

**A CRITICAL ANALYSIS OF EQUAL REMUNERATION CLAIMS IN  
SOUTH AFRICAN LAW**

by

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## **DECLARATION**

I, Shamier Ebrahim (student no: 50819151), hereby declare that the dissertation titled

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is my own work and that all the sources used have been acknowledged (referenced) in the footnotes and ultimately in the bibliography.

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**DATE**

## NOTES

- The dissertation reflects the law as at 30 May 2014.
- The dissertation was in its final stages when the media reported that the Draft Employment Equity Regulations, 2014 had been withdrawn.

## **ACKNOWLEDGEMENTS**

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## **SUMMARY**

The legislation relating to equal remuneration claims is an area of law which is nuanced and consequently poorly understood. It has posed an unattainable mountain for many claimants who came before the South African courts. This is as a direct result of the lack of an adequate legal framework providing for same in the Employment Equity Act 55 of 1998. The case law recognises two causes of action relating to equal remuneration. The first cause of action is equal remuneration for the same/similar work. The second is equal remuneration for work of equal value. The former is easily understood by both claimants and courts but the latter is poorly understood and poses many difficulties. The aim of this dissertation is fourfold. Firstly, the problems and criticisms regarding equal remuneration claims will be briefly highlighted. Secondly, a comprehensive analysis of the current legal framework will be set out together with the inadequacies. Thirdly, an analysis of international law and the law of the United Kingdom relating to equal remuneration claims will be undertaken. Fourthly, this dissertation will conclude by proposing recommendations to rectify the inadequacies.

## **KEY TERMS**

Equal remuneration; equal pay; equal work; same/similar work; work of equal value; grounds of justification; pay differentials.

## ABBREVIATIONS

BCLR: Butterworths Constitutional Law Reports

BLLR: Butterworths Labour Law Reports

CA: Court of Appeal

CC: Constitutional Court

Ch: Chapter

CPD: Cape of Good Hope Provincial Division

EAT: Employment Appeal Tribunal

ECJ: European Court of Justice

EqLR: Equality Law Reports

EWCA: England and Wales Court of Appeal

GG: Government Gazette

HL: House of Lords

IC: Industrial Court

*ILJ*: Industrial Law Journal

IRLR: Industrial Relations Law Reports

JOL: Judgments Online

LAC: Labour Appeal Court

LC: Labour Court

*LDD*: Law, Democracy and Development Journal

NICA: Northern Ireland Court of Appeal

Para: Paragraph

Paras: Paragraphs

*PELJ*: Potchefstroom Electronic Law Journal

SA: South African Law Reports

SADC: South African Development Community

*SAJHR*: South African Journal on Human Rights

*SALJ*: South African Law Journal

*SA Merc LJ*: SA Mercantile Law Journal

WLD: Witwatersrand Local Division

ZACC: South African Constitutional Court

ZASCA: South African Supreme Court of Appeal

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## CHAPTER 1: INTRODUCTION

### 1.1 Background

South Africa has not enacted separate legislation to deal with equal remuneration claims neither does the Employment Equity Act<sup>1</sup> at present contain an explicit provision dealing with same.<sup>2</sup> It should be noted that the Employment Equity Amendment Act<sup>3</sup> seeks to amend the EEA by including an explicit provision in the EEA to deal with equal remuneration for the same/similar work and work of equal value. The EEAA has been assented to by the President but he is yet to decide on the commencement date.<sup>4</sup> The EEAA thus remains inoperative until the President determines its commencement date by proclamation in the *Gazette* and it will consequently be dealt with on this basis.

The EEA does, however, deal with equal remuneration claims indirectly under section 6(1) read with the definition of an employment policy or practice in section 1.<sup>5</sup> The principles of equal remuneration for equal work and work of equal value are not contained in the EEA. Despite this omission, these principles are recognised in case law. In *Louw v Golden Arrow Bus Services (Pty) Ltd*<sup>6</sup> the Labour Court remarked that these principles have not been enshrined as principles of law. The Labour Court further remarked that these are principles of justice, equity and logic which may be taken into account in deciding whether an unfair labour practice relating to equal remuneration has been committed.<sup>7</sup> In *Mangena & Others v Fila South Africa (Pty)*

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<sup>1</sup> 55 of 1998 (hereafter referred to as the “EEA”). The EEA is the main anti-discrimination law in the workplace. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 will be analysed only to the extent that it bears reference to equal remuneration claims (hereafter referred to as the “PEPUDA”). It is apposite to note that chapter 2 of the EEA dealing with the prohibition of unfair discrimination only applies to employees (section 4(1)) whereas the PEPUDA does not apply to employees (section 5(3)).

<sup>2</sup> McGregor M “Equal Remuneration for the Same Work or Work of Equal Value” (2011) 23(3) *SA Merc LJ* at 488 (hereafter referred to as “McGregor”); Pieterse M “Towards Comparable Worth? *Louw v Golden Arrow Bus Services*” (2001) 118(11) *SALJ* 9 at 13 (hereafter referred to as “Pieterse”); *Decent Work Country Profile: South Africa* (International Labour Office, Geneva ILO 2012) at 41.

<sup>3</sup> 47 of 2013 (hereafter referred to as the “EEAA”).

<sup>4</sup> Section 30 of the EEAA states that the EEAA will come into operation on a date to be determined by the President by proclamation in the *Gazette*.

<sup>5</sup> Benjamin P “Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document” (2010) 31 *ILJ* 845 at 866 (hereafter referred to as “Benjamin”); McGregor at 488.

<sup>6</sup> (2000) 21 *ILJ* 188 (LC).

<sup>7</sup> At para 23.

*Ltd & Others*<sup>8</sup> the Labour Court held that section 6(1) of the EEA is broad enough to incorporate both these principles.<sup>9</sup>

The International Labour Organisation<sup>10</sup> has criticised South Africa for failing to include an explicit provision dealing with equal remuneration claims in the EEA.<sup>11</sup> The country has responded to this criticism by proposing the inclusion of an explicit provision in the EEA dealing with equal terms and conditions<sup>12</sup> of employment for the same/similar work<sup>13</sup> or work of equal value.<sup>14</sup> This amendment is contained in the EEAA.<sup>15</sup> It has its genesis in clause 3 of the Employment Equity Amendment Bill and is transposed therefrom unchanged.<sup>16</sup> The Bill together with its Memo provides much needed insight as to the conception of the provisions relating to equal remuneration which are now incorporated in the EEAA. Reference is therefore made to the Bill and the Memo where needed. The Memo's reference to clause 3(b) of the Bill can be read to refer to section 3(b) of the EEAA, which provides for the equal remuneration provisions, as this section has been incorporated from clause 3(b). The Memo states that the (proposed) amendment seeks to provide an explicit basis for equal pay claims.<sup>17</sup>

South Africa has ratified two key ILO Conventions which relate to equal remuneration. These Conventions are the Equal Remuneration Convention<sup>18</sup> and the Discrimination (Employment and Occupation) Convention.<sup>19</sup> The former Convention requires each member state to promote the principle of equal remuneration for work of equal value in respect of both male and female workers.<sup>20</sup> It states that the

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<sup>8</sup> [2009] 12 BLLR 1224 (LC) (hereafter referred to as "*Mangena*").

<sup>9</sup> At para 5.

<sup>10</sup> Hereafter referred to as the "ILO."

<sup>11</sup> Commission for Employment Equity in respect of opportunity and treatment in employment Annual Report 2009–2010 at 3; Clause 3.3.3 of the Memorandum on Objects of Employment Equity Amendment Bill, GG No 35799 of 19 October 2012 (hereafter referred to as the "Memo"); McGregor at 497; Benjamin at 866.

<sup>12</sup> Emphasis added. It is apposite to note that the amendment does not refer to the term, remuneration, but the inclusion of same under "terms of employment" is self-evident.

<sup>13</sup> This is also known as equal work.

<sup>14</sup> Section 3(b) of the EEAA.

<sup>15</sup> Section 3(b).

<sup>16</sup> Employment Equity Amendment Bill, GG No 35799 of 19 October 2012.

<sup>17</sup> Clause 3.3.3 of the Memo.

<sup>18</sup> No 100 of 1951. Ratified in 2000 (hereafter referred to as the "Equal Remuneration Convention").

<sup>19</sup> No 111 of 1958. Ratified in 1997.

<sup>20</sup> Article 2(1).

principle of equal remuneration for work of equal value may be applied by means of *national laws*<sup>21</sup> or regulations and other means.<sup>22</sup> The latter Convention seeks to eliminate any discrimination in respect of opportunity and treatment in employment.<sup>23</sup> It also generally applies to the principle of equal remuneration for work of equal value.<sup>24</sup> South Africa has not enacted laws or regulations to deal with the principles of equal remuneration for equal work and work of equal value as required by the Equal Remuneration Convention.

South Africa is a signatory to the SADC Protocol on Gender and Development.<sup>25</sup> The Protocol requires member states to ensure the application of the principles of equal remuneration for equal work and work of equal value to both males and females. The Protocol suggests that member states should review, adopt and implement *legislative*<sup>26</sup> measures in this regard.<sup>27</sup> South Africa has not implemented legislative measures to deal with equal remuneration claims as yet, but the country is in the process of reviewing the EEA in this regard. This much is evident from the EEAA.

The ILO states that the adoption of *equal remuneration provisions*<sup>28</sup> or *legislation*<sup>29</sup> which is consistent with the Equal Remuneration Convention is a crucial means to promote and ensure pay equity. It further notes that some countries have not set out the principles of equal remuneration fully in their legislation as these laws only refer to equal remuneration for equal work but fails to refer to equal remuneration for work of equal value.<sup>30</sup> The South African position is worsened by the fact that both these principles are non-existent in the EEA. The ILO states that the absence of equal remuneration cases does not *per se* imply a lack of unequal remuneration in

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<sup>21</sup> Emphasis added.

<sup>22</sup> Article 2(2)(a). The other means are: legally established or recognised machinery for wage determination; collective agreements between employers and workers or a combination of these various means (Article 2(2)(b)-(d)).

<sup>23</sup> Article 2.

<sup>24</sup> See Oelz M, Olney S and Manuel T *Equal Pay: An Introductory Guide* (International Labour Office, International Labour Standards Department, Conditions of Work and Equality Department Geneva, ILO, 2013) at 3 (hereafter referred to as "Oelz, Olney and Manuel *Equal Pay Guide*") wherein it is stated that the Discrimination Convention is closely linked to the Equal Remuneration Convention.

<sup>25</sup> 2008. South Africa signed the Protocol on 17 August 2008.

<sup>26</sup> Emphasis added.

<sup>27</sup> Article 19(2)(a).

<sup>28</sup> Emphasis added.

<sup>29</sup> Emphasis added.

<sup>30</sup> Oelz, Olney and Manuel *Equal Pay Guide* at 75.

practice. The ILO remarks that the reason for this may be “a lack of an *appropriate legal framework*<sup>31</sup> for bringing complaints, a lack of awareness of rights and procedures or poor accessibility to complaints procedures.”<sup>32</sup>

It is then axiomatic that an appropriate legal framework for equal remuneration claims is cardinal in order to promote and ensure the principles of equal remuneration for equal work and work of equal value.<sup>33</sup>

## 1.2 Assessing Work of Equal Value

It is apposite to note that the EEA does not prescribe a criteria or a methodology for assessing work of equal value. The ILO notes that the principle of equal remuneration for work of equal value has proved to be difficult to understand, both with regard to what it entails and in its application. It states that the Equal Pay Guide may be used to apply the principle of equal value to *national laws*<sup>34</sup> and practice, *inter alia*.<sup>35</sup> The ILO states that a determination as to whether two jobs are of equal value requires the use of some method to compare them. The ILO refers to job-evaluation methods in this regard.<sup>36</sup> It states that the absence of a methodology to compare different work that could be of equal value might reinforce discrimination in remuneration.<sup>37</sup> Moreover, in *Mangena* the Labour Court acknowledged that it does not have expertise in job grading and in the allocation of value to particular occupations.<sup>38</sup>

It is apposite to note that section 3(b) of the EEAA provides that the Minister may prescribe the criteria and the methodology for assessing work of equal value. The Minister has published the Draft Employment Equity Regulations which contained

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<sup>31</sup> Emphasis added.

<sup>32</sup> Oelz, Olney and Manuel *Equal Pay Guide* at 94.

<sup>33</sup> The author is, however, mindful of the fact that laws alone are not sufficient to ensure equal remuneration for equal work and work of equal value but it constitutes one of the means of achieving same. This suggestion finds international support. See McGregor at 502 wherein the author remarks that laws alone are not sufficient as enforcement and monitoring procedures are also needed.

<sup>34</sup> Emphasis added.

<sup>35</sup> Oelz, Olney and Manuel *Equal Pay Guide* at iii – iv.

<sup>36</sup> Chicha M-T, *Promoting Equity: Gender – Neutral Job Evaluation for Equal Pay: A Step by Step Guide* (Geneva, International Labour Office 2008) at v.

<sup>37</sup> *Gender Equality at the Heart of Decent Work* 1<sup>st</sup> ed (ILO 2009) at 121.

<sup>38</sup> *Mangena* at para 15.

the criteria for assessing work of equal value.<sup>39</sup> The Minister has withdrawn the Draft Regulations due to serious criticism being levelled against Section D, regulation 3, *inter alia*, which dealt with the difference in using national and regional demographics for equitable representation in the different levels of workplaces. The Draft Regulations were not withdrawn due to criticism levelled against the equal remuneration regulations. The Memo envisaged the criteria to be contained in a code of good practice and not regulations.<sup>40</sup> It would thus seem that the Minister has moved away from the Memo in this regard.

Academic scholars have proposed that the factors for assessing work of equal value be contained in a code of practice,<sup>41</sup> or that the factors be included in the form of a provision in the EEA.<sup>42</sup> The EEA does not mention which criteria or methodology will be used, save for stating that the Minister *may*<sup>43</sup> prescribe same. There is thus no clarity in this regard.

### 1.3 Grounds of Justification to Equal Remuneration Claims

The EEA refers to two grounds of justification in respect of unfair discrimination claims, namely, affirmative action and the inherent requirements of the job.<sup>44</sup> The EEA does not contain a provision which amends these grounds of justification with regard to equal remuneration claims. It thus means that the legislature is content with affirmative action and the inherent requirements of the job being applied to equal remuneration claims as grounds of justification. There is support for the view that these justifications are *not*<sup>45</sup> suitable to equal remuneration claims.<sup>46</sup> There is a

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<sup>39</sup> GG No 37338 of 28 February 2014 (hereafter referred to as the “Draft Regulations”).

<sup>40</sup> Clause 3.3.4 of the Memo.

<sup>41</sup> Meintjes-Van der Walt L (1997) Equal Pay Proposals for Women, *Agenda: Empowering Women for Gender Equity* 45 at 47; Meintjes-Van Der Walt L “Levelling the ‘Paying’ Fields” (1998) 19 *ILJ* 22 at 26 (hereafter referred to as “Meintjes-Van der Walt II”).

<sup>42</sup> Hlongwane N “Commentary on South Africa’s Position regarding Equal Pay for Work of Equal Value” (2007) 11(1) *LDD* 69 at 83 (hereafter referred to as “Hlongwane”); Pieterse at 17.

<sup>43</sup> Emphasis added. The word *may* is directory and does not place an obligation on the Minister to prescribe the criteria and the methodology but rather affords the Minister a discretion to do so. See De Ville JR *Constitutional and Statutory Interpretation* (Interdoc Consultants 2000) at 256 for a discussion of the word *may* in the context of peremptory and directory provisions.

<sup>44</sup> Section 6(2)(a)-(b).

<sup>45</sup> Emphasis added.

<sup>46</sup> Meintjes-Van der Walt II at 30 who submitted that a pay differential should not be justified on the grounds of affirmative action; Cohen T “Justifiable Discrimination – Time to Set the Parameters” (2000) 12 *SA Merc LJ* 255 at 260-261 who stated that both the defences of affirmative action and the inherent requirements of the job do not apply directly to pay discrimination; Pieterse at 17 who suggested that pay equity legislation should include specific defences to pay equity claims;

contrary view that these justifications can apply to equal remuneration claims.<sup>47</sup> The Courts have not had the opportunity to analyse the grounds of justification in the context of equal remuneration claims. It is suggested that these grounds of justification will have to be analysed in order to ascertain whether they provide justifications proper to equal remuneration claims. It is apposite to note that clause 5 of the withdrawn Draft Regulations referred to the grounds of justification to equal remuneration claims. This, however, is not contained in the EEAA and it presents a *quagmire* in this regard.

#### **1.4 Research Questions**

The research questions are thus whether the current legal framework provides an adequate legal basis for equal remuneration claims? And, if not, will the amendments in the EEAA provide an adequate legal basis for same?

#### **1.5 Research Methodology**

The research methodology will be in the form of a qualitative study. The qualitative study will deal with South African law in the form of the Constitution; legislation; case law; articles; books; as well as international law and comparative law in the form of the ILO Conventions; books; articles; case law; foreign legislation and related materials.

#### **1.6 Conclusion**

Thus far, it is clear that the EEA does not prescribe a criteria or a methodology for assessing work of equal value, but same is necessary. It is further clear that there are differing views with regard to the suitability of the grounds of justification to equal remuneration claims. In order to address these issues properly it is then apposite to deal with the current legal framework relating to equal remuneration claims in chapter 2.

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Hlongwane at 78 who stated that the EEA does not expressly provide for defences to pay discrimination and it is difficult to reconcile how the defences of affirmative action or the inherent requirements of the job could justify pay discrimination.

<sup>47</sup> Landman A “The Anatomy of Disputes about Equal Pay for Equal Work” (2002) 14 *SA Merc LJ* 341 at 353 who suggested that affirmative action is a suitable ground of justification to equal remuneration claims and the inherent requirements of the job as a ground of justification is possible in theory.

## **1.7 Outline of Chapters**

Chapter 1 provides a brief background of the law relating to equal remuneration and attempts to point out the inadequacies of same. Chapter 2 sets out the law relating to equal remuneration in South Africa extensively and critically analyses same with the aim of identifying the inadequacies. Chapter 3 commences with an exposition of international law relating to equal remuneration, where after a comparative study is done with the United Kingdom's equal remuneration laws. Chapter 4 is the culmination of the entire study and attempts to deal with the inadequacies of the South African law relating to equal remuneration by proposing recommendations (remedial measures) sourced from international law and the United Kingdom law.

## CHAPTER 2: CURRENT LEGAL FRAMEWORK RELATING TO EQUAL REMUNERATION CLAIMS

### 2.1 The Constitution

The Constitution is the supreme law of the country and any law or conduct inconsistent with it is invalid.<sup>1</sup> The Constitution states that when interpreting any legislation the Courts' must promote the spirit, purport and objects of the Bill of Rights.<sup>2</sup> One of the purposes of the Bill of Rights is the achievement of substantive equality.<sup>3</sup> The Employment Equity Act<sup>4</sup> states that the Act must be interpreted in accordance with the Constitution.<sup>5</sup> This would mean that the EEA must be interpreted in accordance with section 9 of the Constitution which encapsulates the notion of substantive equality. It is apposite to note that the EEA was enacted to give effect to section 9 of the Constitution.<sup>6</sup> Section 9 of the Constitution provides that equality includes the enjoyment of all rights and freedoms, and legislative measures designed to advance persons disadvantaged by unfair discrimination may be taken to achieve same.<sup>7</sup> The section further provides that neither the state nor any person

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<sup>1</sup> Section 2 of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the "Constitution").

<sup>2</sup> Section 39(2). This also applies to tribunals and forums when interpreting legislation. In the employment law context this would refer to, *inter alia*, the Commission for Conciliation Mediation and Arbitration.

