

Commentary on South Africa's position regarding equal pay for work of equal value

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1 INTRODUCTION

At present, unequal pay for work of equal value is indirectly regulated by the Employment Equity Act¹ which aims to promote equality in the workplace. The Act does not expressly prohibit the unequal pay for work of equal value but merely prohibits discriminatory practices, including unequal pay and separate pension funds for different race groups in the company.² It will be argued that South Africa requires legislation governing unequal pay for work of equal value. The research reflected in this paper suggests that no struggle for equal pay will be successful unless express provisions for pay equity are included in legislation.

'Pay equity' is a broad concept. A distinction can be drawn between two pertinent aspects: 'equal pay for equal work' and 'equal pay for work of equal value'. The concept 'equal pay for equal work' implies that employees who perform substantially similar work within the same contextual setting must receive similar wages. The concept 'equal pay for work of equal value' indicates that, if a woman is employed in a traditionally female working environment, and her work has the same value as that of men working in a male environment,³ she and the men must be paid similar wages even if their job descriptions differ.⁴ In practice, however, wage discrepancies may exist in such cases because women's work is often undervalued and underpaid in relation to that of men, and also due to racial discrimination and other factors – for example, union membership.⁵

- 1 No 55 of 1998 ('EEA'). The Labour Relations Act No 66 of 1995 provided a transitional arrangement for unfair discrimination in item 2(1)(a) of schedule 7, before the enactment of the EEA.
- 2 S 6, EEA. See also *Leonard Dingler Employee Representative Council v Leonard Dingler* 1998 (19) ILJ 285 (LC), the first discrimination case heard by the new Labour Court, in which the employer had different retirement benefit funds which effectively segregated black from white employees and conferred unequal benefits. The court held that this amounted to indirect as well as direct racial discrimination and thus constituted an unfair labour practice in terms of item 2(1)(a) of Sch 7 to the LRA.
- 3 Or, for example, where black and white employees are doing different jobs in the same environment, but their jobs have the same value.
- 4 Pay Equity Commission (Ontario) *Pay equity in non-union workplaces – Is the law working for you?* <<http://www.payequity.gov.on.ca/peo/english/pubs/lawworking.html>>
- 5 Landman A 'Equal pay for work of equal value' in Strydom EML et al ed *Essential employment discrimination law* (2004) 138; Grogan says 'discrepancy in salary may arise from past discrimination' Grogan J ed *Workplace law* 7 ed (2003) 263.

This article presents a background of the principle of equal pay for work of equal value by referring to relevant international conventions and declarations. Secondly, it analyses how South Africa has dealt with pay discrimination. Finally, the concluding remarks focus on the implementation of measures to combat wage discrimination.

2 INTERNATIONAL CONVENTIONS AND DECLARATIONS

International conventions and declarations serve as primary sources of the right to equality in the workplace. The International Labour Organisation (ILO) aims to improve working conditions globally by promoting minimum standards in employment conditions as laid down in its Conventions and Recommendations. ILO Convention No 100,⁶ concerning equal remuneration for men and women workers for work of equal value, commits member states to ensure that pay equity is applied to all workers by means of national laws, wage determination machinery, collective bargaining, or a combination of these methods.⁷ Remuneration is defined to 'include the ordinary, basic or minimum wage or salary and any additional emoluments payable directly or indirectly, whether in cash or in kind, by the employer to the worker arising out of the worker's employment'.⁸ Also according to ILO Convention No 111 terms and conditions of employment, including remuneration, should not be subject to, *inter alia*, sex.⁹

Article 27(1) of the Convention on the Elimination of All Forms of Discrimination against Women¹⁰ defines discrimination against women as

'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

The Convention provides that member states must penalise anyone who discriminates against women in order to ensure that no person, organisation or business discriminates against women and must change or remove all laws, regulations, customs and practices which discriminate against women.

Further declarations and instruments have been adopted to advance the concept of equality. Such declarations are neither conventions nor international treaties but merely consensus statements made by governments. These declarations are not binding but have a persuasive value internationally. The ILO Declaration on Equality of Opportunity and Treatment for Women Workers,¹¹ for example, states that 'all forms of discrimination on the grounds of sex

6 Equal Remuneration Convention No 100 of 1951.

7 *Ibid.*

8 *Ibid* art 1.

