division 2 (3) (a-g) of the Fair Work Act 2009.

<sup>481</sup> See para 4.2.3



and conditions of employment, (ii) rights and responsibilities of employees, (iii) compliance with and enforcement of the Act, (iv) the administration of the Act by establishing the Fair Work Commission and the Fair Work Ombudsman which is similar to the requirements set out in section 6(4) of the EEA.<sup>482</sup>

### 5.2.3 India

The Indian Constitution of 1949<sup>483</sup> recognises the principle of *equal pay for work of equal value* for both women and men and the right to work.<sup>484</sup> The Constitution offers protection through the Directive Principles of State Policy (DPSP).<sup>485</sup> The Principles are guidelines given to the federal institutes governing the state of India. Articles 39 to 51 of the Constitution of India envisage that all states ideally direct their policy towards securing *equal pay for equal work* for men and women ensuring both have the right to adequate means of livelihood.<sup>486</sup> Though these Directive Principles are not enforceable by any court they are essential to the governance of the country and state. There is a duty on the state to consider them while enacting laws.<sup>487</sup> The Constitution of India is regarded as the supreme law of the land that protects the rights of individuals and restricts the violation of people's rights.<sup>488</sup>

The Code on Wages 2019 was enacted to provide equal remuneration to men and women workers, preventing discrimination on the basis of gender in all matters relating to employment and employment opportunities. The principle of equal pay for equal work is not only demonstrated through the Constitution but various judicial precedents.<sup>489</sup>

Various judicial precedents set out the right to *equal pay for equal work* and is discussed in detail in section 5.3 above.

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<sup>482</sup> EEA 55 OF 1998.

<sup>483</sup> Articles 14 and 39(d) in the Constitution of India 1949.

<sup>484</sup> Articles 39(d) and 41 of the Constitution of India 1949. These Articles are inserted as Directive Principles of State Policy.

<sup>485</sup> Article 39.

<sup>486</sup> Constitution of India 1949. See para 5.2 above.

<sup>487</sup> Devi, Kovuru (January 1, 2000). *Women's Equality in India: A Myth or Reality?* Pp49-50 ISBN 81-7141-563-6.

<sup>488</sup> <https://www.ijlsi.com/equal-pay-for-equal-work-a-paridigm-shift> *Equal Pay for Equal Work- A Paradigm Shift - IJLSI*

<sup>489</sup> See para 5.3 above.



### 5.3 EMPLOYER OBLIGATIONS IN SOUTH AFRICA, AUSTRALIA & INDIA

Legislation on all 3 countries pertaining to the principle of *equal pay for work of equal value* places an obligation on employers to take reasonable steps to promote equal opportunity in the workplace.

Section 5 of the EEA places an obligation on employers to take reasonable steps to promote equal opportunity in the workplace which identify and eliminate unfair discrimination in any employment policy.<sup>490</sup> The Fair Work Act part 2-7 of 2009 requires an employer to provide assurance by designing and implementing policies and practices to achieve improvements. In India the Equal Remuneration Act 1976 barred employers from reversing pay scales and places a duty on employers to pay equal remuneration to men and women workers.<sup>491</sup>

Employers<sup>492</sup> are required to consult<sup>493</sup> with their employees, conduct an annual audit analysis<sup>494</sup> of all employment policies and procedures,<sup>495</sup> including, the working environment and facilities<sup>496</sup> and report to the Director General.<sup>497</sup> This process need to be conducted in order for the employer to identify and eliminate work barriers that discriminate against designated groups.<sup>498</sup>

The annual audit should consist of two types of analysis that the employer needs to conduct as stated in Section 19 of the EEA,<sup>499</sup> namely;

- (1) 'A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures, and the working environment, in order to identify employment barriers which adversely affect people from designated groups.

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<sup>490</sup> Chapter II Section 5 of the EEA.

<sup>491</sup> Equal Remuneration Act, 1976

<sup>492</sup> Section 13(2) of the Employment Equity Act 55 of 1998.

<sup>493</sup> Section 16 of the Employment Equity Act 55 of 1998.

<sup>494</sup> Section 19 of the Employment Equity Act 55 of 1998.

<sup>495</sup> Section 20 of the Employment Equity Act 55 of 1998.

<sup>496</sup> Section 8 of the 'Code'.

<sup>497</sup> Section 21 of the Employment Equity Act 55 of 1998.

<sup>498</sup> Section 15(2) of the Employment Equity Act 55 of 1998.

<sup>499</sup> Section 19 of the Employment Equity Act 55 of 1998.

- (2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational category and level in order to determine the degree of underrepresentation of people from designated groups in various occupational categories and levels in that employer's workforce.'