<sup>3</sup> Section 9(2) of the EEA; See Mubangizi JC *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 2<sup>nd</sup> ed (Juta Claremont 2013) at 83 (hereafter referred to as "Mubangizi *Human Rights*") who stated that section 9(2) of the Constitution promotes the principle of substantive equality by entrenching affirmative action measures, and the significance thereof is to give meaning to employment equity through the modus of substantive equality; See also Currie I & De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed (Juta Cape Town 2013) at 213 who suggested that the notion of formal equality proposes that similarly circumstanced individuals be treated alike whereas, substantive equality requires the law to posit the equality in the outcome of the treatment and differential treatment is often an attendant consequence of such a pursuit. The Bill of Rights does not seek the achievement of formal equality but rather seeks the achievement of its corollary which is substantive equality. In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 112 O'Regan J concurring with the majority judgment remarked that the insistence of identical treatment in conditions of established inequality may lead to inequality. This accords with the notion of substantive equality.

<sup>4</sup> 55 of 1998 (hereafter referred to as the "EEA").

<sup>5</sup> Section 3(1)(a) of the EEA.

<sup>6</sup> Section 9(4) of the Constitution. The Preamble to the EEA states that the Act seeks to promote, *inter alia*, the Constitutional right of equality. It is apposite to note that the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted to give effect to section 9 of the Constitution (the Preamble to the Act) but it has wider application than the EEA in the sense that it applies to all persons except employees who fall within the ambit of the EEA (section 3).

<sup>7</sup> Section 9(2). This is the notion of substantive equality. See also Mubangizi *Human Rights* at 83 who stated that the principle of equality encompassing the equal enjoyment of all rights and

may directly or indirectly unfairly discriminate against anyone on the grounds listed in the section.<sup>8</sup> A claimant may also rely on an unlisted ground provided that the ground is based on attributes or characteristics which have the potential to impair her dignity or affect her adversely in a comparably serious manner.<sup>9</sup> Discrimination on a listed ground/s is unfair unless it is established that same is fair.<sup>10</sup>

It would be remiss not to refer to the test for unfair discrimination as laid down by the Constitutional Court in *Harksen v Lane NO & Others*<sup>11</sup> which has since become the *locus classicus* in this regard. The test<sup>12</sup> may succinctly be postulated as follows:

- a) Does the provision differentiate between people or categories of people? If it does and the differentiation does not bear a rational connection to a legitimate government purpose then there is a violation of section 8(1);<sup>13</sup> If the differentiation does bear a rational connection to a legitimate government purpose it might nevertheless still amount to discrimination;<sup>14</sup>

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freedoms is based on the premise that equality is cardinal in order to redress the past inequalities and it is achieved through the modus of affirmative action. In *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (CC) at para 30 the Constitutional Court held that equality includes remedial measures and same is not a deviation from the right to equality but rather forms part of it. In *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC) at paras 60-61 the Constitutional Court remarked that it is insufficient for the Bill of Rights to merely eliminate statutory provisions which have caused discrimination as remedial measures are necessary in order to curb the attendant consequences of such provisions from perpetuating. These remedial measures referred to would fall squarely within the ambit of substantive equality. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) at para 76 the Constitutional Court remarked that one of the difficulties surrounding affirmative action measures is that it results in the previously advantaged members of society being adversely affected but such consequence must be in accordance with the Constitution.

<sup>8</sup> Section 9(3)-(4). The listed grounds are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

<sup>9</sup> *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC) at para 46. It is apposite to note that section 1 of the PEPUDA includes this test for an unlisted ground under the definition of prohibited grounds.

<sup>10</sup> Section 9(5) of the Constitution.

<sup>11</sup> 1997 (11) BCLR 1489 (CC) (hereafter referred to as "*Harksen*").

<sup>12</sup> The test is commonly known as the *Harksen* test and was used to determine the constitutionality of a legislative provision under the Interim Constitution 200 of 1993 (hereafter referred to as the "Interim Constitution").

<sup>13</sup> Of the Interim Constitution, which has since been repealed by the Constitution. It is apposite to note that section 9(1) of the Constitution has similar wording to section 8(1).

<sup>14</sup> See *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC) at para 25, wherein the Constitutional Court held that the state should not regulate preferences that do not serve a legitimate government purpose because the resolve of equality is to ensure that the state functions in a rational manner; See also *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) at para 17 wherein the Constitutional Court held that the Compensation for

- b) A *two stage analysis*<sup>15</sup> is embarked upon in order to determine whether the differentiation amounts to unfair discrimination: i) if the differentiation is on a specified ground then discrimination would be established whereas, in the case of differentiation on an unspecified ground, the ground must objectively be based on attributes or characteristics which has the potential to impair the dignity of persons or affect them in a comparably serious manner in order to establish discrimination; ii) if the discrimination is on a specified ground then unfairness will be presumed whereas, in the case of discrimination on an unspecified ground the complainant will not be assisted by the unfairness presumption and will have to establish the unfairness; iii) unfairness is determined by having regard to the impact of the discrimination on the complainant and persons similarly situated;
- c) In the event that the discrimination is found to be unfair a determination will have to be made as to whether or not the provision can nevertheless be justified under the limitation clause.<sup>16</sup>

This is the test to be used when the constitutionality of legislation is challenged. The test is *not directly applicable*<sup>17</sup> to a claim of equal remuneration for equal work or one of equal value brought in terms of section 6(1) of the EEA but remains, however, instructive.<sup>18</sup> Section 11 of the EEA states that whenever unfair discrimination is alleged the employer against whom the *allegation*<sup>19</sup> is made is obliged to establish that the discrimination is fair. It should be noted that a *mere allegation*<sup>20</sup> of discrimination is not sufficient to attract the presumption of unfairness as a claimant is obliged to establish a *prima facie* case of discrimination in order to attract same.<sup>21</sup>

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Occupational Injuries and Diseases Act 130 of 1993 has a legitimate government purpose which is to regulate the compensation with regard to the disablement of employees caused by occupational injuries or diseases sustained or contracted during the course of employment.

<sup>15</sup> Emphasis added.

<sup>16</sup> *Harksen* at para 53.

<sup>17</sup> Emphasis added.

<sup>18</sup> Du Toit D “The Prohibition of Unfair Discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998” in Dupper O & Garbers C (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* 1<sup>st</sup> ed (Juta Cape Town 2009) at 151 has suggested that the test as laid down in *Harksen* is *inappropriate* in the employment context (emphasis added).

<sup>19</sup> Emphasis added.

<sup>20</sup> Emphasis added.

<sup>21</sup> *TGWU & Another v Bayete Security Holdings* [1999] 4 BLLR 401 (LC) at para 4; *Ntai & Others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) at paras 11-13.

Section 11 of the EEA should accordingly be read in this context. The remainder of the test for unfair discrimination in terms of the EEA may concisely be stated as follows. A claimant must establish differentiation (between himself and another person) thereafter he is obliged to establish (prove) a link between the differentiation and a ground listed in section 6(1) of the EEA or an unlisted ground which has the potential to impair the human dignity of the claimant or affect him in a comparably serious manner.<sup>22</sup> Once this has been achieved, there exists a presumption of unfairness which the employer has to justify.<sup>23</sup> The *Harksen* test requires a claimant to prove unfairness where he relies on an unlisted ground, whereas a claimant under the EEA relying on an unlisted ground will be assisted by the presumption of unfairness provided he satisfies the requirements for an unlisted ground. The *Harksen* test provides for a limitation test in terms of section 36 of the Constitution where the discrimination is found to be unfair, this does not apply to the EEA as the only justifications which can be relied upon are affirmative action and the inherent requirements of the job.<sup>24</sup> It is thus clear that the *Harksen* test cannot find direct application in a discrimination case brought under the EEA. It is apposite to note that the Employment Equity Amendment Act<sup>25</sup> seeks to amend section 11 of the EEA to bring it in line with the onus as set out in section 13 of the PEPUDA.<sup>26</sup> The amendment is contained in section 6 of the EEAA and it reads as follows:

“11.(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.

<sup>22</sup> Van Niekerk A (ed) *et al Law@work* 2nd ed (LexisNexis 2012) at 135-136 (hereafter referred to as “Van Niekerk *et al Law@work*”). *Mangena & Others v Fila South Africa (Pty) Ltd & Others* [2009] 12 BLLR 1224 (LC) at para 6.

<sup>23</sup> At para 6. Section 11 of the EEA refers to the burden of proof and states that where unfair discrimination is alleged the employer must establish that the discrimination is fair.

<sup>24</sup> Section 6(2)(a)-(b) of the EEA. Van Niekerk *et al Law@work* at 135 have stated that the first part of the test in *Harksen* is the same as the test for discrimination in terms of the EEA but, the second part of the test does not apply to discrimination in terms of the EEA because the EEA must be interpreted in compliance with the Discrimination Convention; Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 5th ed (LexisNexis Durban 2006) at 596 (hereafter referred to as “Du Toit *et al Labour Law*”) have stated that the EEA does not envisage separate enquiries to determine unfairness and justifiability as is the position with the test laid down in *Harksen*; Dupper O & Garbers C “Employment Discrimination” in Thompson C & Benjamin P *South African Labour Law* (Juta Claremont loose-leaf 2002) Vol 2 at CC1-30 (hereafter referred to as “Dupper & Garbers I”) have suggested that the two stage *Harksen* test is collapsed into a single test when applied within the ambit of the EEA.

<sup>25</sup> 47 of 2013 (hereafter referred to as the “EEAA”).

<sup>26</sup> Clause 6 of the Memorandum on Objects of Employment Equity Amendment Bill, GG No 35799 of 19 October 2012 (hereafter referred to as the “Memo”).

- (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;
  - (b) the conduct complained of amounts to discrimination; and
  - (c) the discrimination is unfair.<sup>27</sup>

McGregor commenting on, clause 3.6 of the Employment Equity Amendment Bill<sup>28</sup> which dealt with the amendment to the onus in section 11 of the EEA which is now contained in section 6 of the EEAA, asserts that the proposed amendment reads with difficulty and its meaning is unclear.<sup>29</sup> This criticism is supported. It should be noted that this amendment is not yet in operation.<sup>30</sup> It is envisaged that the amendment will pose difficulties before the courts when it comes into operation.

A claimant<sup>31</sup> may not bring a claim for equal remuneration in terms of section 9 of the Constitution because the EEA deals with equal remuneration claims. This contention is supported by the decision in *SANDU v Minister of Defence & Others*<sup>32</sup> wherein the Constitutional Court held that if the legislation is enacted to give effect to a constitutional right then a claimant may not circumvent the legislation and rely directly on the Constitution without challenging the constitutionality of the legislation.<sup>33</sup> The rationale of this approach is axiomatic. It thus means that an equal remuneration claim will not be dealt with by the Constitutional Court unless the EEA is challenged as being unconstitutional for example in the sense that it does not provide a cause of action to a claimant as envisaged in section 9 of the Constitution.<sup>34</sup>

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<sup>27</sup> Section 6 of the EEAA.

<sup>28</sup> GG No 35799 of 19 October 2012.

<sup>29</sup> McGregor M "Equal Remuneration for the Same Work or Work of Equal Value" (2011) 23(3) *SA Merc LJ* 488 at 501 (hereafter referred to as "McGregor").

<sup>30</sup> Section 30 of the EEAA states that it will come into operation on a date determined by the President by proclamation in the *Gazette*. The President is yet to proclaim same.

<sup>31</sup> Claimant should be read to refer to an employee as defined in section 1 of the EEA together with those who are excluded from the ambit of the definition as espoused in section 4(3) of the EEA.

<sup>32</sup> (CCT 65/06) [2007] ZACC 10 (hereafter referred to as "*SANDU*").

<sup>33</sup> *SANDU* at para 51; See also *NAPTOSA & Others v Minister of Education, Western Cape & Others* 2001 (4) BCLR 388 (CPD) at 396I-J wherein the High Court held that a litigant may not circumvent the provisions of the Labour Relations Act and rely directly on the Constitution in the absence of challenging the constitutionality of the Act and *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* 2006 (1) BCLR 1 (CC) at paras 434-437.

<sup>34</sup> The author will not attack the constitutionality of the EEA or any provisions thereof as this falls outside the ambit of this dissertation.

## 2.2 The Employment Equity Act

The EEA does not expressly deal with equal remuneration claims, but rather deals with same indirectly under section 6 of the EEA.<sup>35</sup> Section 6(1) read with section 1 of the EEA provides a cause of action for equal remuneration claims by providing that no person may unfairly discriminate, directly or indirectly against an employee in any employment policy or practice on a listed or unlisted ground.<sup>36</sup> Section 1 of the EEA defines employment policy or practice to include, *inter alia*, remuneration, employment benefits and terms and conditions of employment. It is apposite to note that the EEA does not refer to the principles of equal remuneration for equal work and equal remuneration for work of equal value.<sup>37</sup> It should further be noted that the EEA does not contain factors or criteria for assessing work of equal value. The EEA refers to two specific grounds of justification to a claim of unfair discrimination (which will include an equal remuneration claim) namely, affirmative action and the inherent requirements of the job.<sup>38</sup> It is then apposite to analyse the case law in order to ascertain how the Courts have dealt with equal remuneration claims, notwithstanding the said deficiencies in the EEA.

### 2.2.1 Case law dealing with equal remuneration for equal work

In *SA Chemical Workers Union & Others v Sentrachim Ltd*<sup>39</sup> the applicants alleged that the respondent discriminated against its black employees by paying them less than their white counterparts who were employed on the same grade or engaged in

<sup>35</sup> McGregor at 488; Pieterse M “Towards Comparable Worth? *Louw v Golden Arrow Bus Services*” (2001) 118(11) SALJ 9 at 13 (hereafter referred to as “Pieterse”); *Decent Work Country Profile: South Africa* (International Labour Office, Geneva ILO 2012) at 41 (hereafter referred to as “*Decent Work Country Profile*”); Benjamin P “Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document” (2010) 31 *ILJ* 845 at 866 (hereafter referred to as “Benjamin”).

<sup>36</sup> Grogan J *Workplace Law* 7<sup>th</sup> ed (Juta Cape Town 2003) at 263 has stated that the discrepancy in remuneration may arise from past discrimination; Benjamin at 866, acknowledging that discrimination between employees on the basis of their contractual arrangements is not in itself actionable, has suggested that the non-suiting of such discrimination infringes on the right to equality and fair labour practices as espoused in the Constitution; Benjamin at 866 has further suggested that the EEA should be amended to provide a remedy for unfair discrimination based on the contract of employees relating to wages and working conditions.

<sup>37</sup> Landman A “The Anatomy of Disputes about Equal Pay for Equal Work” (2002) 14 *SA Merc LJ* 341 at 342 (hereafter referred to as “Landman”) has stated that these principles have not been enshrined as principles of law but they are principles of justice, equity and logic which may be taken into account in deciding whether an unfair labour practice relating to equal remuneration has been committed; See also *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 *ILJ* 188 (LC) at para 23.

<sup>38</sup> Section 6(2)(a)-(b).

<sup>39</sup> (1988) 9 *ILJ* 410 (IC) (hereafter referred to as “*Sentrachim I*”). This case was heard in terms of section 46(9) of the Labour Relations Act 28 of 1956 which has been repealed.

the same work. The Industrial Court held that wage discrimination based on race or any other difference other than *skills* and *experience*<sup>40</sup> was an unfair labour practice. The Industrial Court found that the respondent acknowledged the wage discrimination as alleged and committed itself to remove same. As a result thereof, the Industrial Court ordered the respondent to remove the wage discrimination based on race within a period of six months.<sup>41</sup> It is clear that the principle of equal remuneration for equal work was recognised in this case.<sup>42</sup> It is further clear that the Industrial Court considered *skills* and *experience* to be objective and fair factors upon which to pay black employees less than their white counterparts.<sup>43</sup>

In *National Union of Mineworkers v Henry Gould (Pty) Ltd & Another*<sup>44</sup> the applicant alleged that the respondent's refusal to implement wage increases to union members retrospectively constituted an unfair labour practice. The Industrial Court remarked that as an abstract principle, it is self-evident that equals should be treated equally. It further remarked that employees having the same seniority and in the same job category should receive the same terms and conditions of employment unless there are good and compelling reasons to differentiate between them. The Industrial Court ordered the respondent to pay the union members the relevant amount of wages.<sup>45</sup> It regarded *seniority* as a fair and objective factor to pay different wages.<sup>46</sup>

In *Sentrachem Ltd v John NO & Others*,<sup>47</sup> the High Court noted that it was common cause between the parties that a practice in which a black employee is paid a lesser wage than his white counterpart who is engaged in the same work whilst both have the same length of service, qualifications and skills constitutes an unfair labour practice based on unfair wage discrimination. The High Court remarked that this was

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<sup>40</sup> Emphasis added. The Industrial Court in its order at 439H also refers to length of service in the job as a fair criterion for paying black employees less than their white counterparts.

<sup>41</sup> At 412F, 429F, 430E-F, 439H.

<sup>42</sup> Cohen T "Justifiable Discrimination – Time to Set the Parameters" (2000) 12 *SA Merc LJ* 255 at 260 (hereafter referred to as "Cohen") has stated that the principle of equal remuneration for equal work was established in this case.

<sup>43</sup> Emphasis added.

<sup>44</sup> (1988) 9 *ILJ* 1149 (hereafter referred to as "*Henry Gould*"). This case was heard in terms of section 46(9) of the Labour Relations Act 28 of 1956 which has been repealed.

<sup>45</sup> At 1150E, 1158A-B, 1161I.

<sup>46</sup> Emphasis added.

<sup>47</sup> (1989) 10 *ILJ* 249 (WLD) (hereafter referred to as "*Sentrachem II*").

the correct exposition of the law.<sup>48</sup> This was a review application against the award made in *Sentrachem I* regarding the wage discrimination based on race. This award was set aside by the High Court for lack of an evidential basis to make the award.<sup>49</sup> The High Court regarded *length of service*, *qualifications* and *skills* as fair and objective factors in law to pay different wages.<sup>50</sup>

In *Mthembu & Others v Claude Neon Lights*,<sup>51</sup> the respondent instructed its local management to evaluate each employee and make recommendations as to whether the employee should receive an increase in pay based on merit. Local management decided that two employees should not receive a merit increase. This decision gave rise to the application. The Industrial Court held that discrimination was absent and that it would not be in the interests of employers nor employees to order that an employer is not entitled to differentiate between employees based on their productivity. It further held that an employer is entitled to reward an employee with a merit increase as that increases productivity.<sup>52</sup> It is clear from this case that the Industrial Court regarded *productivity* as a fair and objective factor for paying different wages.<sup>53</sup>

In *TGWU & Another v Bayete Security Holdings*<sup>54</sup> the applicant admitted that he was not aware of the nature of the work performed by his comparator neither was he aware of his comparator's educational qualifications or experience. The Labour Court remarked that the applicant expected it to infer that he was discriminated against on the ground of race on the basis that he was black and earned R1500 whilst his white comparator earned R4500. The Labour Court held that the applicant

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<sup>48</sup> Campanella J "Some Light on Equal Pay" (1991) 12 *ILJ* 26 at 29 (hereafter referred to as "Campanella") has stated that the principle of equal remuneration for equal work was cemented in this case.

<sup>49</sup> At 259B - C, 250I, 259D, 263J.

<sup>50</sup> Emphasis added.

<sup>51</sup> (1992) 13 *ILJ* 422 (IC) (hereafter referred to as "*Mthembu*"). This case was heard in terms of section 46(9) of the Labour Relations Act 28 of 1956 which has been repealed.

<sup>52</sup> At 423B - C, 423E - G.

<sup>53</sup> Emphasis added. See Campanella at 27 who suggested that the presiding officer in *Mthembu's* case regarded productivity as a ground of justification to pay differentiation; Campanella at 29-30 has stated that equal pay for equal work is a crucial element in order to achieve a non-discriminatory policy and employers should not labour under the misapprehension that productivity is a universally fair ground of differentiation because its fairness is dependent on objective criteria which should be applied objectively.