9 Discrimination (Employment and Occupation) Convention No 111 of 1958, discussed more fully in para 3 below.

10 Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979; entry into force 3 September 1981.

11 The Declaration on Equality of Opportunity and Treatment for Women Workers and the Resolution concerning a Plan of Action with a View to Promoting Equality of Opportunity and Treatment for Women Workers, adopted in 1975.

which deny or restrict equality of opportunity and treatment are unacceptable and must be eliminated'.¹² The ILO Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment¹³ also stressed that a concerted effort between governments, employers and workers' organisations was still needed in order to implement the principle of equality.¹⁴ The United Nations' 1995 Beijing Declaration and Platform for Action aimed to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity.¹⁵ This Declaration stated that member government must 'increase efforts to close the gap between women's and men's pay, take steps to implement the principle of equal value by strengthening legislation, including compliance with international labour laws and standards and encourage job evaluation schemes with gender-neutral criteria'.¹⁶

3 PAY DISCRIMINATION IN SOUTH AFRICA

South Africa does not have specific legislation concerning equal pay. The general principle has been that unequal remuneration in itself is not unfair,¹⁷ but where there is a differentiation it should be on account of some factor other than generalised assumptions about the characteristics of particular groups of people.¹⁸

South Africa ratified both ILO Conventions promoting pay equity, namely Convention No 100 of 1951¹⁹ and Convention No 111 of 1958.²⁰ The South African government has also enacted the Employment Equity Act²¹ and the Labour Relations Act²² in order to promote equality in the workplace. In the Labour Relations Act remuneration is defined in section 213 as 'any payment in money, or in kind, or both in money and kind, made or owing to any person in return for that person working for any other person including the state'.²³ Therefore, any benefit the employee receives as part of the package should be equal, subject to the objective of promoting substantive equality.²⁴ An example of this is the extension of maternity rights to women employees as a way of equalising the playing fields between male and female in the workplace.

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

13 Adopted in 1985.

14 See fn 12 above.

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

16 Hodges J 'Recent developments concerning equal pay for work of equal value' (1997) ILO 35 at 36.

17 In *Transport and General Workers Union v Bayete Security Holdings* 1999 (4) BLLR 401 (LC) the applicant employee was appointed to a marketing position after serving the employer as a security guard. The respondent appointed Mr L at the higher salary than that of the applicant. The applicant claimed that the difference in their salaries amounted to unfair discrimination in that Mr L lacked experience in the security industry. The court held that the applicant failed to prove that the difference in salary levels was based on race or any other arbitrary criterion.

18 Du Toit *et al Labour relations law: a comprehensive guide* 3 ed (2000) 444.

19 Ratified in 2000.

20 Ratified in 1997.

21 No 55 of 1998.

22 No 66 of 1995.

23 S 1 of Act 55 of 1998.

24 That is, not only equal treatment but 'the full and equal enjoyment of all rights and freedoms': s 9(2), Constitution.

Article 1(1) of the ILO Convention No 111 defines 'discrimination' as 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. In South Africa section 6 (1) of Employment Equity Act 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 and birth'. Section 3(d) of the Employment Equity Act adds that the Act, and therefore the concept of 'discrimination', must be interpreted 'in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No 111) concerning Discrimination in Respect of Employment and Occupation'.

The statute, like the Constitution, also distinguishes between two forms of discrimination, namely direct and indirect discrimination. Both concepts originated in the United States.²⁵ Direct pay discrimination occurs when employees performing identical or equal work are rewarded differently for no other reason than race, gender or sex.²⁶ Indirect discrimination means 'unequal payment to categories of employees in terms of seemingly neutral criteria (e.g. job descriptions) which, however, coincide substantially with differences of race, gender or other prohibited grounds of discrimination'.²⁷ Examples of such criteria may be qualifications,²⁸ physical characteristics such as height and language proficiency which are not justified by the requirements of the job.

3.1 Constitutional equality

It is advisable to approach unequal pay from a constitutional view, as the Employment Equity Act does not expressly include unequal pay provisions. The Constitution of the Republic of South Africa²⁹ provides for the right to fair labour practices in terms of section 23. Section 9 of the Constitution makes provision for equality, which an employee may raise in the event of an equal pay dispute. In terms of section 9(1) 'everyone is equal before the law and has the right to equal protection and benefit of the law'. Furthermore, section 9(3) provides that 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. In terms of subsection (4) 'no person may unfairly discriminate directly or indirectly

25 Dupper O and Garbers C 'Commentary: employment discrimination' in Thompson C and Benjamin P *South African Labour Law* (1994-2002) 1 CC1-32.