The outcome of the audit will identify whether any of the policies or procedures applicable contain any unfair discrimination or barriers to the recruitment, promotion, advancement, and retention of employees of designated groups. If there are barriers found the employer need to incorporate strategies of development and implementation into the Employment Equity Plan for the workplace.<sup>500</sup> There is a requirement on the employer to submit a report, after the analysis has been conducted, to the Director - General<sup>501</sup> on the progress and implementation of their employment equity plans.<sup>502</sup>

The Regulations<sup>503</sup> and the Code<sup>504</sup> also urges employers to manage their pay policies, practices, and proper consultation processes. This in turn drives and maximises the principle of *equal pay for work of equal value* that is fair. As example, if jobs are deemed to be undervalued, then the onus rests on the employer to align all female dominated jobs with comparable male-dominated jobs in the organisation.<sup>505</sup> In line with the EEA, the Code places a duty on employers to ensure that all forms of unfair discrimination in the workplace is eliminated.<sup>506</sup>

The EEA read together with the Regulations<sup>507</sup> and the Code of Good Practice on Equal Pay for Work of Equal Value.<sup>508</sup> The Regulations and the Code set out guidelines which determine whether work is of equal value. Employers are advised to be proactive in mitigating the risk

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<sup>500</sup> Section 3.5 of the 'Code'

<sup>501</sup> Section 21 of the Employment Equity Act 55 of 1998 – 'Director-General' means the Director-General of the Department of Labour.

<sup>502</sup> Section 13(2)(d) of the Employment Equity Act 55 of 1998.

<sup>503</sup> 2014 GN R595 GG 37873.

<sup>504</sup> Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 in GG 37873.

<sup>505</sup> The Labourguide.co.za article published by Werksman Attorneys.

<sup>506</sup> Section 3.4 of the 'Code'.

<sup>507</sup> Employment Equity Regulations 2014 GN R595 in GG 37873 of 1 August 2014.

<sup>508</sup> Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 in GG 38837.

of any successful claims and equal pay claims.<sup>509</sup> In the case of *Pioneer Foods v Workers Against Regression (WAR)*<sup>510</sup> the court held that differentiation in remuneration of people performing the same work on the basis of length of service does not if itself amount to arbitrary or unfair discrimination.<sup>511</sup>

Every designated employer<sup>512</sup> need to take measures to reduce income differentials or unfair discrimination by virtue of a difference in terms and conditions of employment.<sup>513</sup>

Section 6(5) which was introduced in the EEA allows the Minister of Labour to prescribe criteria and methodology for assessing work of equal value after consultation with the Commission for Employment Equity which sets out guidance to both employees and employers when applying<sup>514</sup> principle of *equal pay for work of equal value* in the workplace.<sup>515</sup>

In South Africa wage discrimination is still highly notable in respect of *work of equal value* in the workplace, there is slow progress on the *equal pay* laws in South Africa. Employers should promote opportunities to all employees. In order for South Africa to narrow the wage gap it has to comply with international standards on equal pay.<sup>516</sup>

#### 5.4 GENDER PAY GAP

Equality will be achieved when women and men are granted equal pay and equal respect.<sup>517</sup>

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<sup>509</sup> <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/Employment-Equal-Pay-Brochure.pdf>.

<sup>510</sup> *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) & others* 19 April 2016 (LC) 687/15.

<sup>511</sup> See para 1.5.1 above.

<sup>512</sup> A 'designated employer' is either i) an employer with 50 and more employees; ii) an employer with fewer than 50 or more employees, with a turn-over that is equal to or above the applicable turnover of a small business in terms of Schedule 4 of the EEA.

<sup>513</sup> Section 27 of the EEA.

<sup>514</sup> The Minister published the Employment Equity Regulations 2014 *GN R595 in GG 37873* of 1 August 2014.

<sup>515</sup> *GN 448 in GG 38837* of 1 June 2015 (the Code) and see para 1.1 above.

<sup>516</sup> Hlongwane N 'Commentary on South Africa's position regarding equal pay for work of equal value.'

<sup>517</sup> <https://africa.unwomen.org/en/stories/explainer/2022/09/equality-will-be-achieved-when-women-and-men-are-granted-equal-pay-and-equal-respect>

In South Africa the existing legislation makes provision to eliminate unfair discrimination and prohibits unfair discrimination on the grounds of gender in the workplace. The Fair Work Amendment (Gender Pay Gap) Bill of 2015 in Australia removes the legal prohibition on workers' discussing their own pay which is not permissible in India and South Africa. The WGEA report shows that the gender pay gap is influenced by number of factors which includes female -dominated industries and jobs attracting lower wages.<sup>518</sup> The gap between women's and men's earnings is a symptom of a broader cultural problem in workplaces.<sup>519</sup>

There is an obligation on employers to achieve equal opportunities and outcomes for both women and men in terms of gender equality in the workforce with the objective of providing *equal pay for work of equal value* and removing barriers which prohibits women from equal participation.<sup>520</sup>

While *equal pay for work of equal value* claims can be based on any of the grounds listed in section 6(1) of the EEA, internationally such claims are most often based on allegations of gender discrimination and are commonly argued in response to gender pay gaps.<sup>521</sup> Many countries highlight pay inequalities between men and women in national reports on the gender pay gap.<sup>522</sup> While South Africa is still in the early stages of implementing the principle of *equal pay for work of equal value*, many employers/companies have already taken steps to identify pay inequality at all levels. Many of the steps taken have been focussed towards addressing gender pay inequality.<sup>523</sup>

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<sup>518</sup> Marsh, S 'Gender pay gap myth busting: Why its more than 'equal pay 'accessed via <https://www.9news.com.au>

<sup>519</sup> Marsh, S 'Gender pay gap myth busting: Why its more than 'equal pay'

<sup>520</sup> See para 5.1, 2.6.3 and 3.4.3 above.