<sup>54</sup> [1999] 4 BLLR 401 (LC) (hereafter referred to as "*TGWU*"). This matter came before the Labour Court in terms of item 2(1)(a) of Schedule 7 of the LRA which has since been repealed.

had not succeeded in proving that he had been discriminated against. It further held that the mere difference in pay between employees does not in itself amount to discrimination. The Labour Court remarked that discrimination takes place when two similarly circumstanced employees are treated differently on the prohibited grounds. It further remarked that responsibility, expertise, experience, skills and the like could justify pay differentials. The application was consequently dismissed.<sup>55</sup> The Labour Court regarded *responsibility, expertise, experience, skills* and *the like* as fair and objective factors for paying different wages.<sup>56</sup>

In *Heynsen v Armstrong Hydraulics (Pty) Ltd*<sup>57</sup> the applicant (a quality control inspector) alleged that he was discriminated against on the basis of race in that he earned less than his co-employees (quality control inspectors) who were part of the bargaining unit and who were weekly paid. The applicant did not belong to the bargaining unit and was monthly paid but the work performed was the same as that of his co-employees. The applicant sought an order directing the respondent to remunerate him on an equal pay for equal work basis. The Labour Court noted that there were differences in the terms and conditions of employment with regard to weekly paid and monthly paid employees.<sup>58</sup> It further noted that monthly paid employees were entitled to certain benefits which hourly paid employees did not enjoy. The Labour Court held that it would not be fair if employees who were not part of the bargaining unit were to benefit from that unit while they still enjoy benefits which were not shared by the bargaining unit. The Labour Court noted that according to the ILO, collective bargaining is not a justification for pay discrimination.<sup>59</sup> It cautioned that this rule was compelling in an ideal society and should not apply rigidly in South African labour relations due to the fact that collective bargaining was a hard fought right for employees. The Labour Court characterised the applicant's complaint as wanting to have his cake and eat it. It found that insofar as their might be discrimination, same was not unfair based on the facts. The application was

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<sup>55</sup> At paras 5, 4, 7, 10.

<sup>56</sup> Emphasis added.

<sup>57</sup> [2000] 12 BLLR 1444 (LC) (hereafter referred to as "*Heynsen*").

<sup>58</sup> At paras 1, 3 - 4, 6, 10-11.

<sup>59</sup> *Heynsen* refers to section 111 of the Directions of the ILO. It is submitted that this should be read as referring to article 2(e) of the Discrimination (Employment and Occupation) Recommendation No 111 of 1958.

consequently dismissed.<sup>60</sup> The Labour Court regarded *collective bargaining* as a possible fair and objective factor for paying different wages.<sup>61</sup>

In *Ntai & Others v SA Breweries Ltd*<sup>62</sup> the applicants, black people, alleged that their employer committed unfair discrimination based on race in that it paid them a lower salary than their white counterparts whilst they all were engaged in the same work or work of equal value. The applicants sought an order that their employer pay them a salary equal to that of their white counterparts. The respondent admitted that there was a difference in the salaries but denied that the cause of same was based on race. The respondent attributed the difference in pay to a series of performance based pay increments, the greater experience of the comparators and their seniority. The Labour Court accepted that the applicants had made out a *prima facie* case but noted that they still bore the overall onus of proving that the difference in pay was based on race. It found that the applicants had failed to prove on a balance of probabilities that the reason for the different salaries was based on race. The application was consequently dismissed.<sup>63</sup>

The Labour Court remarked that the respondent had no legal duty to apply affirmative action measures and somehow increase the salaries of the applicants. It further remarked that the application of an affirmative action measure was a defence which could be relied upon by an employer and did not constitute a right which an employee could use. The Labour Court noted that indirect discrimination exists when an ostensibly neutral requirement adversely affects a disproportionate number of people from a protected group and it may also arise in the case of equal pay for work of equal value.<sup>64</sup> It further noted that the use of ostensibly neutral requirements such as *seniority* and *experience* in the computation of pay could have an adverse impact on employees from the protected group if it was proved that such factors affected the

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<sup>60</sup> At paras 8, 12-13, 15, 17-18.

<sup>61</sup> Emphasis added. See also *Larbi Ordam & Others v Member of the Executive Council for Education (North-West Province) & Another* 1997 (12) BCLR 1655 (CC) at para 28 wherein the Constitutional Court held that an agreed regulation which unfairly discriminates against a minority will not constitute a ground of justification; and *Jansen van Vuuren v South African Airways (Pty) Ltd & Another* [2013] 10 BLLR 1004 (LC) at paras 48-50 wherein the Labour Court held that a collective agreement cannot justify unfair discrimination.

<sup>62</sup> (2001) 22 ILJ 214 (LC) (hereafter referred to as "*Ntai*"). This matter came before the Labour Court in terms of item 2(1)(a) of Schedule 7 of the LRA which has since been repealed.

<sup>63</sup> At paras 2-3, 5, 25, 21, 57, 61, 90.

<sup>64</sup> At paras 85-86.

employees as a group disproportionately when compared to their white counterparts who perform the same work.<sup>65</sup>

In *Co-operative Worker Association & Another v Petroleum Oil and Gas Co-operative of SA*<sup>66</sup> the second applicant alleged that the respondent committed unfair discrimination based on the absence of family responsibility in that employees with family responsibility (dependent spouses and children) received a higher total guaranteed remuneration than employees without family responsibility and this violated the principle of the right to equal pay for equal work or work of equal value. The Labour Court noted that the international community acknowledged the fact that workers with family responsibilities constituted a vulnerable group and are deserving of protection. Additional remuneration for these employees was endorsed and encouraged in terms of both national and international law.<sup>67</sup> The Labour Court agreed with the respondent's submission that the definition of family responsibility made it clear that only those employees with dependants may utilise section 6(1) on the ground of family responsibility. The applicants could therefore not claim unfair discrimination on the basis of the absence of family responsibility which is the corollary of the listed ground of family responsibility. The claim was consequently dismissed.<sup>68</sup> The Labour Court regarded the *absence of family responsibility* as a justification for paying different wages.<sup>69</sup>

### **2.2.2 Case law dealing with equal remuneration for work of equal value**

In *Louw v Golden Arrow Bus Services (Pty) Ltd*<sup>70</sup> the applicant, a black male employed as a buyer alleged that the respondent committed direct unfair discrimination on the ground of race in that it paid his comparator who was a white male employed as a warehouse supervisor a higher salary for work of equal value<sup>71</sup> alternatively, the respondent committed indirect discrimination because the difference in salaries was based on race as a result of the respondent applying

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<sup>65</sup> At paras 79-80.

<sup>66</sup> [2007] 1 BLLR 55 (LC) (hereafter referred to as "*Co-operative Worker Association*").

<sup>67</sup> At paras 6, 8, 42, 51.

<sup>68</sup> At paras 47, 36, 60.

<sup>69</sup> Emphasis added.

<sup>70</sup> (2000) 21 ILJ 188 (LC) (hereafter referred to as "*Louw*").

<sup>71</sup> Pieterse at 18 has stated that the principle of equal remuneration for work of equal value is a manifestation of the constitutional concept of substantive equality.

factors in its pay evaluation that had a disparate impact on black employees. These factors were *performance, potential, responsibility, experience, education, attitude, skills, entry-level* and *market forces*.<sup>72</sup> The applicant sought compensation in the amount of the difference between his salary and that of his comparator. The respondent acknowledged the difference in salary between the applicant and the comparator but denied that it was as a result of discrimination and stated that same was attributable to non-discriminatory considerations.<sup>73</sup>

The Labour Court held that the mere differential treatment of persons from different races was not *per se* discriminatory on the ground of race unless the difference in race is the reason for the disparate treatment. Based on the peromnes system which was used to determine the rate of remuneration there was at least one peromnes grade difference between the size of the applicant's work (buyer) and that of the comparator (warehouse supervisor). The Labour Court further found that the applicant had failed to prove that the two jobs, on an objective evaluation, were of equal value. The Labour Court remarked that this does not mean that the reason for the difference in salary was not due to racial discrimination but it meant that racial discrimination had not been proved. It would not finally dismiss the application in the interests of justice and it handed down an order of absolution from the instance.<sup>74</sup> It is clear that an *objective job evaluation method* lends legitimacy to the relevant value which is attributed to the various jobs.<sup>75</sup>

In *Mangena & Others v Fila South Africa (Pty) Ltd & Others*<sup>76</sup> the applicant, a black male, alleged that the respondent discriminated against him on the ground of race in that it paid his chosen comparator, a white female, a higher salary even though the work performed by both of them was the same or alternatively of equal value.<sup>77</sup> The Labour Court remarked that the EEA does not specifically regulate equal

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<sup>72</sup> Emphasis added.

<sup>73</sup> At paras 4 - 7, 59.

<sup>74</sup> At paras 26, 105 - 106, 130, 133.

<sup>75</sup> Emphasis added. Pieterse at 17 has suggested that in order to prevent disadvantage from perpetuating, analytical job evaluation programmes should be prescribed. It is axiomatic that the analytical job evaluation programmes would of necessity have to contain factors which are objective in order to be fair.

<sup>76</sup> [2009] 12 BLLR 1224 (LC) (hereafter referred to as "*Mangena*").

<sup>77</sup> At paras 2, 4. This claim represents the first part of the claim in the case which relates to the applicant, Shabalala. The second and third parts of the claim will not be dealt with.

remuneration claims as is the position with equality legislation in many other jurisdictions. It further remarked that a claim of equal remuneration for equal work falls to be determined in terms of the EEA as the Act is broad enough to incorporate a claim of equal remuneration for work of equal value, notwithstanding the fact that the principle is not mentioned in the EEA.<sup>78</sup> The Labour Court noting that the Equal Remuneration Convention only refers to the prohibited ground of sex, held that the principle of equal remuneration for work of equal value should be extended beyond the prohibited ground of sex to include the prohibited ground of race *in casu*. It held that it could therefore entertain a claim of equal remuneration for work of equal value under the EEA. The Labour Court noted that it was enjoined by section 3(d) of the EEA to interpret the Act in compliance with South Africa's international law obligations which, *inter alia*, includes the Equal Remuneration Convention.<sup>79</sup>

The Labour Court found that the applicant could not adduce evidence as to the precise functions performed by the comparator and he had an exaggerated view of the nature of the work performed by him. The Labour Court rejected the applicant's evidence as to the nature of the work performed by both him and the comparator and instead accepted the respondent's version in this regard. It concluded that the factual foundation which was necessary to sustain a claim of equal remuneration for equal work was non-existent as the applicant had failed to establish that the work performed by him and the comparator was the same/similar.<sup>80</sup>

The Labour Court then noted that the applicant had not pleaded a claim of equal remuneration for work of equal value. It remarked that the absence of a pleaded case aside there was no evidence before it to establish the relative value that should be accorded to the work performed by the applicant and the comparator. The applicant argued that the Court could take a view on the facts before it as to the relative value of the respective work. The Labour Court indulging the applicant in this regard remarked that to the extent that the issue of relative value was self-evident the work which the applicant was engaged in was of considerably less value than

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<sup>78</sup> McGregor at 497 has stated that the Labour Court's finding that the EEA is broad enough to incorporate claims of equal remuneration for equal work and work of equal value, is plausible and purposive.

<sup>79</sup> At para 5.

<sup>80</sup> At para 14.

that performed by the comparator taking into account, the *demands made, levels of responsibility and skills* in relation to both jobs.<sup>81</sup> The Labour Court correctly acknowledged that it had no expertise in job grading or in the allocation of relative value to different functions or occupations. The Labour Court went further and stated that an applicant claiming equal remuneration for work of equal value must lay a proper factual foundation of the work performed by himself and that of his chosen comparator to enable the court to make an assessment as to what value should be attributed to the work. This factual foundation might include evidence of *skill, effort, responsibility and the like*<sup>82</sup> in relation to the work of both the claimant and the comparator.<sup>83</sup>

It concluded that the basis for the applicant's claim of equal remuneration for work of equal value was non-existent. Both claims of equal remuneration for equal work and work of equal value were consequently dismissed.<sup>84</sup>

### **2.2.3 Dispensing with the requirement to prove the equal value of the work**

In *Mutale v Lorcom Twenty Two CC*,<sup>85</sup> the applicant alleged that the respondent had committed an unfair labour practice by racially discriminating against her in the computation of her salary. The applicant stated that the respondent had told her, with regard to an advertised position at the respondent, to offer R1000 – R3000 to black candidates and to accept the amount requested by white candidates. This gave rise to the applicant querying the basis for the computation of her salary. The respondent denied the racist employment practice. The Labour Court found that a comparison of the applicant's salary to that of her chosen comparator (white female) was difficult in that the applicant was employed as a bookkeeper whilst the evidence was to the effect that the comparator was employed as a sales manager. The Labour Court held that it was not necessary for the applicant to compare her salary with that of a co-employee (comparator) because judged on its own it was clearly based on race.

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<sup>81</sup> Emphasis added. It is apposite to note that the Labour Court concluded the sentence with the abbreviation, etc (etcetera), which would suggest that similar factors could be taken into account when determining the relative value of the jobs, at para 15.

<sup>82</sup> This would mean that one could adduce evidence regarding like factors in relation to the work performed.

<sup>83</sup> At para 15.

<sup>84</sup> At para 15, 17; McGregor at 503 has stated that *Mangena* is the *locus classicus* on equal remuneration claims and will retain such status, notwithstanding possible changes to the EEA.

<sup>85</sup> [2009] 3 BLLR 217 (LC) (hereafter referred to as "*Mutale*").

The Labour Court found that the respondent used race as a yardstick to determine the salary to be offered to job applicants.<sup>86</sup> It held that it was clear from the applicant's curriculum vitae that she asked for a starting salary of R5000 per month. The Labour Court reasoned that had the applicant been white she would have received her asking salary of R5000 in terms of the respondent's employment practice. The Labour Court accordingly held that the difference between the amounts of R5000 and R3000 per month for the first year of employment constituted the compensation to which the applicant was entitled. The applicant was awarded an amount of R24000 for the racial discrimination in the computation of her salary.<sup>87</sup>

This case is unique in the sense that the discrimination was adjudicated as an unfair labour practice ostensibly under section 186(2)(a) of the Labour Relations Act<sup>88</sup> as it relates to the provision of benefits but the judgment is not clear in this regard. It is apposite to note that section 186(2)(a) of the LRA does not deal with discrimination but rather deals with unfair conduct by the employer in relation to, *inter alia*, the provision of benefits to an employee.<sup>89</sup> It is further unique in the sense that the applicant succeeded in her claim despite choosing an unsuitable comparator. It is apposite to note that the racist employment practice of the respondent was the deciding factor in the case. It would thus mean that this case is authority for the view that where the employer has a racist employment practice in place regarding the computation of salary, the claimant will not need to choose a suitable comparator and will consequently not have to show that the work performed is the same or of equal value to that of the comparator.

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<sup>86</sup> At paras 1, 4, 40, 2, 39.

<sup>87</sup> At paras 21, 40-41.

<sup>88</sup> 66 of 1995 (hereafter referred to as the "LRA").

<sup>89</sup> Section 186(2)(a) of the LRA defines an unfair labour practice as "any unfair act or omission that arises between an employer and an employee involving-  
(a) *unfair conduct* by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee" (emphasis added).

## 2.3 The Factors Emerging from the Case Law

### 2.3.1 The justification factors

It is clear from the aforementioned analysis of the case law that the following factors have been regarded as fair and objective (neutral) for justifying pay differentials:

- a) Skills;<sup>90</sup>
- b) Experience;<sup>91</sup>
- c) Seniority;<sup>92</sup>
- d) Length of service;<sup>93</sup>
- e) Qualifications;<sup>94</sup>
- f) Productivity;<sup>95</sup>
- g) Responsibility;<sup>96</sup>
- h) Collective bargaining (agreements);<sup>97</sup>
- i) Absence of family responsibility;<sup>98</sup> and
- j) Objective job evaluation methods.<sup>99</sup>

### 2.3.2 The factors for assessing equal value

It is further clear that the following factors have been referred to as applying to the assessment of the value of the work:

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<sup>90</sup> *Sentrachem I* at 429F; *Sentrachem II* at 259B-C; *TGWU* at para 7.

<sup>91</sup> *Sentrachem I* at 429F; *TGWU* at para 7; *Ntai* at para 80.

<sup>92</sup> *Henry Gould* at 1158A-B; *Ntai* at para 80; Landman at 354 has stated that pay differentials based on seniority is a recognised defence; Meintjes-Van Der Walt L “Levelling the ‘Paying’ Fields” (1998) 19 *ILJ* 22 at 30 (hereafter referred to as “Meintjes-Van der Walt”) relying on foreign law has stated that a bona fide seniority system is an acceptable ground of justification to pay differentials.

<sup>93</sup> *Sentrachem II* at 259B - C.

<sup>94</sup> *Sentrachem II* at 259B - C.

<sup>95</sup> *Mthembu* at 423E - G; Landman at 353-354 referring to section 32 of the Ontario Employment Standards Act of 1990 has stated that merit has been accepted as a ground of justification for pay differentials; Meintjes-Van Der Walt at 30 relying on foreign law has stated that a merit system based on objective criteria is an acceptable ground of justification to pay differentials. It is clear from *Mthembu*'s case that merit is linked to productivity (see para 2.2.1 hereof).

<sup>96</sup> *TGWU* at para 7.

<sup>97</sup> *Heynsen* at paras 12-13, 17; Landman at 351 has stated that an employer can attempt to rely on a collective agreement that provides for discriminatory wages as a ground of justification for pay differentials but this reliance is unlikely to succeed; Grogan J *Employment Rights* (Juta Claremont 2010) at 230 relying on *SA Union of Journalists v South African Broadcasting Corporation* (1999) 20 *ILJ* 2840 (LAC) has stated that collective bargaining agreements with different unions which result in pay differentials are permissible.

<sup>98</sup> *Co-operative Worker Association* at paras 36, 47.

<sup>99</sup> *Louw* at para 106; Pieterse at 17 has suggested that the use of specific objective job evaluation methods will prevent perpetuating disadvantage.

- a) Skill;<sup>100</sup>
- b) Physical and mental effort;<sup>101</sup>
- c) Responsibility;<sup>102</sup> and
- d) Like factors.<sup>103</sup>

It is apposite to note that these factors overlap with the justification factors in paragraph 2.3.1 *supra*. It is clear from the last factor (d) above, that the list of factors is not intended to be a *numerus clausus*. It is further clear that the case law has developed factors to justify pay differentials as well as factors for assessing the value of the work in question. It should be noted that the EEA does not refer to the aforementioned factors for assessing the value of the work, neither does it refer to the factors mentioned in paragraph 2.3.1 *supra* as grounds of justification to equal remuneration claims. The EEA does, however, contain two statutory grounds of justification to unfair discrimination claims namely, affirmative action and the inherent requirements of the job.<sup>104</sup> It is then apposite to deal with the statutory grounds of justification to a claim for unfair discrimination which includes an equal remuneration claim.

#### **2.4 The Statutory Grounds of Justification**

The EEA refers to two grounds of justification to a claim of unfair discrimination namely, affirmative action and the inherent requirements of the job.<sup>105</sup> It should be noted that neither ground of justification in the context of equal remuneration claims has come before the South African Courts. It is thus apposite to analyse the grounds of justification in the context of equal remuneration claims. It is prudent to deal first with the authorities which have differing views regarding the suitability of affirmative action and the inherent requirements of the job to operate as grounds of justification to an equal remuneration claim. Thereafter, affirmative action and the inherent

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<sup>100</sup> *Mangena* at paras 6, 15.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.* In *Louw*, the court noted that the factors used in the peromnes pay evaluation method were: performance, potential, responsibility, expertise, education, attitude, skills, entry level and market forces; *Meintjes-Van Der Walt* at 26 has stated that the evaluation of job content is normally based on four criteria namely, skill, responsibility, physical and mental effort and conditions under which the work is performed.