26 See (fn 2 above) 289.

27 *Ibid* 292.

28 In *Griggs v Duke Power Co.* 401 US 424 (1971), the employer used job qualifications such as a high school diploma to recruit new staff, and such criteria had a negative impact on the black candidates.

29 Originally enacted as Act 108 of 1996.

against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination'. Item 2(1)(a) of schedule 7 to the Labour Relations Act, repealed and superseded by section 6 of the Employment Equity Act, was enacted to prevent unfair discrimination.³⁰ Differentiation on the basis of one of the grounds listed in section 9(3) is presumed to be unfair until the contrary is proved.³¹ Even if discrimination is *prima facie* unfair the Constitution provides that it may be proven to be justified if it is contained in law of general application, subject to the strict criteria laid down by the 'limitation clause' (section 36).

According to Currie, differentiation on a ground that is not on the list of the presumptively illegitimate grounds of differentiation in section 9(3) will constitute unfair discrimination if it can be shown to be analogous to the listed grounds.³² In *Harksen v Lane*³³ 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 comparably serious manner'.³⁴ In this matter the Constitutional Court tabulated the stages of an enquiry into a violation of the equality clause as follows:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) First, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

30 Item 2(1)(a) of schedule 7 prohibited any unfair act or omission between an employer and employee based on arbitrary grounds, including but not limited to race, ethnic or social origin, sex, sexual orientation, gender, family responsibility, political affiliation, and belief.

31 S 9(5) of the Constitution.

32 Currie I and De Waal J *The bill of rights handbook* 5 ed (2005) 257.

33 1998 (1) SA 300 (CC).

34 *Ibid* para 46.

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

- (c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause.³⁵

In *Larbi-Odam v MEC for Education (North-West Province)*,³⁶ the Constitutional Court found that a provincial regulation which prevented all non-citizens from being appointed into permanent teaching posts was unfair discrimination. The ground for unfair discrimination in this case was citizenship. Citizenship, though not listed, was thus treated as a prohibited ground of discrimination because it is based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens. The court found that such discrimination was not justified under section 36 (the 'limitation clause') because the aim of reducing unemployment for citizens cannot justify discrimination against permanent residents who should be viewed no differently from South African citizens.³⁷

The constitutional test, however, is also capable of being applied to the conduct of individual employers. In *Hoffmann v South African Airways*³⁸ the Constitutional Court dealt with an airline's policy of not employing HIV-positive persons as cabin attendants. HIV status was treated as a prohibited ground of discrimination analogous to the listed grounds.³⁹ The court noted a 'prevailing prejudice' against HIV-positive people. In such a context, any further discrimination against them was 'a fresh instance of stigmatisation' and an assault on their dignity.⁴⁰

Unequal pay for work of equal value between men and women, or workers of different races, would clearly amount to discrimination on the listed grounds of sex, gender or race. Pay discrimination, however, may also take place on unlisted grounds, such as trade union membership. In such cases the test outlined above will need to be applied.

3.2 Employment Equity Act

South Africa's first attempt to control unfair discrimination in the workplace was expressed in item 2(1)(a) of the 'residual unfair labour practice' in schedule 7 of the Labour Relations Act, which (as already noted) has been repealed and superseded by section 6 of the Employment Equity Act.

The aim of the Employment Equity Act is to achieve equity in the workplace by eliminating unfair discrimination and implementing affirmative action measures in favour of persons suffering the effects of past discrimination. In particular, the Act recognises the need for 'designated groups' (black people, women and people with disabilities) to be equitably represented in

³⁵ *Ibid* para 53.

³⁶ 1998 (1) SA 745 (CC).

³⁷ *Ibid* para 30 and 35.

³⁸ 2000 (11) BCLR 1235 (CC).

³⁹ HIV status is a listed ground in terms of s 6(1) of Act 55 of 1998.