<sup>521</sup> 'Equal Pay Compensation Discrimination' [www.eeoc.gov](http://www.eeoc.gov). Retrieved 27 March 2018. See para 1.2 and para 4.2.3 above.

<sup>522</sup> Global Wage Report 2021 The World Economic Forum accessed via - <https://www.weforum.org/agenda/2022/03/6-surprising-facts-gender-pay-gap/>

<sup>523</sup> Richer, R: Director PwC- <https://www.pwc.co.za/en/press-room/gender-pay-gap.html>. (accessed 7 April 2019).



In 2021 the Global Gender Gap Report showed that women globally earned around 37 percent less than men in similar roles and South Africa was ranked 18<sup>th</sup> out of 156 countries.<sup>524</sup>

It has been shown that women in Australia have more options in employment and equal opportunity today than what they did in the 1950's, however equal opportunity has not translated fully into reality for all women.<sup>525</sup> In India the real issue is not how much pay gap exists, but that after 34 years of passing legislation relating to *equal pay for equal work* the pay gap still exists.<sup>526</sup>

Australia as a country has a greater advantage in terms of equal opportunity today than South Africa and India and possibly the leading country in adopting equality in employment.

## 5.5 RECOMMENDATIONS AND FINAL REMARKS

All 3 countries, South Africa, Australia, and India has similar principles governing the principle of *equal pay for work of equal value*. The process to fully execute on this remains a struggle and complexed to the point where gender pay gap is still behind globally in terms of earning *equal pay for equal work*.

South African organisations/employers must take the reasonable measures<sup>527</sup> to ensure that they comply with the obligations as set out in the legislation governing the principle of *equal pay for work of equal value*. In order for employers to comply with the legislation they need to ensure that they have a sound internal documented framework and grading system, a robust performance management system,<sup>528</sup> well -designed and defensible pay scales and a fair remuneration policy.<sup>529</sup>

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<sup>524</sup> Global Wage Report 2021 The World Economic Forum accessed via -

<https://www.weforum.org/agenda/2022/03/6-surprising-facts-gender-pay-gap/>

<sup>525</sup> Australian Journal of Social Issues Vol.45 No.1 AUTUMN 2010 p119.

<sup>526</sup> Bhattacharya B, Kedia B: '*Unequal Pay for Equal Work – Prevailing Form of Gender Discrimination in India*' International Journal of Social Science & Management 2013.

<sup>527</sup> Chapter III of the Employment Equity Act 55 of 1998.

<sup>528</sup> Section 2(5) of the 'Code'.

<sup>529</sup> Morton B, Blair C "*How to Comply with Equal Pay for Work of Equal Value*".



The EEA Regulations<sup>530</sup> prescribe the criteria and methodology for assessing work of equal value envisaged in section 6(4) of EEA. Employers need to ensure that unfair discrimination, including gender wage discrimination, is eliminated in the workplace<sup>531</sup> The Employment Equity Regulations<sup>532</sup> and the Code<sup>533</sup> were issued to assist in the implementation and execution of the principle of *equal pay* for work of equal value within organisations.

Eliminating unfair discrimination will ensure affirmative action measures are in place to expedite growth and advancement.<sup>534</sup> The effective removal of barriers of unfair discrimination will ensure fairness and equity in the workplace.<sup>535</sup>

The *equal pay for work of equal value* principle eliminated discrimination in the workplace, however the rejection of comparable worth and job evaluation using traditional factors such as skills, effort, responsibility and working conditions has impeded the promotion of equal pay.<sup>536</sup>

There are requirements placed on employers, employees, and representative trade unions to jointly develop strategies to advance designated groups.<sup>537</sup> This can only be done by adopting appropriate affirmative action measures and incorporating them into formal Employment Equity Plans.<sup>538</sup> Affirmative action measures are deemed essential remedial measures designed to achieve equity in employment as an outcome.<sup>539</sup>

In considering the impact gender wage discrimination has in South Africa and globally, including development undergone around the complexity of the principle of *equal pay for work of equal value*<sup>540</sup> South African labour law is moving in the right direction.

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<sup>530</sup> 2014 GN R595 GG 37873 (the EEA Regulations).

<sup>531</sup> Employment Equity Amendment Act 55 of 1998.

<sup>532</sup> 2014 GN R595 GG 37873.

<sup>533</sup> Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 in GG 37873.

<sup>534</sup> Section 1 of the 'Code'

<sup>535</sup> 'Barrier could exist where a policy and procedure limit the opportunities of employees'- section 2(5) of the 'Code'.

<sup>536</sup> Hlongwane, commentary on South Africa's position regarding '*Equal Pay for Work of Equal Value*': A Comparative Perspective

<sup>537</sup> Section 13 of the EEA 55 of 1998.

<sup>538</sup> Section 6(5) of the EEA.

<sup>539</sup> Section 6(5) of the EEA.

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