<sup>104</sup> Section 6(2)(a)-(b).

<sup>105</sup> *Ibid.*

requirements of the job will be analysed in the context of equal remuneration claims in an attempt to ascertain whether or not they constitute suitable grounds of justification.

In *Ntai* the Labour Court dealing with an equal remuneration claim remarked *obiter*, that the respondent had no legal duty to apply affirmative action measures and somehow increase the salaries of the applicants. The Labour Court further remarked that the application of an affirmative action measure was a defence which could be relied upon by an employer and does not constitute a right which an employee could utilise.<sup>106</sup> It is clear from the *obiter* remarks made, that the Labour Court regarded affirmative action as a suitable defence to an equal remuneration claim.

Meintjes-Van der Walt has suggested that a pay differential in the context of remuneration discrimination should not be justified on the grounds of affirmative action as there are more constructive ways in which an affirmative action plan could be utilised to address past inequalities without implementing new differentials.<sup>107</sup> The reason for the suggestion of non-suitability of affirmative action as a ground of justification to an equal remuneration claim is based on the view that an affirmative action plan could be used more fruitfully elsewhere.

Landman has suggested that affirmative action is a suitable ground of justification to an equal remuneration claim. He has further suggested that when affirmative action is applied in the context of equal remuneration claims, it may be that designated employees are paid more than able-bodied white males who are the only persons who do not belong to a designated group. Whether an employer may discriminate within the designated groups by applying affirmative action measures is a vexed question. With regard to the inherent requirements of the job, Landman has suggested that the justification to equal remuneration claims on this ground is possible in theory.<sup>108</sup>

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<sup>106</sup> At paras 85 - 86.

<sup>107</sup> Meintjes-Van Der Walt at 30.

<sup>108</sup> Landman at 353.

Du Toit *et al* have suggested that it is difficult to imagine circumstances where either affirmative action or the inherent requirements of the job could be applicable as grounds of justification to remuneration discrimination on a prohibited ground between employees performing work of equal value.<sup>109</sup>

Cohen has stated that neither the defence of affirmative action or the inherent requirements of the job applies directly to pay discrimination.<sup>110</sup> There is no explanation as to why these defences cannot apply to pay-discrimination.

Pieterse has suggested that pay equity legislation should include specific defences to pay equity claims and it will be beneficial if the legislation specifies the interface between pay equity principles and affirmative action structures.<sup>111</sup> There is no comment made regarding the non-suitability of affirmative action or the inherent requirements of the job as grounds of justification to equal remuneration claims.

Hlongwane has stated that the EEA does not expressly provide for defences to pay discrimination and it is thus difficult to reconcile how either the defence of affirmative action or the inherent requirements of the job could justify pay discrimination committed on one of the grounds referred to in section 6(1) of the EEA.<sup>112</sup> There is no explanation as to why these defences cannot apply as grounds of justification to pay discrimination.<sup>113</sup>

It should be noted that the above authorities do not proffer an explanation as to why neither affirmative action nor the inherent requirements of the job are not suitable grounds of justification to equal remuneration claims. The authorities, who state that affirmative action and the inherent requirements of the job are suitable grounds of justification likewise, do not proffer an explanation for this. If one accepts that an equal remuneration claim is justiciable in terms of the EEA, then affirmative action

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<sup>109</sup> Du Toit *et al Labour Law* at 617.

<sup>110</sup> Cohen at 260 - 261.

<sup>111</sup> Pieterse at 17.

<sup>112</sup> Hlongwane N "Commentary on South Africa's Position regarding Equal Pay for Work of Equal Value" (2007) 11(1) *LDD* 69 at 78 (hereafter referred to as "Hlongwane").

<sup>113</sup> It is axiomatic that affirmative action cannot apply as a ground of justification to all the grounds referred to in section 6(1) of the EEA with reference to equal remuneration claims. Affirmative action only applies as a ground of justification where the discrimination is based on sex, gender and/or race.

and the inherent requirements of the job constitute the grounds of justification to an equal remuneration claim *ex lege*. A finding that neither constitutes a suitable ground of justification to an equal remuneration claim and should therefore not apply as such, will of necessity have to be based on sound arguments and suggestions. Put differently, affirmative action and the inherent requirements of the job are suitable and proper grounds of justification to an equal remuneration claim until the contrary is proved.

#### **2.4.1 Affirmative action**

Section 6(2)(a) of the EEA provides that the taking of affirmative action measures which are consistent with the purpose of the EEA is not unfair discrimination. The purpose of the EEA is to achieve equity in the workplace by, *inter alia*, implementing affirmative action measures to ensure that persons from the designated groups are equitably represented in all occupational categories and levels in the workforce.<sup>114</sup> Section 15(2) of the EEA prescribes the affirmative action measures to be taken by designated employers.<sup>115</sup>

These measures are:

- a) To identify and eliminate employment barriers;
- b) To diversify the workplace based on equal dignity and respect;
- c) To reasonably accommodate people from designated groups in order to ensure that they enjoy equal opportunities; and

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<sup>114</sup> Section 2 of the EEA; section 15(1) of the EEA defines affirmative action measures as those measures that are “designed to ensure that suitably qualified people from the designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of a designated employer”; See also Dupper O & Garbers C “Affirmative Action” in Dupper O *et al Essential Employment Discrimination Law* (Juta Claremont 2010) at 259 (hereafter referred to as “Dupper & Garbers II”) with regard to the comments on the goal of affirmative action.

<sup>115</sup> A designated employer is defined in section 1 of the EEA as: a) a person who employs 50 or more employees; b) a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the annual turnover of a small business as set out in Schedule 4 to the EEA; c) a municipality as referred to in Chapter 7 of the Constitution; d) an organ of state as referred to in section 239 of the Constitution, but excluding, local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; e) an employer bound by a collective agreement as referred to in sections 23 or 31 of the Labour Relations Act 66 of 1995, which collective agreement appoints the employer as a designated employer.

- d) To ensure equitable representation of suitably qualified people from the designated groups in all levels in the workforce.<sup>116</sup>

These measures must be reflected in the designated employers' employment equity plan.<sup>117</sup> The measure mentioned in (d) above, includes preferential treatment and numerical goals.<sup>118</sup> The question which arises in the context of equal remuneration claims is whether the preferential treatment as contemplated in section 15(3) of the EEA includes paying suitably qualified persons from the designated groups more than their non-designated counterparts in the workforce in order to ensure equitable representation? On a literal reading of section 15(3) read with section 15(2)(d)(i) of the EEA it would seem that it does. This suggestion is not dispositive of the suitability of affirmative action as a ground of justification to equal remuneration claims as it still has to be analysed in accordance with the purpose of the EEA and the matrix relating to equal remuneration claims. It should be noted that chapter 3 of the EEA which deals extensively with affirmative action does not apply to non-designated employers,<sup>119</sup> but non-designated employers are nevertheless not exempt from the provisions of section 6(2)(a) of the EEA<sup>120</sup> which lists affirmative action as one of the grounds of justification to an unfair discrimination claim. Therefore, a non-designated employer may raise the defence of affirmative action and by implication may take affirmative action measures within its workplace.<sup>121</sup> The author will hereinafter, only deal with affirmative action as it relates to designated employers.<sup>122</sup>

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<sup>116</sup> Section 15(2)(a)-(d)(i) of the EEA.

<sup>117</sup> Section 20(2)(b) of the EEA. Meintjes-Van der Walt at 33 has suggested that the implementation of employment equity plans could eradicate remuneration inequity and consequently level the playing fields.

<sup>118</sup> Section 15(3) of the EEA. It is apposite to note that while numerical goals are allowed, quotas are not (section 15(3) of the EEA). In *Solidarity obo Barnard v SAPS* (165/2013) [2013] ZASCA 177 at para 68 the Supreme Court of Appeal remarked that where numerical goals and representivity are applied as absolute criteria to appointments, this application would transform the numerical goals into quotas which are outlawed in terms of the EEA.

<sup>119</sup> Section 12 of the EEA.

<sup>120</sup> The section falls within chapter 2 of the EEA which does not exclude non-designated employers from its ambit.

<sup>121</sup> See Dupper & Garbers II at 269 who stated that affirmative action measures taken by a non-designated employer falls beyond the framework of statutory employment equity plans and such employer will have to prove that it is taking affirmative action measures that are consistent with the purpose of the EEA as prescribed by section 2 of the Act if it wishes to rely on the ground of justification contained in section 6(2)(b) of the EEA.

<sup>122</sup> The comments made, hereinafter, regarding affirmative action as it relates to designated employers are instructive to non-designated employers with regard to them taking affirmative action measures and raising same as a ground of justification to an equal remuneration claim.

It is apposite to note that affirmative action only applies to suitably qualified persons<sup>123</sup> from the designated groups.<sup>124</sup> The designated groups are defined as black people, women and people with disabilities.<sup>125</sup> As a corollary to the definition of designated groups it is clear that affirmative action may only be relied upon as a ground of justification in circumstances where the discrimination is based on race, sex, gender and/or disability. To this extent the justification of affirmative action is of limited application to equal remuneration claims. It then follows that affirmative action cannot be relied on as a ground of justification in circumstances where the discrimination is based on grounds other than, race, sex, gender and/or disability. With the aforementioned in mind, it is then apposite to analyse the suitability of the ground of justification in relation to equal remuneration claims.

In order to analyse affirmative action as a ground of justification to equal remuneration claims, the following question is postulated. Does paying an employee from a designated group a higher wage than his/her counterpart from a non-designated group, in order to ensure the equitable representation of designated employees in all categories and levels of the workplace amount to an affirmative action measure? If it does, it would mean that it may be relied upon by an employer as a ground of justification to an equal remuneration claim based on race, sex and/or gender.

The EEA states that in order to determine whether a designated employer is implementing its employment equity plan in accordance with the EEA, one must have regard to, *inter alia*, the number of suitably qualified employees from the

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<sup>123</sup> A suitably qualified person refers to a person who may be qualified for a job as a result of one or more of the following factors: a) formal qualifications; prior learning; relevant experience; or capacity to acquire, within a reasonable period, the ability to do the job (sections 1 read with 20(3)(a)-(d) of the EEA).

<sup>124</sup> Section 2 of the EEA; section 15(1) of the EEA.

<sup>125</sup> Section 1 of the EEA; black people refers to Africans, Coloured persons and Indians (section 1 of the EEA); people with disabilities refers to people who have a long term physical or mental impairment which substantially limits their prospects of employment (section 1 of the EEA). In *Chinese Association of South Africa & Others v Minister of Labour & Others* case 59251/2007 TPD dated 18/06/2007 the High Court held that Chinese people who are also South African citizens fall within the ambit of the definition of "black people" in section 1 of the EEA.

designated groups from which the employer may *promote* or *appoint*.<sup>126</sup> The EEA does not mention as an affirmative action measure, the paying of a designated employee more than their non-designated counterpart.<sup>127</sup> It is suggested that the absence of the higher pay being mentioned as an affirmative action measure coupled with the reference to promotion and appointment of designated employees is a strong indication that paying a designated employee more than their non-designated counterparts does not fall within the ambit of an affirmative action measure. This suggestion on its own will not, however, be sufficient to sustain an argument relating to the non-suitability of affirmative action as a ground of justification to equal remuneration claims. A further basis is needed to sustain such argument.

Dupper states that affirmative action is a temporary measure that should cease operating once it has achieved its goal (measures) and the duration of affirmative action programmes are intrinsically linked to the justification proffered for their existence. He further states that if the affirmative action measures operate, notwithstanding the achievement of the goals, then this will be regarded as discrimination.<sup>128</sup> It is apposite to note that an employment equity plan cannot be shorter than 1 year or longer than 5 years.<sup>129</sup> It is thus clear that an affirmative action measure cannot survive in perpetuity as it will come to an end once the measure has been achieved.

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<sup>126</sup> Section 42(a)(ii) of the EEA; See Dupper & Garbers II at 259 who stated that section 42 of the EEA provides important indications as to the meaning of the term equitable representation as used in section 2 of the EEA.

<sup>127</sup> Section 15(2) of the EEA.

<sup>128</sup> Dupper O "Affirmative Action: Who, How and How Long?" (2008) 24 *SAJHR* 425 at 439; Dupper & Garbers II at 262; McGregor M "No Right to Affirmative Action" (2006) 14 *Juta's Business Law* 16 at 19 has suggested that affirmative action will cease once the past imbalances are rectified. See *George v Liberty Life Association of Africa Ltd* (1996) 17 *ILJ* 571 (IC) at 593 wherein the Industrial Court remarked that affirmative action is an interim measure which is temporary in nature. In *Willemse v Patelia NO* [2006] JOL 18510 (LC) at para 73 the Labour Court held that the employer having achieved its affirmative action goals was bound in terms of its policy directives to apply the criterion of merit with regard to promotion. In *Unisa v Reynhardt* [2010] 12 BLLR 1272 (LAC) at para 30, the Labour Appeal Court held that once the appellant had reached its employment targets the preferential treatment (affirmative action) no longer applied and appointments were to be made based on merit. Mushariwa M "*Unisa v Reynhardt* [2010] 12 BLLR 1272 (LAC): Does Affirmative Action have a Lifecycle?" 2012 (15) *PELJ* 412 at 423 has stated that it is cardinal for employers to know if and when they have reached their affirmative action targets as a failure to do so will result in non-designated employees being subject to discrimination which would be unfair.

<sup>129</sup> Section 20(1)(e) of the EEA.

The following questions are postulated with reference to paying an employee from a designated group more than his/her counterpart from a non-designated group in order to ensure the equitable representation of designated employees in all categories and levels of the workplace. What will the lifespan of this measure be? Will the employer pay the employee from the designated group a higher salary than a non-designated employee in perpetuity? The answer to these questions will be set out in the form of an example.

For example, with regard to an affirmative action measure regarding appointments (or promotions) of designated persons, the employment equity plan refers to the target of 50% designated employees in all categories and levels of the workplace. Once the employer has reached the target of appointing (promoting) 50% of designated employees in its employ, then the target has been achieved and the affirmative action measure in that regard has come to an end. Thus meaning that the affirmative action measure can no longer apply and if it does, this *ultra vires* application will be regarded as discrimination which will be unfair. It is difficult to postulate a similar example with the measure being paying a higher salary to designated employees as an affirmative action measure. The difficulty lies in determining the lifespan of the measure and this results from the measure itself. It is suggested that this measure should not be regarded as an affirmative action measure due to its impracticality and the creation of new pay differentials innate in its application.<sup>130</sup>

In light of the above analysis, it is suggested that affirmative action is not a suitable ground of justification to equal remuneration claims.

#### **2.4.2 Inherent requirements of the job**

Inherent requirements of the job are not defined in the EEA but same has been given meaning by the Courts. Article 2 of the Discrimination Convention states that, any distinction, exclusion, or preference in respect of a particular job based on its

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<sup>130</sup> This suggestion is supported by section 27(2) of the EEA which provides that a designated employer must implement measures to reduce disproportionate pay differentials. See Hlongwane at 81 - 82 and Pieterse at 14 for a general discussion of section 27 of the EEA.

inherent requirements will not be deemed to be discrimination.<sup>131</sup> The Discrimination Convention, however, does not provide a definition for the term “inherent requirements of the job.” It is then apposite to analyse the meaning of same as developed by the case law.

In *Whitehead v Woolworths (Pty) Ltd*<sup>132</sup> the Labour Court defined an inherent requirement of a job as referring to an indispensable attribute which must relate in an inescapable way to the performing of the job.<sup>133</sup> In *Woolworths (Pty) Ltd v Whitehead*<sup>134</sup> the Labour Appeal Court adopted a more flexible approach than the Labour Court by finding that rational and commercially understandable considerations constituted adequate justification to a claim of discrimination on the ground of pregnancy.<sup>135</sup>

In *Ntai* the Labour Court rejected mere commercial reasons as a justification and adopted a strict approach which is akin to business necessity.<sup>136</sup> *Du Toit et al* suggests that commercial rationale cannot by itself establish an inherent requirement of the job and clear evidence regarding the nature of the requirement of the job should be led to place the court in a position to make a finding as to whether or not the employer’s decision based on that requirement is reasonable.<sup>137</sup>

In *Lagadien v University of Cape Town*,<sup>138</sup> the Labour Court found that proven skills, experience and knowledge were indispensable requirements for the particular job and the refusal to appoint a person who lacked same was permissible within the meaning of the inherent requirements of the job as espoused in section 6(2)(b) of the EEA.<sup>139</sup> Naidu has stated that inherent requirements of the job are requirements that

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<sup>131</sup> Discrimination (Employment and Occupation) Convention No 111 of 1958.

<sup>132</sup> [1999] 8 BLLR 862 (LC).

<sup>133</sup> At para 34; See also Pretorius JL, Klinck ME & Ngwena CG *Employment Equity Law* (Butterworths Durban loose-leaf 2002) at 5-15 (fn 72) (hereafter referred to as “Pretorius, Klinck & Ngwena *Employment Equity Law*”) wherein the authors have suggested that notwithstanding the overturning of the Labour Court’s decision by the Labour Appeal Court, the former court’s definition of the inherent requirements of the job has not been affected and remains intact.

<sup>134</sup> [2000] 6 BLLR 640 (LAC).

<sup>135</sup> At 688.

<sup>136</sup> At para 88.

<sup>137</sup> *Du toit et al Labour Law* at 607.

<sup>138</sup> [2001] 1 BLLR 76 (LC).

<sup>139</sup> At 83.

cannot be removed from the job without radically changing the nature of the job and a job that can be performed without imposing the requirements fails the test.<sup>140</sup>

Dupper & Garbers have stated that it can be inferred from the phrase *inherent requirement of a job* that “only essential job duties should be taken into account and that if the requirement is not met, the job cannot be done.”<sup>141</sup> Du Toit *et al* have suggested that the inherent requirements of the job should be analysed within the matrix of the following criteria: i) it must be a permanent feature of the job; i) it must be essential to the job; and iii) it must be indispensable to the performance of the work.<sup>142</sup>

It will be apposite to analyse the possibility of the ground of justification being applied to an equal remuneration claim by way of examples.

A and B perform *equal work*, but A is paid less than B and alleges that the remuneration discrimination is based on race as A is a black male and B is a white male. The employer will not be able to rely successfully on the inherent requirements of the job as a justification to the remuneration discrimination because A and B perform equal work, meaning that they both comply with the inherent requirements of the job. This example is based on the assumption that A proves the racial discrimination and the onus then shifts to the employer to justify the discrimination.

A and B perform *work of equal value*, but A is paid less than B and alleges that the remuneration discrimination is based on race as A is a black male and B is a white male. The employer will not be able to rely on the inherent requirements of the job as a justification to remuneration discrimination because different requirements are envisaged by the concept equal value and the requirements of the two jobs will of necessity be different but may be proven to be of equal value. This example is based on the assumption that A proves the racial discrimination and the onus then shifts to the employer to justify the discrimination.

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<sup>140</sup> Naidu M “The ‘Inherent Job Requirement Defence’- Lessons from Abroad” (1998) 10 *SA Merc LJ* 173 at 181.

<sup>141</sup> Dupper O & Garbers C “Justifying Discrimination” in Dupper O *et al Essential Discrimination Law* (Juta Claremont 2010) at 83.

<sup>142</sup> Du Toit *et al Labour Law* at 608.

In light of the above analysis, it is suggested that the inherent requirements of the job is not a suitable ground of justification to equal remuneration claims.