⁴⁰ See (fn 38 above) para 28.

all occupational categories and levels in the workplace. This is important for women because a high level of female participation usually implies that women are disproportionately represented at lower levels.⁴¹ Research conducted by Deloitte & Touche Human Capital Corporation revealed that white men in top management positions filled 80% of such positions in 2000. The study also indicated that women earned 10% less than men on the same job level in the same company. While some companies were narrowing the racial divide, it showed but that the gender divide is still present.⁴²

In addition, the International Labour Organisation Community Review noted that, although women's incomes are substantially lower than those of men, the average income for African men is less than that of white women.⁴³ According to Meintjes-Van der Walt, the problem of pay inequality is further compounded by the fact that white women and Africans are concentrated in occupations at the lower end of the remuneration spectrum.

Section 5 of the Employment Equity Act furthermore places a duty on every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. 'Employment policy or practice' is widely defined as including recruitment procedures, advertising and selection criteria, appointment and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, disciplinary measures other than dismissal, and dismissal.⁴⁴

In terms of section 6 of the Employment Equity Act, read with section 9 of the Constitution, discrimination on listed grounds must be presumed to be unfair. However, discrimination on unlisted grounds will also be unfair if the differentiation on that ground 'has the effect of nullifying or impairing equality of treatment in employment or occupation'.⁴⁵ In *Ntai v South African Breweries Ltd*⁴⁶ the court held that discrimination on unlisted grounds can only be considered discriminatory if it is based on 'attributes and characteristics which have the potential to impair the fundamental human dignity of the applicants as human beings'. This does not mean that every employee should be paid the same but rather that the difference in pay should be based on such grounds as length of service, experience or the level of responsibility. In determining equal pay, the position of an employee or job category must be compared with that of other employees or job categories.⁴⁷

41 'Pay equity: differences between women and men farmworkers' Research Report by: Community Agency for Social Enquiry (CASE) September 1999.

42 Deloitte & Touche Human Capital Corporation survey quoted in 'Legislation closing the equity gap in SA's companies' *Business Day* 6 June 2001 9; see also 'White men are still SA's best paid' *Business Day* 22 May 2001 21; 'Pale males still rule workplace roost' *Cape Argus* 7 June 2001 9.

43 Meintjes-Van der Walt L 'Levelling the "paying" fields' (1998) 19 *Industrial Law Journal* 22 at 23.

44 S 1 of Act 55 of 1998; Du Toit *et al Labour relations law: a comprehensive guide* 5 ed (2006) 614.

45 Discrimination (Employment and Occupation) Convention art 1(1)(b).

46 2001 (2) BLLR 186 (LC) para 72.

47 Du Toit *et al Labour relations law: a comprehensive guide* 4 ed (2003) 579.

The Comparator

In an equal pay claim, the employee must show that he/she has been paid differently from another employee employed by the same employer and that this is based on a prohibited ground such as gender or race. Who should the comparator be?⁴⁸ The Employment Equity Act does not deal with the question. In *Ntai*⁴⁹ the applicants were black training officers who alleged race discrimination or arbitrary discrimination because they earned less than their white colleagues who performed the same work. The applicants identified two white employees as comparators. The court accepted the two white employees as comparators but held that the applicants failed to prove grounds upon which their allegation of arbitrary discrimination was based.

3.3 Equal pay for equal work

The notion of 'equal pay for equal work' could imply that individuals with similar qualifications and experience should receive equal pay only when they are performing exactly the same work under identical conditions.⁵⁰ In *SACWU v Sentrachim Ltd*,⁵¹ employees were dismissed after a lengthy strike. The employees alleged that the employer discriminated between black and white employees on the grounds of race by paying black employees less than white employees in the same grade. It was held that wage discrimination based on race or any other difference between employees, other than skills and experience, is an unfair labour practice.⁵² The Supreme Court affirmed the prohibition of direct wage discrimination.⁵³

The approach in the *Sentrachim* case, however, will not remove wage discrimination against women in 'women only' occupations or against blacks in occupations where they are predominant. The equal pay for equal work approach does not, for instance, overcome discrimination in a situation where there is a concentration of Africans and women in the workplace. This problem made it necessary to adopt a broader approach, based on the principle of 'equal pay for work of equal value'.

3.4 Equal pay for work of equal value

The concept 'equal pay for work of equal value' is assessed on the basis of certain common criteria (skill, effort, responsibility) which are of equal value to those of a comparator employed by the same employer. These values should be assessed from the point of view of work content, training and expe-

48 Oxford Concise Dictionary define comparator as 'a device for comparing something measurable with a reference or standard or something used as a standard for comparison'.