## 2.5 The PEPUDA

The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>143</sup> gives effect to section 9 of the Constitution.<sup>144</sup> It is important to note from the outset that this Act does not apply to any person to whom and to the extent to which the EEA applies.<sup>145</sup> The Act seeks to promote equality and eliminate unfair discrimination against people on certain prohibited grounds, *inter alia*, race, gender, sex, pregnancy, marital status, colour and religion.<sup>146</sup> Section 1 further sets out the requirements for analogous grounds which, if met, can be relied on. The PEPUDA contains specific sections aimed at the elimination of discrimination on the grounds of race and gender.<sup>147</sup> The PEPUDA states that failing to respect the principle of equal pay for equal work and perpetuating disproportionate income differentials deriving from past unfair discrimination are wide spread practices that need to be addressed.<sup>148</sup> The Act proposes that the State ensures that legislative and other measures are taken to address these practices.<sup>149</sup> The Act, however, does not regulate equal remuneration claims.<sup>150</sup> The Act specifically mentions the Conventions on the Elimination of All

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<sup>143</sup> Act 4 of 2000 (hereafter referred to as the “PEPUDA”).

<sup>144</sup> Section 2(a) of the PEPUDA. It is apposite to note that section 1 of the PEPUDA defines *equality* as including the full and equal enjoyment of rights and freedoms as espoused in the Constitution, *de facto* and *de jure* equality and equality of outcome (emphasis added).

<sup>145</sup> Section 5(3) of the PEPUDA; Landman A “Unfair Discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 in Dupper O *et al Essential Employment Discrimination Law* (Juta Claremont 2010) at 307 has suggested that decisions made in terms of the PEPUDA may be useful in the interpretation of the EEA; Dupper & Garbers I at CC 1-20 have submitted that the PEPUDA will not play a major interpretative role with regards to the EEA.

<sup>146</sup> Sections 2(b), 6, 1 of the PEPUDA.

<sup>147</sup> Sections 7, 8 of the PEPUDA.

<sup>148</sup> Section 29(1) read with item 1(c)-(d) of the Schedule to the PEPUDA; Kok A “The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform” (2008) 24 *SAJHR* 445 at 465 (fn153) has stated that section 29 of the PEPUDA refers to practices which are or may be unfair and as result thereof if a practice may be unfair then the corollary is that it may be fair in a particular case.

<sup>149</sup> Section 29(2) of the PEPUDA.

<sup>150</sup> McGregor at 492; For a general discussion of the PEPUDA as it relates to equal remuneration see Albertyn C, Goldblatt B and Roederer C (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (Witwatersrand University Press 2001) at 105-107.

Forms of Racial Discrimination and the Elimination of All Forms of Discrimination against Women.<sup>151</sup>

It is perplexing that the PEPUDA refers to equal remuneration claims explicitly, *albeit*, for illustrative purposes and envisages that the State must where appropriate ensure that legislative and other measures are taken to address the unfair practices of failing to respect, *inter alia*, the principle of equal pay for equal work<sup>152</sup> It is suggested that this is a *quagmire* as these provisions are needed in the EEA as practical and enforcing provisions, however, they lay dormant in the *necropolis* of the PEPUDA.

## 2.6 The Employment Equity Amendment Act

Thus far, it is clear that the EEA does not contain factors or a methodology for assessing work of equal value but such factors, however, came to the fore, to a limited extent, in the case of *Mangena*.<sup>153</sup> It is further clear that the statutory grounds of justification in the EEA are not suitable and proper in the context of equal remuneration claims, but suitable grounds of justification, nevertheless, exist in case law as mentioned in paragraph 2.3.1 *supra*. It is then apposite to analyse the EEAA in this context and attempt to ascertain whether or not the said deficiencies will adequately be addressed by the amendments to the EEA.

With regard to the criteria and methodology for assessing work of equal value, section 3(b) of the EEAA provides that the Minister may prescribe the criteria and the methodology for assessing work of equal value. The Minister has published the Draft Employment Equity Regulations which contained the criteria and methodology for assessing work of equal value. The Minister has withdrawn the Draft Employment Equity Regulations due to serious criticism being leveled against Section D, regulation 3, *inter alia*, which dealt with the difference in using national and regional demographics for equitable representation in the different levels of workplaces.<sup>154</sup> There are thus no criteria or methodology at present for assessing work of equal value. Academic scholars have proposed that the factors for assessing work of equal

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<sup>151</sup> Section 2(h) of the PEPUDA.

<sup>152</sup> Section 29 (1) - (2) of the PEPUDA.

<sup>153</sup> See para 2.3.2 hereof.

<sup>154</sup> Draft Employment Equity Regulations, 2014 GG No 37338 of 28 February 2014.

value be contained in a code of practice,<sup>155</sup> or that the factors be included in the form of a provision in the EEA.<sup>156</sup>

With regard to the grounds of justification in terms of the EEA, the EEAA does *not* propose an amendment to same with regard to equal remuneration claims. In the absence thereof, it thus means that the legislature is content with affirmative action and the inherent requirements of the job being applied to equal remuneration claims as grounds of justification. The absence of specific grounds of justification to equal remuneration claims detracts from the aim of the proposed amendment (section 3(b) of the EEAA) which is to provide an explicit basis for equal remuneration claims.<sup>157</sup>

It is thus clear from the above analysis that the EEAA needs to be redrafted with the aim of addressing the deficiencies as referred to above. It is clear that the EEAA is far from achieving its goal of providing an explicit basis for equal remuneration claims. It is apposite to note that the EEAA has been assented to by the President but is yet to come into operation on a date to be decided upon by the President. The EEAA will most probably come into operation in its current form.

## 2.7 Conclusion

Thus far, it is clear that the EEA does not contain factors or a methodology for assessing work of equal value. It is further clear that the statutory grounds of justification in the EEA are not suitable and proper in the context of equal remuneration claims. It should, however, be noted that case law has developed factors for assessing work of equal value, *albeit*, to a limited extent in *Mangena* and it has also developed neutral factors to operate as grounds of justification to equal remuneration claims. This development from the case law is not sufficient to give rise to an adequate legal framework relating to equal remuneration claims. The Courts are there to interpret the law and not to make the law. This is based on the maxim *uidicis est ius dicere non facere*.<sup>158</sup> It is then the task of the legislature to establish an

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<sup>155</sup> Meintjes-Van der Walt L (1997) Equal Pay Proposals for Women, *Agenda: Empowering Women for Gender Equity* 45 at 47; Meintjes-Van der Walt at 26.

<sup>156</sup> Hlongwane at 83; Pieterse at 17.

<sup>157</sup> Clause 3.3.3 of the Memo.

<sup>158</sup> See Edwards AB "Sources of South African Law" in Hosten WJ *et al Introduction to South African Law and Legal Theory* 2<sup>nd</sup> ed (Butterworths Publishers 1995) at 428 for an extensive discussion of the maxim and its relation to the separation of powers doctrine (*trias politica*).

adequate legal framework.<sup>159</sup> It is suggested that the EEAA be redrafted to address the deficiencies and anomalies as set out above. In order to propose proper remedial measures, it is suggested that same should be sourced from international law as well as comparative law and be incorporated into the EEA through the EEAA after proper analysis. It is then apposite to deal with the international legal framework relating to equal remuneration claims in chapter 3.

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<sup>159</sup> Pieterse at 16 has stated that it is the task of the legislature and not the courts to provide guidelines with regard to the application of the principles of equal remuneration for equal and work of equal value within the matrix of the EEA.

## CHAPTER 3: INTERNATIONAL LEGAL FRAMEWORK RELATING TO EQUAL REMUNERATION CLAIMS

### 3.1 The Role and Status of International Law

The Constitution provides that the courts' *must*<sup>1</sup> prefer any reasonable interpretation of any legislation that is consistent with international law over any alternative interpretation that is inconsistent with same. The reference to any legislation will include the Employment Equity Act<sup>2</sup> and related employment legislation. The Constitution further provides that a court *must* consider international law when interpreting the Bill of Rights.<sup>3</sup> The status of international law as espoused by the Constitution is thus clear. It is, however, important to bear in mind that international law does not apply to South African law with impunity but is also subject to the supremacy of the Constitution. If international law is found to be inconsistent with the Constitution then it will be invalid, this, however, is unlikely to eventuate.<sup>4</sup>

It is thus clear that South African law is required to be in conformity with international law in most respects. Therefore, South African legislation which regulates equal remuneration claims have to be interpreted in accordance with international law relating to equal remuneration claims. It is therefore important to ascertain the sources of international law. Article 38(1)(a)-(d) of the Statute of the International Court of Justice lists five sources of international law, namely:

- a) International Conventions;
- b) International Customs;
- c) The general principles of law recognised by civilized nations;
- d) Judicial decisions; and
- e) Teachings of the most highly qualified publicists of the various nations.

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<sup>1</sup> Section 233 of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the "Constitution"). The word *must* is peremptory and the courts are thus bound to comply with the prescripts of the section.

<sup>2</sup> Act 55 of 1998 (hereafter referred to as the "EEA").

<sup>3</sup> Section 39(1)(b) of the Constitution.

<sup>4</sup> Section 2 of the Constitution.

It is well recognised that article 38(1) contains the sources of international law.<sup>5</sup> Botha, however, states that the following three sources should be added to the list contained in section 38(1) of the Statute of the International Court of Justice:

- f) Decisions of international organisations;
- g) Certain emerging sources, for instance, *ius cogens*; and
- h) Soft law.<sup>6</sup>

It is self-evident that international law is divided into different branches and sub-branches. We are concerned here with the branch of international law which is known as international labour law. It should also be borne in mind that the EEA mandates an interpretation of the Act which complies with the international (labour) law obligations of South Africa, in particular the Discrimination (Employment and Occupation) Convention.<sup>7</sup> It is thus clear that international law informs the interpretation process of South African legislation and in particular the EEA. It is therefore important to establish the sources of international labour law.

## **3.2 International Labour Law Relating to Equal Remuneration Claims**

### **3.2.1 The sources of International labour law**

It is well established that the main sources of international labour law are to be found in the form of the Conventions and Recommendations of the International Labour Organisation.<sup>8</sup> Sources that may be added to these are:

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<sup>5</sup> Dugard J, Du Plessis M and Pronto A *International Law: A South African Perspective* 4th ed (Juta, Cape Town 2012) at 24 (hereafter referred to as “Dugard, Du Plessis and Pronto *International Law*”); Botha NJ “International Law” in Joubert WA *et al The Law of South Africa* 2nd edition (LexisNexis Durban 2008) at 442 (hereafter referred to as “Botha”).

<sup>6</sup> Botha at 442. See Landau E and Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Leiden Boston 2008) at 67 (hereafter referred to as “Landau and Beigbeder *ILO Standards*”) for a discussion of the principle of equal remuneration for equal work and work of equal value having attained the status of *ius cogens* from which no derogation is allowed. Scharf M and Williams P *The Law of International Organizations: Problems and Materials* 3ed (Carolina Academic Press 2013) states at 690 (hereafter referred to as “Scharf and Williams *Law of International Organizations*”) that “[a] [*ius cogens* norm is a peremptory rule of international law that prevails over any conflicting international rule or agreement. A *ius cogens* norm permits no derogation, and can be modified only by a subsequent international law norm of the same character.”

<sup>7</sup> No 111 of 1958 (hereafter referred to as the “Discrimination Convention”). This Convention was ratified by South Africa in 1997.

<sup>8</sup> Hereafter referred to as the “ILO.” Valticos N and Potobsky G *International Labour Law* 2<sup>nd</sup> ed (Kluwer Law and Taxation Publishers Deventer-Boston 1995) at 49 (hereafter referred to as “Valticos and Potobsky *International Labour Law*”); Servais JM *International Labour Law* 2<sup>nd</sup> ed

- a) The Constitution of the ILO;
- b) Less formal instruments, for instance, resolutions adopted by the ILO;
- c) Case Law;
- d) Instruments adopted by special conference under the auspices or with the co-operation of the ILO;
- e) United Nations Instruments, for instance, the 1948 Universal Declaration of Human Rights;
- f) Regional Instruments, for instance, the European Convention for the Protection of Human Rights and Fundamental Freedom of 1950; and
- g) Other Regional Instruments, for instance, in the American region, the American Convention of Human Rights was adopted in 1969, in the Middle East an Arab Convention on Labour Standards was adopted in 1967 and in Africa a General Social Security Convention was adopted in 1971.<sup>9</sup>

The principle of equal remuneration for equal work and work of equal value is recognised as a human right in international law.<sup>10</sup> Article 23(2) of the United Nations Universal Declaration of Human Rights provides that “[e]veryone, without any discrimination, has the right to equal pay for equal work.”<sup>11</sup> Article 7(a)(i) of the

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(Kluwer Law International 2009) at 65 (hereafter referred to as “*Servais International Labour Law*”).

<sup>9</sup> Valticos and Potobsky *International Labour Law* at 49, 66, 68-71, 73-75. Further examples of regional instruments are: article 32 of the Arab Charter of Human Rights of 1994 provides that the state shall ensure to citizens equal pay for work of equal value; article 15 of the African Charter on Human and Peoples Rights of 1986 (commonly referred to as the *Banjul Charter*) provides that every person has the right to receive equal pay for equal work; article 19(2) of the SADC Protocol on Gender and Development of 2008 provides that member states must ensure the application of the principle of equal remuneration for equal work and work of equal value to both men and women.

<sup>10</sup> It is apposite to note that the ILO has referred to equal remuneration as a human right to which all men and women are entitled in Oelz M, Olney S and Manuel T *Equal Pay: An Introductory Guide* (International Labour Office, International Labour Standards Department, Conditions of Work and Equality Department Geneva, ILO, 2013) at 2 (hereafter referred to as “*Oelz, Olney and Manuel Equal Pay Guide*”). The Equal Remuneration Convention constitutes one of the core human rights instruments, Sheeran S and Rodley N *Routledge Handbook of International Human Rights Law* (Routledge 2013) at 347 (hereafter referred to as Sheeran and Rodley “*International Human Rights Law*”). They further state at 339 that “[s]cholars and activists often neglect a vital aspect of human rights: the role of labour law and the International Labour Organization (ILO). Yet labour law is often the most immediate and practical way to promote and to enforce human rights, entering directly into contact with the concerns that most people encounter on a daily basis.”

<sup>11</sup> Scharf and Williams *Law of International Organizations* state at 684 that the Universal Declaration of Human Rights is regarded as the primary instrument relating to international human rights. It is apposite to note that the Universal Declaration of Human Rights together with the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and

International Covenant on Economic, Social and Cultural Rights of 1966 provides for “[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.” Article 5(d)(i) of the International Convention on the Elimination of All forms of Racial Discrimination of 1969 includes, *inter alia*, the right to equal pay for equal work. Article 11(1)(d) of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 states that women, without discrimination, have the right to equal remuneration for work of equal value. Article 141 of the Treaty establishing the European Community of 1997 (previously article 119 of the Treaty of Rome of 1957) makes the application of the principle of equal pay for equal work and work of equal value compulsory in member states.

It is submitted that the status of the principle of equal remuneration for equal work and work of equal value as a human right cannot successfully be disputed as it attaches to human beings and is not a principle which is applied in the abstract.

### **3.2.2 Guidance from the Equal Remuneration Convention and related materials**

The Equal Remuneration Convention<sup>12</sup> promotes the principle of equal remuneration for equal work and work of equal value. Equal work is easily determined and does not pose a problem in an equal remuneration claim.<sup>13</sup> Equal value, however, is not easily determined.<sup>14</sup> There are guidelines which have been published under the auspices of the ILO to assist member states to better understand and implement the principle of equal remuneration for work of equal value as espoused in the Equal Remuneration Convention. Guidance will be sought from these guidelines regarding the factors which are relevant to assess the value of the work and the defences available in an equal remuneration claim.

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Political Rights comprise the *International Bill of Human Rights*, Scharf and Williams *Law of International Organizations* at 686.

<sup>12</sup> No 100 of 1951 (hereafter referred to as the “Equal Remuneration Convention”).

<sup>13</sup> See *Gender Equality at the Heart of Decent Work* 1st ed (ILO 2009) at 120 (hereafter referred to as “*Gender Equality at the Heart of Decent Work*”). Landau and Beigbeder *ILO Standards* at 67 states that the Equal Remuneration Convention is recognised as a core Convention of the ILO human rights Conventions.

<sup>14</sup> Valticos and Potobsky *International Labour Law* state at 210 that the application of the principle of equal remuneration for work of equal value may result in difficulty when comparing different types of work. They further state at 210 that “[t]hese difficulties are increased where there does not exist a system of objective appraisal of the work to be performed.”

The Equal Remuneration Convention does not set out the factors for assessing work of equal value, but states that the methods to be followed in objective appraisals (objective factors) may be decided upon by the member states.<sup>15</sup> It similarly does not set out the defences to equal remuneration claims, but states that differential rates between workers that are determined by an objective appraisal which is free from discrimination based on sex shall not be considered to be contrary to the principle of equal remuneration for equal work or work of equal value.<sup>16</sup> The Discrimination Convention does not assist in this regard. The Equal Pay Guide, however, states that it may be used to apply the principle of equal remuneration for work of equal value in national law and practice. The Guide states that the value of different work should be determined on the basis of objective criteria such as skill, working conditions, responsibilities and effort.<sup>17</sup> It is apposite to note that this criteria corresponds closely to the evaluation factors used in most point methods of job evaluation namely, qualifications, effort, responsibility and conditions under which the work is performed.<sup>18</sup> The Guide further mentions that job evaluations which measure the relative value of work are different from performance appraisals. Performance appraisals evaluate the performance of an individual worker. The result of a successful performance appraisal normally results in a (performance) bonus for the individual worker.<sup>19</sup> It seems that an employer may rely on an objective performance appraisal as a defence to an equal remuneration claim.

While the Equal Remuneration Convention does not specifically mention which job evaluation method/s should be used, it makes it clear that the method/s used must be free from discrimination. The Equal Pay Guide states that “[o]bjective job evaluation methods are the best means of determining the value of the work to be performed.”<sup>20</sup> The Guide sets out the following list of matters to be considered when drafting equal remuneration provisions for the purpose of including same in domestic legislation:

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<sup>15</sup> Articles 1 - 2.

<sup>16</sup> Article 3.

<sup>17</sup> Oelz, Olney and Manuel *Equal Pay Guide* at iv, 25.

<sup>18</sup> Chicha M-T, *Promoting Equity: Gender – Neutral Job Evaluation for Equal Pay: A Step by Step Guide* (Geneva, International Labour Office 2008) at 27 (hereafter referred to as “Chicha Job Evaluation Guide”).

<sup>19</sup> Oelz, Olney and Manuel *Equal Pay Guide* at 26.

<sup>20</sup> *Idem* at 38.

- a) The right to claim equal remuneration for work of equal value should be clearly set out;<sup>21</sup>
- b) Explaining the concept of “work of equal value” provides guidance to claimants on how to prove whether the work is of equal value. The guidance may take the form of setting out objective criteria for determining whether work is of equal value;<sup>22</sup>
- c) Remuneration should be broadly defined;<sup>23</sup>
- d) Discriminatory job evaluation methods may be specifically prohibited. In this regard, guidance may be given by illustrating what constitutes job evaluation methods free from discrimination;<sup>24</sup>
- e) Collective agreements may be required to ensure that they comply with the principles of equal remuneration for equal work and work of equal value;<sup>25</sup>
- f) Complainants should have access to competent remedies in relation to a violation of the equal remuneration principles;<sup>26</sup> and

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<sup>21</sup> At 79. The guide states that general protection from unfair remuneration discrimination based on sex is important but fails to reflect fully the principle of equal remuneration for equal work and work of equal value as required by the Equal Remuneration Convention. It further states that giving full effect to the principle of equal remuneration results in claimants being able to have the right to claim equal remuneration for work of equal value (Oelz, Olney and Manuel *Equal Pay Guide* at 79). The principle of equal remuneration for work of equal value conforms to the notion of substantive equality, *Decent Work Country Profile: South Africa* (International Labour Office, Geneva ILO 2012) at 41. The SADC Protocol on Gender and Development of 2008 (signed by South Africa on 17 August 2008) requires member states to implement legislative measures to ensure the application of the principle of equal remuneration for equal work and work of equal value to both men and women. Servais *International Labour Law* states at 155 that the concept of equal value is wider than that of equal work. Valticos and Potobsky *International Labour Law* state at 210 that the concept of equal value has a wider meaning than that of equal work.

<sup>22</sup> At 81. The Guide lists skills, responsibility, effort and working conditions as objective factors (Oelz, Olney and Manuel *Equal Pay Guide* at 81). Chicha *Job Evaluation Guide* at 2 refers to the Committee of Experts on the Application of Conventions and Recommendations (2007) which notes that the difficulties in applying the concept of equal value results from a poor understanding of the concept of work of equal value.

<sup>23</sup> At 81.

<sup>24</sup> At 82; See *Gender Equality at the Heart of Decent Work* at 121 where it is stated that “[w]ithout a methodology to compare different work that might be of equal value, key aspects of women’s jobs are disregarded or scored lower than those performed by men, thus reinforcing discrimination in pay” and Chicha *Job Evaluation Guide* at v where it is stated that job evaluation methods are required to determine whether two jobs which are different are however of equal value. Chicha *Job Evaluation Guide* at 25 states that the purpose of a job evaluation method is to use common (objective) criteria to assess jobs in order to establish their relative value. She further states at 26 that the most appropriate job evaluation method for purposes of pay equity (equal remuneration) is the “point method.”

<sup>25</sup> At 83.

<sup>26</sup> At 84. The Guide mentions the remedy of having the unequal pay reversed and the imposition of fines. It further states that “[w]here the burden of proof is on the complainant, it is more difficult to enforce equal remuneration through legal proceedings. Often the complainant may not have the information to prove pay discrimination. A number of countries have therefore introduced rules

- g) Pro-active provisions which require the employer to eliminate unfair discrimination relating to the principle of equal remuneration for equal work and work of equal value.<sup>27</sup>

The Equal Pay Guide observes that courts, tribunals (and related bodies) are able to give effect to the principle of equal remuneration for equal work and work of equal value by delivering justice (effective remedies) to those whose equal remuneration rights have been infringed. It further observes that these institutions also clarify the subject-matter relating to what constitutes unequal remuneration and what does not. Such decisions lead to a better understanding of the principles relating to equal remuneration.<sup>28</sup>

### **3.2.3 Factors emerging from International law**

#### **3.2.3.1 Factors for assessing work of equal value**

It is clear from the above analysis of international law that the following factors are regarded as suitable factors to assess the value of work:

- a) Skill;
- b) Working conditions;
- c) Responsibilities; and
- d) Effort.<sup>29</sup>

#### **3.2.3.2 Grounds of justification**

It is clear from the above analysis of international law that the Equal Remuneration Convention does not set out the defences which may be raised in an equal

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partially or wholly shifting the burden of proof to the employer” (Oelz, Olney and Manuel *Equal Pay Guide* at 84).

<sup>27</sup> At 85.

<sup>28</sup> At 91.

<sup>29</sup> Oelz, Olney and Manuel *Equal Pay Guide* at 25. Chicha *Job Evaluation Guide* at 27 states that the point method of job evaluation uses the following factors: a) qualifications; b) effort; c) responsibility; d) conditions under which work is performed. These factors closely resemble the factors mentioned in international law for assessing the value of the work. Landau and Beigbeder *ILO Standards* at 68-69 refer to the ILO Committee of Experts Observation on Convention No. 100 (2007) which notes that “[i]n order to establish whether different jobs are of equal value, there has to be an examination of the respective tasks involved. This examination must be undertaken on the basis of entirely objective and non-discriminatory criteria.” The Committee further notes that the use of analytical job evaluation methods is the most effective method of objectively assessing the equal value of the work.

remuneration claim, neither does the Equal Pay Guide set out same. What is, however, clear from the Equal Remuneration Convention is that differential rates between workers that are determined by an objective appraisal (job evaluation method) which is free from discrimination based on sex shall not be considered to be contrary to the principle of equal remuneration for equal work or work of equal value.<sup>30</sup> It is thus clear that the use of objective appraisals (job evaluation methods) or objective factors to determine the value of the work can (successfully) be raised as a defence to an equal remuneration claim as it is not contrary to the principle of equal remuneration.

### 3.3. The Need for Comparative Law

The ILO sets standards in general terms and leaves the means of enforcing same to member states. The Equal Remuneration Convention states that the principle of equal remuneration for equal work and work of equal value may be applied by means of, *inter alia*, national laws.<sup>31</sup> There is, however, no example of national laws relating to equal remuneration claims which can be sourced directly from the Equal Remuneration Convention. The need, therefore, arises to consult comparative law which has implemented the provisions of the Equal Remuneration Convention. The comparative law will be utilised as an example of what the Convention requires from member states.<sup>32</sup> Blanpain asserts that “[c]omparative law is undoubtedly an excellent tool of education.”<sup>33</sup> It is axiomatic that the country chosen must have

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<sup>30</sup> Article 3 of the Equal Remuneration Convention. It seems that an employer may also rely on an *objective performance appraisal* as a defence to an equal remuneration claim (Oelz, Olney and Manuel *Equal Pay Guide* at 26). See Bronstein A *International and Comparative Labour Law: Current Challenges* (International Labour Organization 2009) at 134 for a discussion of objective job evaluation methods as an effective tool to achieve pay equity (equal remuneration). Servais *International Labour Law* states at 155 that the Equal Remuneration Convention “encourages countries to promote objective appraisal of jobs on the basis of the work to be performed.” Landau and Beigbeder *ILO Standards* state at 88 that “[w]here there is an objective justification for the disparity of pay which is not based on sex and the employer can prove it, the principle of equal pay will not apply.”

<sup>31</sup> Article 2(2)(a).

<sup>32</sup> Bussani M and Mattei U *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) at 253 state that recourse to comparative law is important in understanding the obligations imposed by an international organisation.

<sup>33</sup> Blanpain R “Comparativism in Labour Law and Industrial Relations” in Blanpain R (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Kluwer Law International 2004) at 4 (hereafter referred to as “Blanpain”). He further states at 4 that by analysing foreign systems one often discovers that “a similar problem is resolved in another country in a completely different way, such that one cannot help but initiate the analysis and evaluation of one’s own system again, but now from another angle, from an enriched point of view, from a new insight.”

ratified the Convention. It is apposite to note that the ILO consults, *inter alia*, comparative labour law when formulating minimum international standards.<sup>34</sup>

The law relating to equal remuneration claims in the United Kingdom has been chosen for purposes of the comparative study. This country has been chosen for the following reasons:

- a) It ratified the Equal Remuneration Convention on 15 June 1971.<sup>35</sup> South Africa has ratified the Convention on 30 March 2000. It is clear from this that the United Kingdom has more experience with the implementation of the Convention than South Africa as it has bound itself to it 29 years earlier.
- b) The United Kingdom with specific provisions on equal remuneration in their Equality Act<sup>36</sup>, unlike South Africa, has not been criticised by the ILO for failing to enact specific laws/provisions to give effect to the principles of equal remuneration for equal work and work of equal value.

The law relating to the principle of equal remuneration in the United Kingdom will be analysed only insofar as ascertaining the factors used to assess the value of work and the defences available in an equal remuneration claim. The comparative study is thus narrowed down.

### **3.4 Equal Remuneration Claims in the United Kingdom**

#### **3.4.1 The legislative framework**

The United Kingdom gives effect to the principles of equal remuneration for equal work and work of equal value by means of provisions in the Equality Act.<sup>37</sup> It should be noted that there is an Equal Pay Statutory Code of Practice to the EA.<sup>38</sup> The Equal Pay Code does not itself impose legal obligations but instead explains the

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<sup>34</sup> Valticos and Potobsky *International Labour Law* at 30. They further state at 30 that “[t]he main functions of comparative labour law are to learn about other labour institutions in order to have a better understanding of those in one’s own country and to identify the position of national institutions in respect to prevailing tendencies.

<sup>35</sup> <http://www.ilo.org/dyn/normlex/en/f> (accessed on 24 May 2014).

<sup>36</sup> Equality Act of 2010.

<sup>37</sup> Of 2010 (hereafter referred to as the “EA”).

<sup>38</sup> Equal Pay Statutory Code of Practice to the Equality Act of 2010 (hereafter referred to as the “Equal Pay Code”).

legal obligations under the EA and provides guidance in this regard.<sup>39</sup> It should further be noted that the EA makes reference to *terms and conditions of work* and not pay. It is, however, clear that terms and conditions of work include a wide spectrum of work-related benefits which includes pay as this is one of the fundamental terms of work. In terms of section 65(1) of the EA equal work includes; like work, work rated as equivalent and work of equal value.<sup>40</sup> Section 65 of the EA explains what is meant by these notions as follows:

- a) *Like work*: includes work that is broadly the same/similar and work where the differences between the work are not of practical importance (material) in relation to the terms of the work.<sup>41</sup>
- b) *Work rated as equivalent*: work is rated as equivalent if a job evaluation study “(a) gives an equal value to A’s job and B’s job in terms of the demands made on a worker, or (b) would give an equal value to A’s job and B’s job in those terms were the evaluation not made on a sex-specific system.”<sup>42</sup>
- c) *Work of equal value*: “A’s work is of equal value to B’s work if it is - (a) neither like B’s work nor rated as equivalent to B’s work, but (b) nevertheless equal to B’s work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.”<sup>43</sup>

It is interesting to note that section 66(1) of the EA provides that if the terms of an employee’s work<sup>44</sup> does not include a sex equality clause then this clause is implied into the terms of work. A sex equality clause has the following effect:

“(a) [I]f a term of A’s is less favourable to A than a corresponding term of B’s is to B, A’s term is modified so as not to be less favourable.

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<sup>39</sup> Item 16 of the Equal Pay Code.

<sup>40</sup> Section 65(1)(a)-(c).

<sup>41</sup> Section 65(2)(a)-(b).

<sup>42</sup> Section 65(4)(a)-(b). Section 80(5)(a) defines a job evaluation study as “a study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skill and decision-making, the jobs to be done – (a) by some or all of the workers in an undertaking or group of undertakings.”

<sup>43</sup> Section 65(6)(a)-(b).

<sup>44</sup> The terms of an employee’s work is defined in section 80(2)(a), *inter alia*, as “the terms of the person’s employment that are in the person’s contract of employment.”

(b) [I]f A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term."<sup>45</sup>

This provision provides an employee aggrieved with unequal pay for equal work or work of equal value with a cause of action based on the implied sex equality clause. The sex equality clause is thus the cause of action upon which the equal remuneration claim should be based and this claim is then brought within the ambit of the EA.

An employment tribunal faced with an equal remuneration claim for work of equal value may require an independent expert to prepare a report for it on the value of the work in question.<sup>46</sup> It is thus clear that there is support for the employment tribunals (courts) in the form of using experts to assess the value of the work in question. If the claimant's work is alleged to be of equal value to the comparator but the claimant and the comparator's work have been given different values in terms of a *job evaluation study*, the tribunal must determine that the claimant's work is not of equal value to the comparator's work unless it has *reasonable grounds for suspecting* that the factors used for the evaluation in the study were based on a system that discriminates on the ground of sex or is unreliable.<sup>47</sup>

A claimant may approach the employment tribunal with an equal pay claim.<sup>48</sup> The tribunal must then determine whether there has been unequal pay in the particular case. An employer faced with a *prima facie* case of unequal pay may raise the *genuine material factor defence*. The employer has the onus of proving the defence on a balance of probabilities. The successful raising of the defence means that the difference in the terms and conditions of employment is due to a *material factor* which is not the difference of sex.<sup>49</sup> Section 69 of the EA sets out the genuine

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<sup>45</sup> Section 66(2)(a) - (b). Item 20 of the Equal Pay Code states that the equal pay provisions in the EA apply to women as well as men.

<sup>46</sup> Section 131(2).

<sup>47</sup> Section 131(5) - (6). Section 131(7) provides that "a system discriminates because of sex if a difference (or coincidence) between the values that the system sets on different demands is not justifiable regardless of the sex of the person on whom the demands are made."

<sup>48</sup> Smith I and Baker A *Smith & Woods Employment Law* (Oxford University Press 2013) at 372 (hereafter referred to as "Smith and Baker *Employment Law*").

<sup>49</sup> *Idem* at 366.

material factor defence. The following subsections from section 69 of the EA place the defence in perspective to a claim of equal remuneration:

“(1) The sex equality clause in A’s terms has no effect in relation to a difference between A’s terms and B’s terms if the responsible person shows that the difference is because of a material factor reliance on which-

- (a) does not involve treating A less favourably because of A’s sex than the responsible person treats B, and
- (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A’s are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A’s.”<sup>50</sup>

It is clear from subsection (1)(a) of section 69 that if the reason for treating A (the aggrieved employee) and B (the comparator) differently in relation to their terms of employment is not based on sex, then this is a complete defence to an equal pay claim. Subsection (1)(b) of section 69 permits discrimination in terms and conditions of employment based on sex if the reason for doing so constitutes a proportionate means of achieving a legitimate aim. At first blush this section seems to be counterproductive to what the EA seeks to achieve but this is clarified in subsection (3) of section 69 which states that:

“[f]or the purposes of subsection (1), the long-term objective of reducing inequality between men’s and women’s terms of work is always to be regarded as a legitimate aim.”

### **3.4.2 Factors emerging from the Equality Act**

#### **3.4.2.1 Factors for assessing work of equal value**

It is clear from the above analysis of the EA that the following factors should be used to assess the value of the work:

- a) Effort;
- b) Skill;
- c) Decision making; and
- d) Demands of the work.<sup>51</sup>

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<sup>50</sup> Section 69(1) - (2).

<sup>51</sup> Section 65(6)(a) - (b).

Reference to the words “factors such as” preceding the factors above as mentioned in section 65(6)(b) makes it clear that the list of factors does not constitute a *numerous clausus*.

### **3.4.2.2 Grounds of justification**

It is further clear from the above analysis of the EA that the following are regarded as defences to an equal pay claim:

- a) A job evaluation study that is not based on a system that discriminates on the ground of sex and that is reliable;<sup>52</sup> and
- b) The genuine material factor defence.<sup>53</sup>

### **3.4.3 The case law**

It should be noted that the case law decided under the repealed Equal Pay Act<sup>54</sup> which provided for the right to equal pay for work of equal value and the defences thereto will be analysed below in addition to the case law decided under the EA. These cases, whilst decided under repealed legislation, are instructive and provide an invaluable insight as to how the courts have (previously) dealt with the specific issues relating to equal pay claims and how they might (possibly) deal with these issues in future litigation. Case law decided under the repealed EPA cannot be disregarded as it forms part of the jurisprudence relating to equal remuneration claims. It should further be noted that the case law decided by the European Court of Justice and the Northern Ireland Court of Appeal will be referred to, but only to a limited extent. Reference to these cases under the analysis of the case law in the United Kingdom should not be surprising as the tribunals and courts in the United Kingdom readily make reference to the decisions of these courts in their judgments.

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<sup>52</sup> Section 131(6)(a)-(b). Item 42 of the Equal Pay Code states that “[i]f a job evaluation study has assessed the woman’s job as being of lower value than her male comparator’s job, then an equal value claim will fail unless the Employment Tribunal has reasonable grounds for suspecting that the evaluation was tainted by discrimination or was in some other way unreliable.”

<sup>53</sup> Section 69.

<sup>54</sup> Of 1970 (hereafter referred to as the “EPA”). This Act was the predecessor to the EA in respect of equal remuneration claims.

### **3.4.3.1 Case law dealing with the assessment of work of equal value**

In *Bromley v H & J Quick Ltd*<sup>55</sup> the female appellants were employed by the respondent as clerical workers and they claimed that their work was of equal value to that of male managers in the employ of the respondent. Their claims were dismissed by both the Industrial Tribunal and the Employment Appeal Tribunal. The respondent requested a firm of independent management consultants to undertake a job evaluation study within its workplace. The firm used five factors for consideration in the study. These factors were: a) skill<sup>56</sup>; b) mental demand; c) responsibility; d) physical environment; and e) external contacts. It was common cause that the jobs of the appellants and the comparators were assessed by management using an approach which assesses the job as a whole and without having regard to the five factors<sup>57</sup> which were mentioned in the job evaluation study. The Court of Appeal held that a job evaluation study as defined in section 1(5) of the EPA<sup>58</sup> requires the jobs of each worker to be valued in terms of the factors used in the study. In *casu*, this was not done and as a result thereof, the appeal was allowed and the appellant's claims were remitted to the Industrial Tribunal with a direction that a report from an independent expert be sought.<sup>59</sup> It is clear from this case that a job evaluation study must apply to all employees which it covers and the value to be attached to an employee's work has to emanate from an assessment of the employee's job in terms of the factors used in the study. It is further clear that where there is no job evaluation study or if same does not comply with the EA, then obtaining a report from an expert relating to the value to be attached to the jobs under scrutiny, is recommended.

In *Murphy v Bord Telecom Eireann*<sup>60</sup> the High Court of Ireland referred three questions to the European Court of Justice under article 177 of the EEC Treaty. Reference will only be made to the first question namely "[d]oes the community law principle of equal pay for equal work extend to a claim for equal pay on the basis of work of equal value in circumstances where the work of the claimant has been

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<sup>55</sup> [1988] IRLR 249 CA.

<sup>56</sup> Alternatives to skill were training and experience.

<sup>57</sup> Only two of the appellants jobs were assessed under the five criteria (at para 25).

<sup>58</sup> Section 1(5) of the EPA is now contained in section 65(4) of the EA read with section 80(5) of the EA.

<sup>59</sup> At paras 11, 13, 15, 25, 34.

<sup>60</sup> [1998] IRLR 267 ECJ.

assessed to be of higher value than that of the person with whom the claimant sought comparison?" The factual matrix giving rise to this question was briefly as follows: Murphy and 28 other women brought proceedings against their employer, Bord Telecom Eireann and sought equal pay to that of a specified male comparator in the same employ who was paid more than they were. The women were employed as factory workers and they were responsible for dismantling, cleaning, oiling, and reassembling telephones and other equipment. The male comparator was responsible for cleaning, collecting and delivering equipment, and general assistance. The Equality Officer who handled the case, in the first instance, took the view that the women's work were of a higher value to that of the male comparator and, therefore, did not constitute "like work." This view was upheld on appeal by the Labour Court. The European Court of Justice held that the community law principle of equal pay should be interpreted to cover a situation where a worker is engaged in work of higher value to that of the chosen comparator.<sup>61</sup> The principle of equal pay for work of equal value does not only apply to a claimant who is engaged in work that is of equal value to that of the comparator but also applies to a situation where the claimant is engaged in work that is of a higher value to that of the comparator provided that he/she is paid less than the chosen comparator and discrimination is proved.

In *Leverton v Clwyd County Council*<sup>62</sup> the appellant was employed by the respondent as a nurse in an infant's school. She claimed under the EPA, that her work was of equal value to that of male clerical staff in different establishments. It is apposite to note that both the appellant and the comparators were employed under the Scheme of Conditions of Service of the NJC for Local Authorities' Administrative, Professional, Technical and Clerical Services. The appellant's annual salary was £5058 whereas her comparators annual salaries ranged from £6081 to £8532. She clearly earned less than her comparators. The appellant worked 32, 5 hours per week and had 70 days' annual leave whereas her comparators worked 37 hours per week and had 20 days annual leave. The House of Lords held, *inter alia*, that the

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<sup>61</sup> At paras 1 - 4, 12. Item 45 of the Equal Pay Code, however, provides that "[a] woman may also bring a claim of equal pay where her job is rated higher than that of a comparator under a job evaluation scheme but she is paid less. However, this will not entitle her, if an equality clause applies, to better terms than those her comparator has."