49 See fn 43 above.

50 Meintjes-Van der Walt (fn 43 above) 25.

51 1988 (9) ILJ 410 (IC).

52 The Industrial Court under the Labour Relations Act of 1956 pronounced 'unfair' under the general definition of unfair labour practice and the Labour Relations Act of 1995 substituted the definition of unfair labour practice with statutory provisions which expressly describe impermissible employer actions. In *Maseko v Entitlement Experts* 1997 (3) BLLR (317) CCMA it was held that unfair acts by employees against their employers are not justifiable under the 1995 Labour Relations Act.

53 *Sentrachim v John* 1989 (10) ILJ 249 (W) 259 C-D.

rience, complexity, and responsibility.⁵⁴ In *Fouche and Eastern Metropolitan Local Council*⁵⁵ the employee claimed that he was discriminated against by not being paid a higher salary and that he was entitled to a higher salary by virtue of a report on executive positions that had been adopted by the bargaining council. The arbitrator found that factors such as qualifications and skills used by the employer were to be related to 'the complexity of the job'. The employees' salary levels were to be 'based on job requirements' and not on the 'performance levels of individuals'.⁵⁶ In *Louw v Golden Arrow Bus Services*,⁵⁷ the court dealt with the issue of racial discrimination. The applicant alleged that he was paid less than his white colleague although the work performed was equal in value. The court found that 'it is unfair practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, for example race or ethnic origin'.⁵⁸

Meintjes-Van der Walt states that the advantage of using the equal value approach is that dissimilar jobs can be compared and that this approach can therefore broaden the scope of equal pay protection.⁵⁹

Meintjes-Van der Walt suggests that the following aspects should be included in the relevant Code of Good Practice⁶⁰ to serve as guidelines for both employers and employees in applying the principle of equal pay for work of equal value:⁶¹

- (a) Jobs requiring equal skills in performance. According to the United States Employment Commission, skills include factors such as experience, training, education, and ability.
- (b) Equal pay standards should apply to all jobs in which performance requires equal responsibility.
- (c) Where substantial difference exists in the amount or degree of effort required to be expended in the performance of jobs, an equal pay standard cannot apply even though the jobs may be equal in all other respects.
- (d) Performance under similar working conditions. In the United States the term 'similar working conditions' encompasses two sub-factors namely, 'surroundings' and 'hazard'.

3.5 Enforcement mechanism

In terms of section 10 of the Employment Equity Act, unequal pay disputes based on prohibited grounds should be referred to the Commission for Conciliation, Mediation and Arbitration within six months of the conduct that

54 Meintjes-Van der Walt (fn 43 above) 26.

55 1999 (8) ARB 6.12.1.

56 *Ibid* at 4.

57 2000 (3) BLLR 311 LC.

58 *Ibid* para 26. *In casu*, however, the applicant failed to establish that his work and that of the comparator were of equal value.

59 Meintjes-Van der Walt (fn 43 above) 26.

60 Code of Good Practice on the preparation, implementation and monitoring of employment equity plans Government Notice R1394 in *Government Gazette* 2026 23 November 1999.

61 Meintjes-Van der Walt (fn 43 above) 26.

gave rise to the dispute or, provided good cause is shown, late referral may be condoned.⁶² If the dispute remains unresolved after conciliation, it may be referred to the Labour Court for adjudication or the parties may consent to arbitration. However, the Labour Court may take into account any delay on the part of the party who seeks relief in processing a dispute.⁶³

Onus of proof

Section 11 of the Employment Equity Act provides that, 'whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair'. When unfair discrimination is alleged on listed grounds, the employer must therefore prove that its conduct does not amount to unfair discrimination. This marks a change from the position that had previously existed in terms of item 2(1)(a) of Schedule 7 to the LRA. In *Transport and General Workers Union v Bayete Security Holdings*,⁶⁴ for example, the court required the employee to prove that there was something other than the fact that he was black and his higher paid colleague was white before it was prepared to conclude that the difference in their wages amounted to discrimination.

3.6 Employer's defences

The Employment Equity Act does not expressly provide for pay discrimination or for defences thereto. The two general statutory defences to claims of unfair discrimination are also applicable to unequal pay claims. Section 6(2) states that 'it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act', or to 'distinguish, exclude or prefer any person on the basis of an inherent requirement of a job'. However, it is difficult to see how either affirmative action or the inherent requirements of a job can justify paying one employee more than another purely on the basis of one of the grounds referred to in section 6(1) of the Employment Equity Act.