<sup>62</sup> [1989] IRLR 28 HL.

employer was entitled to rely on the difference in the hours worked per week and the number of annual leave days to successfully establish the genuine material factor defence to the equal pay claim of the appellant. The appeal was consequently dismissed.<sup>63</sup> An employee who works less hours than her comparator will have a difficult time establishing that the work is of equal value to that of the comparator and will be defeated by the employer raising the genuine material factor defence. It is submitted that this comment is not restricted to hours of work and annual leave but may apply *mutatis mutandis* to other terms and conditions of employment.

In *Dibro Ltd v Hore*<sup>64</sup> the female respondents were employed by the appellant as assemblers.<sup>65</sup> They claimed that their work was of equal value to that of two male operators within the employ of the respondent. The appellant raised the defence that the work of the respondents and the comparators has been rated as unequal in terms of a job evaluation scheme. This job evaluation scheme did not, however, comply with a job evaluation study as envisaged in section 1(5) of the EPA. At some stage, the Advisory, Conciliation and Arbitration Service became involved in the case and job evaluation meetings were held. The result of the meetings was an analytical job evaluation scheme which was enforced in the workplace of the appellant. The appellant argued that this scheme was in fact a job evaluation study which complied with section 1(5) of the EPA and, according to this scheme, the work of the respondents and the comparators were not of equal value. The Industrial Tribunal refused to allow the appellant to rely on the scheme as a defence because it was carried out after the respondents presented their claim. The appellant appealed this decision. The Employment Appeal Tribunal held that the issue was whether the work of the respondents and the comparators were of equal value at the time when the proceedings were issued. The Employment Appeal Tribunal further held that the work must be compared as when the work was being carried out at the date of the issuing of the proceedings. It further held that a job evaluation scheme which comes into existence after the initiation of proceedings, but which nevertheless complies with section 1(5) of the EPA, is admissible in evidence and may be relied upon by

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<sup>63</sup> At pages 28-29, 33.

<sup>64</sup> [1989] IRLR 129 EAT.

<sup>65</sup> It is apposite to note that in para 1 of *Dibro* the respondents are referred to as having been employed as packers whereas on page 129 of *Dibro* they are referred to as having been employed as assemblers.

the employer provided it relates to the facts and circumstances which existed at the time when the proceedings were initiated. The appeal was upheld and the case was remitted to the Industrial Tribunal for further hearing.<sup>66</sup> An employer may rely on a job evaluation study which was undertaken after equal pay proceedings were initiated provided the study complies with section 1(5) of the EPA (this defence is now contained in section 69 of the EA read with section 80(5) of the EA) and it evaluates the relevant work of the parties as carried out at the date the proceedings were instituted. This would also mean that where a job evaluation study does not exist, a Court or Tribunal must assess the value of the work as it existed at the time when the proceedings were initiated. This seems to be not only in accordance with the law but also logical.

In *Redcar & Cleveland Borough Council v Bainbridge* (No. 2)<sup>67</sup> the England and Wales Court of Appeal had to decide, *inter alia*, the novel question relating to the effect of the doctrine of *res judicata* on an equal pay claim, and in particular:

“[i]s the cause of action for equal pay for a particular pay period based on equal value the same as, or different from, the cause of action for equal pay claim for the same period based on RAE [work rated as equivalent]?”<sup>68</sup>

If the causes of action are distinct that would mean that the doctrine of *res judicata* would not be applicable but if they are the same cause of action then the doctrine will afford a complete defence to an attempt to establish and obtain a remedy for that same cause of action in a new action. The Court of Appeal held that there is nothing inconsistent with the three different legal bases for the claim of equal pay namely; a) equal pay for like work; b) equal pay for work rated as equivalent and c) equal pay for work of equal value and there is nothing in EPA which restricts a claimant to only one way of framing her claim (there is likewise, nothing in the EA which restricts a claimant to only one way of framing her claim). It further held that the different claims may have different outcomes as a result of different considerations required to establish them. The Court of Appeal, however, qualified this by stating that “it is not permissible to allege a new cause of action in respect of a particular pay period in another action under the same head for the same pay period simply by selecting a

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<sup>66</sup> At paras 2, 4 - 5, 11 - 12, 17, 20, 28, 31, 34.

<sup>67</sup> [2008] IRLR 776 EWCA.

<sup>68</sup> At paras 213, 217.

different comparator.” It stated that with regard to a new cause of action for the same period it would be necessary to bring the claim under a different head, usually with different comparators.<sup>69</sup> A claimant is therefore entitled to bring a claim under either or all of the three causes of action mentioned above. The successful or unsuccessful outcome of a claim under one of the heads does not preclude a later claim under either of the remaining causes of action for the same pay period as claimed in the initial cause of action.

In *Potter v North Cumbria Acute Hospitals NHS Trust*<sup>70</sup> the Employment Appeal Tribunal heard an appeal against a decision of the Employment Tribunal wherein the Tribunal held that “[t]he correct comparison period for the evaluation of equality by the independent expert is at the date of the presentation of the claim.” The appellants appealed this decision. The Employment Appeal Tribunal held that where material changes in job content during the claim period is alleged, it will be prudent, subject to the particular circumstances of a particular case, “to consider and decide the question first in relation to one part of the period and to deal later, if necessary, with an earlier or later period pre- or post- the alleged change.” It stated that this amounted to the splitting of issues. The Employment Appeal Tribunal noted that the Chairman in the Tribunal below was of the view that the better course was to allow the independent experts to produce their reports, having done the comparison for the evaluation as at the date of presentation of the claim and that the Tribunal would then consider the impact of any changes in the work content. The Employment Appeal Tribunal held that this reasoning was unassailable and dismissed the appeal.<sup>71</sup> Where a claimant alleges material changes in her job and that of the comparator and the claim involves different periods, such changes should be dealt with separately and a useful procedural tool in this regard is for the Tribunal/Courts to order the splitting of issues (causes of action). The independent expert’s report should deal with the first period of the claim and the Tribunal should be able to determine the impact of the changes on the work content. The Tribunal would then be able to make a decision on the further conduct of the proceedings. For example,

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<sup>69</sup> At paras 213, 216 - 217, 257, 261.

<sup>70</sup> [2009] IRLR 22 EAT.

<sup>71</sup> At paras 6 - 7, 15, 19.

the issues could be split and/or separate reports could be sought from independent experts relating to the different claim periods.

In *Hosvell v Ashford & St Peter's Hospital NHS Trust*<sup>72</sup> the issue before the Court of Appeal was whether an Employment Tribunal erred in law by refusing an application by the appellant that a decision to appoint an independent expert be revoked. It is apposite to note that the appellant and the respondent in the Tribunal below requested the Judge to order the request of a report of an independent expert on the issue of equal value. This order was granted by agreement between the parties. Prior to the appointment of an expert, the appellant made an application requesting the Tribunal to withdraw the order that an expert be appointed to determine the issue of equal value. The Tribunal refused the application. The appellant then appealed to the Employment Appeal Tribunal and the appeal was dismissed. The appellant then launched the appeal to the Court of Appeal which dismissed it and stated, *inter alia*, that the Tribunal must determine if it wishes to obtain an independent expert's report to assist it. It further stated that the fact that in some cases the Tribunal may find that the two jobs are of equal value does not mean that in such circumstances it is deprived of requesting a report, especially if it is of the opinion that it will be prejudiced by the absence thereof. The discretion to appoint an independent expert and request a report lies with the Tribunal.<sup>73</sup> A Tribunal has the final say as to whether or not an expert should be appointed and a report be sought. It cannot be deprived of requesting such report even where it can successfully be argued that the Tribunal is in a position to properly make a decision on the value of the work in question in the absence of same. The Tribunal should decide whether or not it needs the report because it is the Tribunal which will ultimately have to make a decision on the value of the work in question. It will be absurd to allow a party to proceedings to deprive a Tribunal of a report where it seeks same. Requesting an independent expert's report in an equal value case is viewed as normal practice.<sup>74</sup>

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<sup>72</sup> [2009] IRLR 734 CA.

<sup>73</sup> At paras 1, 15 - 17, 45 - 46.

<sup>74</sup> At para 15.

### **3.4.3.2 Case law dealing with the grounds of justification to equal pay claims**

In *Secretary of State for Justice v Bowling*<sup>75</sup> the respondent was employed by the Prison Service, which fell under the appellant, as a service desk user support team customer service adviser. The respondent claimed in the Employment Tribunal that she was doing like work to that of her chosen male comparator, but was paid less than him. The male comparator held the same post as the respondent, but however, started on a salary of £15, 567 as opposed to the respondent who started on £14, 762. The difference between the starting salaries was due to the comparator being appointed on spinal point 3 in terms of the appellant's salary scale and the respondent being appointed on spinal point 1. The appellant argued that the reason for this difference was due to the fact that the comparator had more background and experience than the respondent. The Employment Tribunal accepted this explanation in respect of the difference in pay that existed at the time of appointment. The Employment Tribunal, however, held that this explanation could not apply to the period where the respondent and the comparator had achieved the same appraisal rating because at that stage the reason of skill and experience had ceased to be a material factor which could be relied on for paying different wages for like work. It therefore allowed the respondent's claim in part.<sup>76</sup> On appeal, the Employment Appeal Tribunal accepted the appellant's argument that "it is in the nature of an incremental scale that where an employee starts on the scale will impact on his pay, relative to his colleagues', in each subsequent year until they reach the top." The Employment Appeal Tribunal accepted that a differential was built into the pay of the respondent once the comparator had been appointed two points above the respondent in terms of the salary scale and if the original differential was free from sex discrimination then it follows that the differentials in later years too were free from sex discrimination. The appeal was consequently allowed.<sup>77</sup> Where

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<sup>75</sup> [2012] IRLR 382 EAT.

<sup>76</sup> At paras 1, 2.1 - 2.3, 5.

<sup>77</sup> At paras 6 - 7, 11. In *Skills Development Scotland v Buchanan* [2011] EqLR 955 EAT, the Employment Appeal Tribunal held that "in an equal value case, if the employer establishes a genuine explanation - not a sham, fraud or pretense - for the variation in the contracts and that explanation does not involve sex, then he need not go further. In particular, he need not show objective justification. If the employer proves a gender neutral explanation for the difference in pay, that is sufficient. In an individual case, it may seem that the explanation for the difference demonstrates that it is unfair or unjustified on moral grounds but that is not relevant" (at para 20). In *Glasgow City Council v Marshall* [2000] IRLR 272 HL, the House of Lords made the following comments with regard to an employer rebutting a presumption of sex discrimination relating to unequal pay: "In order to discharge this burden the employer must satisfy the tribunal on several

two employees doing like work are appointed on different levels of a salary scale due to skill and experience which is free from unfair discrimination, then the difference in pay in later years will not amount to unfair discrimination. This is only logical if one employee is appointed on a higher scale than the other, if both employees perform well then the one employee will almost always receive higher wages than the other. It is submitted that this case may apply *mutatis mutandis* to a claim of equal pay for work of equal value and is not confined to equal pay for like work only.

In *Council of the City of Sunderland v Brennan*<sup>78</sup> female employees (caterers, cleaners, carers, school support staff) of the appellant claimed that their work was rated as equivalent or was of equal value to that of their male comparators (gardeners, road sweepers, drivers and refuse collectors) but they did not receive bonus payments which were received by their comparators. The appellant argued in the Employment Tribunal that the reason for non-payment was linked to productivity. The Tribunal held that “the bonus schemes enjoyed by the predominantly male groups “had long ceased to have anything to do with productivity.” The appellant aggrieved by this finding unsuccessfully appealed same to the Employment Appeal Tribunal. The England and Wales Court of Appeal held that the fact that the ultimate withdrawal of the bonus system had not impacted on productivity in the sense of it being decreased led to a “permissible inference that the bonus system had long since ceased to relate to productivity.” The Appeal was accordingly dismissed.<sup>79</sup> Pay

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matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretense. Secondly, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a ‘material’ factor, that is, a significant and relevant factor. Third, that the reason is not ‘the difference of sex’. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c), may be a ‘material’ difference, that is, a significant and relevant difference, between the woman’s case and the man’s case” (at page 276). In *Coventry City Council v Nicholls* [2009] IRLR 345 EAT, the Employment Appeal Tribunal held that an employer relying on a genuine material factor defence must demonstrate what that factor is and that the factor is: “(a) A genuine reason and not a sham or a pretense, which existed and was known to the employer at the date that the pay was fixed and which continues to the point of the hearing; (b) That the less favourable treatment is due to this reason. The factor must be a material factor and must be causative, not just justificatory; (c) The reason must not be the difference of sex. This can include direct or indirect discrimination; (d) The factor relied upon is a significant and relevant difference between the woman’s case and the man’s case; (e) If the factor relied upon is indirectly discriminatory on the grounds of sex, that reliance upon it is justified” (at para 12).

<sup>78</sup> [2012] IRLR 507 EWCA.

<sup>79</sup> At paras 1, 6 - 7, 10, 27, 42. In *Cumbria County Council v Dow* (No. 1) [2008] IRLR 91 EAT, the Employment Appeal Tribunal held that the appellant’s productivity (bonus) scheme did not achieve a legitimate objective because the appellant had failed to apply it rigorously and this

differentials between the sexes cannot be justified in terms of a bonus system which has no bearing to productivity which was the factor which it sought to reward the bonuses for. There must be a link between productivity and the bonus system.

In *Redcar & Cleveland Borough Council v Bainbridge* (No. 2)<sup>80</sup> the England and Wales Court of Appeal dealt with three consolidated appeals concerning questions of law relating to claims of equal pay and the scope of the defences. Only the law relating to the scope of collective agreements as a defence to equal pay claims will be considered. The Court of Appeal held that different jobs that have been subject to separate collective bargaining processes can be a complete defence to an equal pay claim. It, however, qualified this by stating that collective bargaining can only be a defence where the reason for the pay differential is the separate collective bargaining and not the difference of sex. It held that where separate bargaining has the effect that one group of sex (females) of similar proportions earn less than another group of sex (males) of similar proportions, this could constitute a complete defence to an equal pay claim which is not sex-tainted. It further held that this would not apply where there is a marked difference between the two groups because the difference would constitute evidence from which a Tribunal could infer that the process of the separate bargaining was tainted by sex unless the employer furnishes a different explanation. It concluded by stating that “the fact of separate collective bargaining would not, of itself, be likely to disprove the possibility of sex discrimination.”<sup>81</sup> Where separate collective bargaining is raised by the employer as a justification to pay differentials between the sexes, the employer has to show that it was not sex-tainted. This applies to a scenario where there is a marked difference in

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resulted in the payments made according to the scheme forming part of the basic wage. The Employment Appeal Tribunal further held that a Tribunal is entitled to seek “evidence that productivity had increased as a result of improvements in the performance of the workers themselves” (at paras 130, 133, 135 - 136). It is clear from this case that a bonus scheme that is intended to reward productivity must do just that. Where the scheme ceases to reward productivity then it loses its status of being a legitimate means of improving productivity and will fail as a ground justifying pay differentials.

<sup>80</sup> [2008] IRLR 776 EWCA.

<sup>81</sup> At paras 2 - 3, 181, 198. In *British Road Services Ltd v Loughran* [1997] IRLR 92 NICA, the Northern Ireland Court of Appeal held that if one of the groups subject to separate collective bargaining are made up of predominantly females then a Tribunal should ascertain the reason for the wage difference in particular whether it is due to sex discrimination (at para 76). In a dissenting judgment, McCollum J held that “[i]n my view, in the circumstances of this case, the separate pay structures were capable of amounting to a material factor free of the taint of sex discrimination, as the percentage of women in the less well paid group was not so high as to lead inevitably to a finding of indirect discrimination” (at para 44).

the sex of the groups because a Tribunal will be entitled to infer that the process was sex-tainted. It is further clear from this case that where the pay differentials apply to two different groups of similar proportions then then there is no inference to be drawn that the process was or is sex tainted.

In *Benveniste v University of Southampton*<sup>82</sup> the appellant took up employment with the respondent in 1981. It was common cause that the salary offered to the appellant was less than what she would have been offered had there been no financial constraints on the respondent in 1981. The appellant accepted the offer of employment on the understanding that she would be paid the salary that she would have been entitled to had there been no financial constraints on the respondent, once same ceased to exist. The respondent's financial constraints came to an end in 1982. The respondent undertook to increase the appellant's salary slightly by means of pay increments but the appellant found this to be unsatisfactory. There were several correspondences between the appellant and the respondent regarding her low salary as compared to that of her four male comparators. This resulted in the appellant being dismissed by the respondent. The appellant claimed equal pay for like work in the Industrial Tribunal. This claim was dismissed. The appellant then appealed to the Employment Appeal Tribunal which appeal was also dismissed. The Court of Appeal held that once the financial constraints on the respondent came to an end in 1982, the reason for paying the appellant a lower salary disappeared. It further held that "... [it was] not persuaded that it can be right that the appellant should continue to be paid on a lower scale once the reason for payment at the lower scale has been removed." It reasoned that the material difference between the rate of pay between the appellant and that of her comparators had evaporated. It noted that there was no evidence to the effect that the respondent was under continuing financial constraints. The Court of Appeal allowed the appeal and remitted the case to the Industrial Tribunal for the determination of a suitable remedy.<sup>83</sup> Financial constraints can justify pay differentials. This, however, is limited to the existence or continuation of the financial constraints. Once the financial constraints have ceased to exist then it loses its status as a ground to justify pay differentials. Where the financial constraints are of a continuing nature then this can operate as a

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<sup>82</sup> [1989] IRLR 123 CA.

<sup>83</sup> At paras 4 - 5, 10, 12, 14, 30 - 32.

justification to pay differentials. The existence or continuation of the financial constraints must, however, be genuine.

In *Fearnon v Smurfit Corrugated Cases Lurgan (Limited)*<sup>84</sup> the Northern Ireland Court of Appeal heard an appeal from the Industrial Tribunal by way of a stated case. The following question was posed in the stated case “[w]as the tribunal correct in law to hold that the protection afforded by the material difference of red-circling<sup>85</sup> is not time limited?” The Court of Appeal held that the length of time in respect of which pay differentials had endured due to red-circling is not irrelevant to the issue of whether it can continue to be a general material factor. It explained that in order for red-circling to qualify as a general material factor-defence to pay differentials, the reason for its existence or continuation at the time the pay differential is being challenged, is of cardinal importance and must be examined. It further held that “[i]t is wrong to assume that because it was right to institute the system, that it will remain right to maintain it indefinitely.” The Court of Appeal answered the above question in the negative and allowed the appeal.<sup>86</sup> A defence to an equal pay claim cannot be valid in perpetuity without its validity being examined at the time when a

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<sup>84</sup> [2009] IRLR 132 NICA.

<sup>85</sup> Red-circling is a pay protection measure which protects an employee’s salary even in circumstances where his duties have lessened (at para 3). See also *Bury Metropolitan Council v Hamilton* [2011] IRLR 358 EAT wherein the Employment Appeal Tribunal dealt with pay protection claims.