In the United Kingdom, the employer faced with a claim of pay discrimination based on sex has to show that the difference in pay is genuinely due to material factors and not to a difference in sex.⁶⁵ The European Court of Justice allows the justification for the difference in pay only where it relates to a real business need of the employer.⁶⁶ If the employer adopts a discriminatory pay policy and the objective of doing so corresponds to a real need of the undertaking, then such discrimination is necessary in order to enable the undertaking to function effectively. In *Hill and Stapleton v Revenue Commissioners and Department of Finance*⁶⁷ the court stated that it required concrete evidence before accepting this justification. The court rejected the Revenue Commissioners' and Department of Finance's argument that a discriminatory

62 S 10(3) of Act 55 of 1998.

63 S 50(3) of Act 55 of 1998.

64 See fn 17 above.

65 Equal Pay Act 1970 (UK): section 1(3).

66 *Bilka-Kaufhaus GmbH v Weber von Harz* (1986) IRLR 317 ECJ.

67 (1998) IRLR 466 ECJ.

reward system maintained staff motivation, commitment and morale. The court held that an employer could not justify discrimination arising from a job-sharing scheme solely on the grounds of cost. In the United States, pay discrimination is allowed if based on seniority, merit, productivity or any other factor except sex.⁶⁸

In South Africa the use of market forces as a defence to a claim of unfair pay discrimination should be rejected for two reasons. First, it is unlikely to fit into the scope of the defence of 'inherent requirements of a job' which the Act permits. Second, market forces in themselves are likely to reflect the biases of the society within which they function, which in South Africa would undermine the provision against discrimination.⁶⁹ In *Golden Arrow Bus Services* the Labour Court stated that market factors 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 grounds of discrimination.⁷⁰ In *NUMSA and SAMANCOR Ltd (Meyerton Works)*⁷¹ 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 to the Labour Relations Act or any other inherent characteristics of classes of employees. The arbitrator had to deal with the issue of the right to equality.

According to the employer, a shortage of candidates for a particular job and the need to attract them by means of higher pay constituted an objectively justified ground for the differentiation. The arbitrator considered the following three principles in determining equal remuneration, namely:

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

The arbitrator noted that historical factors were responsible for the differentiation in remuneration. These historical factors were the market forces that prevailed at the time of recruitment of the various Human Resources Officers and their evaluation at that time.⁷² No award was made in this case. The arbitrator required the parties to reach a mutually acceptable and appropriate solution only after a year; thereafter the applicant could approach the arbitrator if the discrepancy in his salary was not addressed.

68 Lindemann B *et al* eds *employment discrimination Law* 3 ed (1996) 497.

69 Du Toit (fn 50 above) 581.

70 See (fn 57 above) para 76-82.

71 1998 7 ARB 6.7.12.

72 *NUMSA and SAMANCOR Ltd (Meyerton Works)* 1998 (7) ARB 6.7.12: 4.

In *Association of Professional Teachers v Minister of Education*⁷³ the applicant (a professional teacher and principal of a primary school) applied for a housing subsidy. Her application was rejected because she was married and her husband was in full-time employment and not permanently and medically unfit to obtain employment. The court noted that, in dealing with an alleged unfair labour practice, the consideration of justification is considered together with the question of fairness and does not usually require a separate investigation. The court held that a policy which distinguishes on the basis of sex constitutes an unfair labour practice as it unfairly discriminates against and offends the requirement of equal pay for equal work.⁷⁴ The court noted that the respondent's policy was motivated by the perception that married men are the primary breadwinners of their families. The court held that such perception is neither justified nor could it pass the test of a fair labour practice.⁷⁵

In *George v Western Cape Education Department*⁷⁶ the applicant similarly applied for a house owner allowance. Her application was turned down because she was a married woman whose husband was not permanently medically disabled, but was in fact a full-time university student. The employment relationship between the applicant and respondents was regulated by the negotiated Personnel Administration Manual which excluded married women from obtaining a house owner allowance. The court held that the fact that a measure is contained in a collective agreement is not a defence to a claim of unfair discrimination.⁷⁷

Since South African legislation does not expressly provide defences that may justify unequal remuneration, there is uncertainty as to what will be accepted as legitimate reasons for unequal remuneration coinciding with differences of (in particular) race and sex. At present, the Labour Court must exercise its discretion in considering any defence raised by the employer as valid in the absence of prohibited grounds, and in its judgments is compelled to refer to case law in other jurisdictions.

3.7 Disproportionate income differentials

'Disproportionate income difference', regulated by section 27 of the Employment Equity Act, is relevant to pay discrimination because it refers to the ratio between the remuneration of employees at different levels and in different occupation categories. The legislature added section 27 in response to trade unions' outcry over the wage gap. COSATU criticised the Employment Equity Bill by stating that the legislature had addressed the problem of wage inequality where two workers are in the same job grading but are paid dif-

73 1995 (16) ILJ 1048 (IC), decided in terms of the Labour Relations Act 28 of 1956.

74 *Association of Professional Teachers v Minister of Education* 1995 (16) ILJ 1048 (IC) 1089 para J.

75 *Ibid* 1090 para A-C.

76 1995 (16) ILJ 1529 (IC).

77 In this matter at 1548 J and 1549 A-C the court followed the decision of *Enderby v Frenchay Health Authority* (1993) IRLR 591 ECJ where the court recognised that to allow the mere existence of separate agreements to preclude a *prima facie* finding of discrimination would be to invite the use of collective agreements as a device to circumvent the principle of equal pay.

ferently based on race and gender.⁷⁸ However, the legislature had not paid sufficient attention in the proposed legislation to the pay difference between the highest occupational level and the lowest occupation level. The Department of Labour then proposed section 27 in response to COSATU's proposal for closing the wage gap.

Section 27(1) provides that employers must submit a statement on the remuneration and benefits paid to employees in the occupational category and level of their workforce to the Employment Conditions Commission. Section 27(2) further states that if disproportionate income differentials are reflected in such statement, the employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister of Labour upon advice of the Employment Conditions Commission. No enforcement mechanism is laid down other than the general power of the Labour Court to order compliance with any provision of the Act, except where Act provides otherwise.⁷⁹ This does not mean that the Labour Court can, in effect, take over the role of wage determination where an employer fails to comply with section 27. In terms of the Labour Relations Act,⁸⁰ collective bargaining is considered the preferable and most effective method of dealing with change in pay practices.⁸¹ Although the LRA does not contain a statutory duty to bargain, it encourages parties to bargain collectively. By means of recognition agreements it is also possible for employers and trade unions to create a contractual duty to bargain.⁸²

This is also the approach suggested by the Employment Equity Act. Section 27(3), by listing collective bargaining as the first mechanism for complying with section 27(2), creates a clear inference that pay differentials established by collective bargaining are proportionate. Secondly, the Employment Conditions Commission is under a duty to research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials.⁸³ Thirdly, compliance with section 27(2) can be achieved by complying with a sectoral determination made by the Minister in terms of section 51 of the Basic Conditions of Employment Act.⁸⁴

78 COSATU commented that 'a bill that attempts to bring about true equity has to address the issue (of the apartheid wage gap) and address it seriously' in 'COSATU – Statement on Employment Equity Bill and the apartheid wage gap' *Press Statement* 5 August 1998 COSATU Parliamentary Office; see Du Toit (note 47 above) 618.

79 S 50(1)(f).

80 Act 66 of 1995 ('the LRA').

81 S 1(c)(i) of the LRA states that one of the primary objects of the Act is 'to provide a framework within which employees and their trade unions, employers and employers' organisations can ... collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest'.

82 Olivier M Smit N Kalula E and Leslie G 'Collective agreements and individual contracts of employment in labour law – South African report' in Sewerynski M ed *Collective agreements and individual contracts of employment* (2003) 219.

83 S 27(4) of Act 55 of 1998. Du Toit notes that the Employment Conditions Commission in framing its advice 'is directed to consider a range of factors, including the ability of employers to carry on their business successfully in terms of section 54(3)(b) of the Basic Conditions of Employment Act and the likely impact of any proposed condition of employment on current employment or the creation of employment in terms of section 54(3)(h) of the Basic Conditions of Employment Act': *op cit* (note 50 above) 582.

84 No 75 of 1997.

Parties engaging in collective bargaining for the purposes of this section may request disclosure of the information contained in the employer's statement on remuneration and benefits in subsection (1), subject to the employer's right not to disclose confidential or other restricted categories of information in terms of section 16(4) and (5) of the Labour Relations Act.

Also in the United States, collective bargaining has furthered the cause of pay equity. Once the union won representative rights, it attempted to address equal pay concerns in collective bargaining. According to Bellace, unions in the United States have traditionally negotiated not only on wage rates but on how jobs should be slotted into wage grades based on notions of value.⁸⁵ Unions have also forced the rearrangement of jobs in a hierarchy even if women are not involved.⁸⁶ The decline in unionisation since the 1980s has limited the unions' scope in bargaining for equal pay and job classification. In the United Kingdom, collective bargaining allows the union greater control than merely supporting an applicant's case in an industrial tribunal.⁸⁷ Trade unions had no direct access to industrial tribunals, whereas collective bargaining is a forum open to trade unions.

COSATU and its affiliates, together with non-governmental organisations, have pressed for more progress in securing equal pay for work of equal value.⁸⁸ The following have been emphasised:

- (a) Skills acquired by women on the job must be appropriately valued and reflected in remuneration.
- (b) Incorporating the equal pay principle in collective bargaining for all full-time and part-time workers.
- (c) All casual workers, irrespective of their employment contracts, are to be covered by collective bargaining so that the above principle is respected.
- (d) Promoting and securing legislation on equal pay for equal work and work of equal value.
- (e) Upgrading low wages and salary categories in jobs traditionally held by women.
- (f) Eliminating barriers that prohibit women from entering jobs traditionally held by men.
- (g) Developing specific campaigns to promote equal pay.⁸⁹

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

85 Bellace JR 'Equal pay in the United States' in Eyraud F and Hartnell C eds *Equal pay protection industrialised market economies: in search of great effectiveness* ILO Office 171.

86 An example would be the work the United Steelworkers of America did in the basic steel industry in the late 1930s and early 1940s, cited by Bellace *Ibid*

87 McCrudden C 'Equal pay in the United Kingdom' in Eyraud F and Hartnell C eds *Equal pay protection in industrialised market economies: in search of great effectiveness* ILO Office 153.

88 'Gender policy' September (2000) 9:3 *The Shopsteward*.

89 *Ibid* page 4.

4 CONCLUSION

South African employees still endure wage discrimination in respect of work of equal value in the workplace. The issue needs to be addressed urgently in order for South Africa to have a stable workforce that can compete locally and internationally.

The Constitution provides relief with regard to unequal pay for work of equal value disputes, when the ground for differential is unlisted in terms of section 9(3) of the Constitution and such a ground is 'unfair'. The ground for differential must be analogous to the listed grounds and relates to attributes or characteristics that impact on human dignity. The notion of 'equal pay for work of equal value' has also received legislative support in item 7.3.1 of the Code of Good Practice⁹⁰ and in the Public Service Act Regulations.⁹¹

To a certain extent, pay discrimination is eliminated by incorporating equal pay principles in collective agreements for full-time and part-time workers. Collective bargaining has always played a pioneering role in labour issues because it is more flexible than legislation as it is less general and takes innovative social practice into consideration. The fundamental problem regarding reliance on collective action by employees is that not all sectors are unionised. Trade unions do, however, have significant roles to play in promoting equal pay and in assisting individual complainants. Their broader influence is also indicated by the vital role COSATU played in the enactment of section 27 of the Employment Equity Act.

Finally, the Employment Equity Act is at present the most important vehicle in achieving equity in the workplace. South Africa is a signatory to both ILO Conventions advancing equal pay namely, Convention No 100 and Convention No 111. However; the legislature has not enshrined equal pay as a principle of law in its own right in the Employment Equity Act. The Act only promotes equal remuneration for work of equal value in an indirect manner.⁹² It is submitted that the legislature should enact provisions directly regulating unequal remuneration for work of equal value in the Employment Equity Act. These should include binding provisions for identifying 'work of equal value' and grounds for the justification for work of unequal value, rather than leaving it to the discretion of the courts to determine whether the employer's defences are justifiable. South Africa would then fully comply with international standards on equal pay and could rank among those countries which have successfully narrowed the wage gap.

⁹⁰ Note 63 above.

⁹¹ GNR.1 of 1 January 2001 in terms of Proclamation 103 of 1994;.

⁹² Ss 5 and 6 of Act 55 of 1998.

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