<sup>86</sup> At paras 1 - 2, 12, 15, 17. In *Snoxell v Vauxhall Motors Ltd* [1977] IRLR 123 EAT, the female appellants were employed as inspectors of motor machine parts by the respondent. They claimed that they were being paid less than certain of their male counterparts who were red-circled, for doing the same work. The Industrial Tribunal dismissed their claims and upheld the defence of red-circling as raised by the respondent. The Employment Appeal Tribunal disagreed with the Tribunal and held that the inevitable conclusion on the evidence is that the female appellants would have been red-circled had they not been women. The appeal was allowed and the case was remitted to the Industrial Tribunal to determine the amount of arrear remuneration which the appellants were entitled to (at paras 11, 26, 52). In *United Biscuits Ltd v Young* [1978] IRLR 15 EAT, the respondent, a female packing supervisor, employed on day shift claimed that she was paid less than her male counterparts who were employed on night shift and were red-circled. She sought to be remunerated according to the amount paid to her male counterparts. The appellant’s reliance on red-circling as the ground justifying the pay differentials was rejected by the Industrial Tribunal. The Employment Appeal Tribunal held that “where an employer seeks to discharge the *onus* which rests upon him under s.1(3) by what may be described as a ‘red circle defence’, he must do so under reference to each employee whom it is claimed is within the circle. He must prove that at the time when that employee was admitted to the circle his higher remuneration was related to a consideration other than sex. It may be that in some cases he can rely upon a presumption that considerations which apply to existing members of the circle apply to subsequent intrants. But where, as here, these considerations are accepted as having eventually disappeared we consider that it is for the employer to establish by satisfactory evidence that this occurred after the latest intrant was accepted.” The Employment Appeal Tribunal accordingly dismissed the appeal (at paras 2 - 3, 8, 10).

claim of equal pay is made. It may be that the application is valid in perpetuity but this must be proved at the stage when it is raised as a defence. To allow the defence of red-circling to be valid in perpetuity because the reason for its initial implementation was justified, would allow unscrupulous employers to rely on the defence even where the reason for the initial implementation of the red-circling has ceased to exist.<sup>87</sup>

In *Rainey v Greater Glasgow Health Board*<sup>88</sup> the appellant female was employed by the respondent as a prosthetist. She claimed equal pay to that of her chosen male comparator who was also employed by the respondent as a prosthetist. The respondent offered the comparator a higher starting salary (£6,680) than that offered to the appellant (£4,733). The respondent alleged that the higher starting salary was to attract the comparator to work for it. Unlike the comparator, the appellant was not offered employment whilst employed for a private company. The appellant's claim was dismissed by both the Industrial Tribunal and the Employment Appeal Tribunal. The main question before the House of Lords was whether the explanation furnished by the respondent for the pay differential constituted a general material factor defence, which excluded the difference of sex. The House of Lords held that administrative efficiency could constitute a genuine material factor defence. It noted and agreed with the finding of the Industrial Tribunal that the new prosthetic service would not have been established timeously had it not been for the appointment of the comparator and others like him who were offered an amount of remuneration equal to that which they were receiving from the private company. It further held that the comparator was paid more because of the need of the respondent to attract him. It concluded that the respondent's explanation of the pay differential did amount to a genuine material factor defence. The appeal was accordingly dismissed.<sup>89</sup> Where

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<sup>87</sup> At para 12.

<sup>88</sup> [1987] IRLR 26 HL.

<sup>89</sup> At paras 2 - 3, 5, 8 - 9, 11, 18 - 22. In *Ratcliffe v North Yorkshire County Council* [1995] IRLR 439 HL, the respondent dismissed the female appellants and rehired them at a lower wage. The respondent alleged that it did this because it had to become tender competitive. The respondent had lost out a tender to another company whose labour costs were substantially lower than that of the respondent. The Industrial Tribunal found that the need of the respondent to reduce the appellant's wages in order to compete with other companies may have been a material factor, but it was due to a factor based on the difference of sex. The Tribunal found in favour of the appellants and rejected the respondent's explanation as being a justification to the pay differentials. The Employment Appeal Tribunal overturned the decision of the Tribunal. The Court of Appeal upheld the decision of the Employment Appeal Tribunal. The House of Lords, however,

there is a need by the employer to attract an employee to its business for legitimate reasons (administrative efficiency), this will amount to a defence which would justify consequent pay differentials.

In *Bilka-Kaufhaus GmbH v Weber von Hartz*<sup>90</sup> the European Court of Justice held that an employer may rely on objectively justified economic grounds for pay differentials. It further held that it is the task of the national court to determine whether the explanation furnished by the employer for the pay differentials constitutes objectively justified economic grounds. The Court noted that the measures adopted by the employer must be appropriate to achieving the economic objectives.<sup>91</sup> This case makes it clear that an employer may rely on economic grounds as a justification to pay differentials. It is the duty of the national court to ascertain whether the economic grounds relied on, are genuine, and achieve the objectives sought.

In *Wilson v Health & Safety Executive*<sup>92</sup> the England and Wales Court of Appeal was faced with the following questions relating to a service-related criterion which determined pay “does the employer have to provide objective justification for the way he uses such a criterion, and, if so, in what circumstances?” The Court of Appeal noted that the use of service-related pay scales were common and as a general rule an employer does not have to justify its decision to adopt same because the law acknowledges that experience allows an employee to produce better work. It held that an employer will have to justify the use of a service-related criterion in detail where the employee has furnished evidence which gives rise to serious doubts as to whether the use of the service-related criterion is appropriate to attain the criterion

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agreed with the Industrial Tribunal and held that “[t]o reduce the women’s wages below that of their male comparators was the very kind of discrimination in relation to pay which the Act sought to remove.” (at 439 - 440). In *Albion Shipping Agency v Arnold* [1981] IRLR 525 EAT, the Employment Appeal Tribunal held that “as a matter of common sense a change in the circumstances of the business in which the man and the woman are successively employed can (but not necessary will) constitute a ‘material difference’ between her case and his” (at para 15). In *British Coal Corporation v Smith; North Yorkshire County Council v Rattcliffe* [1994] IRLR 342 CA, the Court of Appeal held that “a “material factor” defence must fail if the employer cannot prove that the material factor relied upon was not tainted by sex” (at 344). In *National Coal Board v Sherwin* [1978] IRLR 122 EAT the Employment Appeal Tribunal held that “it is no justification for a refusal to pay the same wages to women doing the same work as a man to say that the man could not have been recruited for less” (at 123).

<sup>90</sup> [1986] IRLR 317 ECJ.

<sup>91</sup> At para 36.

<sup>92</sup> [2010] IRLR 59 EWCA.

objective which is the rendering of better work performance by employees with more years of service. In these circumstances an employer will have to justify the use of the service-related criterion by proving the general rule that an employee with experience produces better work and this is evidenced in its workplace.<sup>93</sup> The use of a service-related pay criterion is as a general rule legitimate and will be a complete defence to an equal pay claim. It is only when an employee furnishes evidence which casts serious doubt on whether the criterion is appropriate to attain the criterion objective which is the rendering of better work performance by employees with more years of service that an employer will be called upon to justify same by disproving the doubt. An employee may therefore only challenge a service-pay criterion on this limited ground.

In *Davies v McCartneys*<sup>94</sup> the appellant argued before the Employment Appeal Tribunal that the Industrial Tribunal committed an error by relying for its finding that the respondent had proved a material factor defence, on factors which were also used in the assessment of the value of the work. The Employment Appeal Tribunal held that there is no limitation to the factors which an employer may rely on in proving a material factor defence. It stated that the important part of the defence is that it is based on a material factor which is genuine and not based on the difference of sex. It further held that:

“[h]owever, it is our view that an employer should not be allowed simply to say, ‘I value one demand factor so highly that I pay more’, unless his true reason for doing so is one which is found by the Tribunal to be reasonable and genuine and not attributable to sex.”<sup>95</sup>

An employer may rely on the factors for assessing the value of work as a defence to a pay differential. In this instance, the factors for assessing the value of the work are capable of justifying the pay differential for genuine reasons which are not sex-tainted.

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<sup>93</sup> At paras 1, 16.

<sup>94</sup> [1989] IRLR 43 EAT.

<sup>95</sup> At paras 11, 14 - 15.

### **3.4.4 Factors emerging from the case law**

#### **3.4.4.1 Factors for assessing work of equal value**

It is apposite to note from the case law above that the Tribunals and Courts make regular use of section 131(2) of the EA which allows them to request an independent expert's report on the value of the work in question. This is normal practice as was stated in *Hosvell v Ashford & St Peter's Hospital NHS Trust*.<sup>96</sup> Section 131(2) of the EA provides that:

“[w]here a question arises in the proceedings as to whether one person's work is of equal value to another's, the tribunal may, before determining the question, require a member of the panel of independent experts to prepare a report on the question.”

The case law does not discuss the factors for assessing the value of the work in detail, but it is clear that the factors emerging from the EA is used as well as objective factors which are used in terms of a job evaluation study and an independent expert's report. It is apposite to list the crucial aspects relating to equal value from the above case law. The list is as follows:

- a) A job evaluation study has to assess the employees work in terms of the factors used in the study;
- b) The principle of equal pay for work of equal value applies to a situation where a claimant is engaged in work that is of higher value to that of the chosen comparator provided the claimant is paid less;
- c) Hours worked and number of annual leave days;
- d) A Court or Tribunal must assess the value of the work as it existed at the time when the equal pay proceedings were initiated;
- e) A claimant is entitled to bring an equal pay claim under either or all of the following causes of action; equal pay for like work, equal pay for work rated as equivalent and equal pay for work of equal value;
- f) Where a claimant alleges material changes in her job and that of the comparator and the claim involves different periods, such changes should be dealt with separately by splitting the issues (causes of action);

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<sup>96</sup> [2009] IRLR 734 CA.

- g) A Tribunal has the ultimate say as to whether or not an expert should be appointed and a report sought on the value of the work in question.<sup>97</sup>

#### **3.4.4.2 Grounds of justification**

It is clear from the above analysis of the case law that the following are regarded as defences to an equal pay claim:

- a) Comparator was employed on a higher salary scale due to skill and experience;<sup>98</sup>
- b) Productivity which is rewarded in terms of a bonus system;<sup>99</sup>
- c) Collective bargaining;<sup>100</sup>
- d) Financial constraints;<sup>101</sup>
- e) Red-circling;<sup>102</sup>
- f) Administrative efficiency;<sup>103</sup>
- g) Economic grounds (reasons);<sup>104</sup>
- h) Service-pay criterion;<sup>105</sup> and
- i) Factors used for assessing the value of work in an equal value claim.<sup>106</sup>

### **3.5 Conclusion**

It is clear that international law plays an important role in the interpretation to be accorded to the EEA as the EEA requires the Act to be interpreted in accordance with international labour law. It is apposite to note that international law recognises the principle of equal remuneration for equal work and work of equal value as a human right. This places the principle of equal remuneration at the apex with other rights which have been accorded human right status. International law explains that the value of the work in an equal remuneration claim should be determined on the basis of certain objective criteria. It also sets out a list of matters which should be considered when drafting equal remuneration provisions. International law

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<sup>97</sup> Para 3.4.3.1.

<sup>98</sup> *Secretary of State v Bowling* at para 3.4.3.2.

<sup>99</sup> *Council of the City of Sunderland v Brennan* at para 3.4.3.2.

<sup>100</sup> *Redcar & Cleveland Borough Council v Bainbridge* (No. 2) at para 3.4.3.2.

<sup>101</sup> *Benveniste v University of Southampton* at para 3.4.3.2.

<sup>102</sup> *Fearnon v Smurfit Corrugated Cases Lurgan (Limited)* at para 3.4.3.2.

<sup>103</sup> *Rainey v Greater Glasgow Health Board* at para 3.4.3.2.

<sup>104</sup> *Bilka-Kaufhaus GmbH v Weber von Hartz* at para 3.4.3.2.

<sup>105</sup> *Wilson v Health & Safety Executive* at para 3.4.3.2.

<sup>106</sup> *Davies v McCartneys* at para 3.4.3.2.

recognises that the courts have a vital role to play in shaping the jurisprudence relating to equal remuneration claims, in particular their decisions can lead to a better understanding of the principles relating to equal remuneration. It also provides some guidance with regard to the grounds of justification to an equal remuneration claim.

It is clear that the United Kingdom has a more than adequate legislative framework in the form of the EA which is able to give effect to the principle of equal pay for equal work and work of equal value. Firstly, the EA sets out the following three causes of action: a) equal pay for like work; b) equal pay for work rated as equivalent; c) equal pay for work of equal value. A fourth cause of action should be added in the form of the sex equality clause which allows a woman's contract to be brought into line with her male counterparts contracts where there is/are provision/s in the male's contract that is/are not contained in the female's contract or not contained in the same beneficial manner. The female's contract should then be modified to include such a term. It is apposite to note that where the Tribunals/Courts are faced with an equal remuneration claim for work of equal value, it is usual practice to request an independent expert to submit a report on the value of the work in question. The EA sets out the factors for assessing the value of the work and the grounds of justification to an equal remuneration claim. The analysis of the case law clearly shows that the Tribunals/Courts have given meaning to the statutory provisions relating to the principle of equal remuneration. The result is a rich jurisprudence relating to equal remuneration claims. It is then apposite to derive lessons from international law and the United Kingdom law for the South African law relating to equal remuneration claims in chapter 4.

## CHAPTER 4: INADEQUACIES AND RECOMMENDATIONS

### 4.1 The Inadequacies of the Current Legal Framework and the proposed Recommendations

It is clear from chapters 1 and 2 *supra* that the Employment Equity Act<sup>1</sup> does not deal adequately with equal remuneration claims and the resultant effect is a poor legislative framework which poses dilemmas before the courts and ultimately affects claimants negatively. The courts cannot be expected to draft provisions for the EEA under the guise of delivering a judgment as it is barred from doing so by the *trias politica* doctrine. This is the duty of the legislature which should be executed within legislation. It is then apposite to deal with the inadequacies found in the current legal framework and to propose recommendations (remedial measures) to rectify same.

#### 4.1.1 The lack of factors for assessing work of equal value

The EEA does not contain criteria for assessing work of equal value. The Employment Equity Amendment Act states that the criteria *may*<sup>2</sup> be prescribed by the Minister.<sup>3</sup> This provision should be amended to a peremptory provision and should read as follows:

“(5) The Minister, after consultation with the Commission, [may] must prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4).”<sup>4</sup>

It is difficult to understand how a provision of this importance can be made directory by affording the Minister a discretion to prescribe the methodology and criteria for assessing work of equal value. This provision forms an essential part of addressing the inadequate legal framework relating to equal remuneration claims. The Minister has published the Draft Employment Equity Regulations which contained the criteria for assessing work of equal value.<sup>5</sup> The Minister has withdrawn the Draft Regulations due to serious criticism being leveled against Section D, regulation 3, *inter alia*, which dealt with the difference in using national and regional demographics for

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<sup>1</sup> 55 of 1998 (hereafter referred to as the “EEA”).

<sup>2</sup> Emphasis added.

<sup>3</sup> Section 3(b) of the Employment Equity Amendment Act 47 of 2013 (hereafter referred to as the “EEAA”).

<sup>4</sup> Section 3(b) of the EEAA. The word in square brackets indicates an omission and the word underlined indicates an insertion.

<sup>5</sup> Section B: Unfair Discrimination, Regulation 4 of the Draft Employment Equity Regulations GG No 37338 of 28 February 2014 (hereafter referred to as the “withdrawn Draft Regulations”).

equitable representation in the different levels of workplaces.<sup>6</sup> The Draft Regulations were not withdrawn due to criticism leveled against the equal remuneration regulations. But, notwithstanding the withdrawal of the Draft Regulations, the regulations on equal remuneration provide an invaluable source from which recommendations can be proposed to remedy the inadequate legal framework relating to equal remuneration claims (as, previously mentioned, no criteria is prescribed for assessing the value of the work at present). The Commission for Employment Equity states that it has advised the Minister on the equal remuneration regulations in the Draft Regulations with the assistance of the International Labour Organisation.<sup>7</sup>

The withdrawn Draft Regulations contained the following criteria: responsibility; skills (qualifications); physical, mental and emotional effort; the conditions under which the work is performed; and any other factor indicating the value of the work provided the employer establishes its relevance.<sup>8</sup> These factors are in accordance with the factors for assessing work of equal value as found in South African case law,<sup>9</sup> international law<sup>10</sup> and United Kingdom Law.<sup>11</sup> It is submitted that these criteria should remain unchanged when the Draft Regulations are revised. This will assist in providing an adequate legal framework relating to equal remuneration claims.

The EEAA does not contain an amendment with regard to the methodology to be used when assessing work of equal value. The withdrawn Draft Regulations provided the methodology in this regard.<sup>12</sup> It stated that it should first be determined whether the work of the claimant is of equal value to that of the comparator. If this is established, then it must be determined whether there are any differences in the terms and conditions of employment (remuneration) and if so, whether such

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<sup>6</sup> <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654/page71654?oid=624249&sn=Detail&pid=71654> (accessed on 30 May 2014); "No need to fixate on race any more" 2014-05-29 *Business Day* 10.

<sup>7</sup> Commission for Employment Equity Annual Report 2013-2014 at 5.

<sup>8</sup> Section B: Unfair Discrimination, Regulation 4(1)-(2) of the withdrawn Draft Regulations.

<sup>9</sup> Ch 2, para 2.3.2.

<sup>10</sup> Ch 3, para 3.2.3.1.

<sup>11</sup> Ch 3, para 3.4.2.1.

<sup>12</sup> Section B: Unfair Discrimination, Regulation 3 of the withdrawn Draft Regulations.

difference constitutes unfair discrimination.<sup>13</sup> This methodology is logical and should be retained when the revised Draft Regulations are published.

The EEA, unlike the Equality Act<sup>14</sup> in the United Kingdom, does not contain a provision which allows a court to refer a question relating to the value of work to an independent expert for submission of a report. In the United Kingdom it is common practice for a court to request a report from an expert in a work of equal value case.<sup>15</sup> It is submitted that this provision should be incorporated in the EEA under section 6 and should read as follows:

“(6) Where a question arises in the proceedings as to whether [one person’s] the claimant’s work is of equal value to [another’s] that of the comparator, the [tribunal] court may, before determining the question, require a member of the panel of independent experts to prepare a report on the question.”<sup>16</sup>

This provision would be dependent upon a list of independent experts and provision should be made in this regard. For example, the revised Draft Regulations could mention that an independent expert as referred to in the proposed provision should be accredited by the Department of Labour and should appear on the list of experts as maintained by the Department. A court using the proposed provision will then be in a position to appoint an expert from this list. It is submitted that the inclusion of the proposed provision will result in the courts being able to have the much needed assistance of a report from an expert without having to evaluate the value of the work themselves. This does not mean that the courts should adopt the expert’s report without more, because it will always be the final arbiter, as in any other case, involving the use of expert evidence. The proposed provision would address the comment made in *Mangena & others v Fila South Africa (Pty) Ltd* to the effect that the Labour Court does not have expertise in job grading or in the allocation of relative value to different functions or occupations.<sup>17</sup>

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<sup>13</sup> Section B: Unfair Discrimination, Regulation 3(a)-(b) of the withdrawn Draft Regulations.

<sup>14</sup> Section 131(2) of the Equality Act of 2010 (hereafter referred to as the “EA”).

<sup>15</sup> Ch 3, para 3.4.4.1.

<sup>16</sup> Section 131(2) of the EA. The words in square brackets indicate omissions while words and number underlined indicate insertions.

<sup>17</sup> Ch 2, para 2.2.2.

#### **4.1.2 The lack of grounds of justification to equal remuneration claims**

The EEA refers to affirmative action and the inherent requirements of the job as grounds of justification.<sup>18</sup> These grounds of justification are, however, not suitable to equal remuneration claims.<sup>19</sup> The EEAA does not contain an amendment to the EEA with regard to the grounds of justification. The withdrawn Draft Regulations, however, referred to the grounds of justification to an equal remuneration claim.<sup>20</sup> It is strange that the grounds of justification to a cause of action (an equal remuneration claim) are not contained in the EEA where the cause of action is provided for. This results in the equal pay remedy being rendered incomplete.<sup>21</sup> It is submitted that the grounds of justification should not be contained in the revised Draft Regulations but rather in the EEA where it completes the remedy of equal remuneration for the same/similar work and work of equal value.

The withdrawn Draft Regulations listed the following as grounds of justification:

- a) Seniority (length of service);
- b) Qualifications, ability and competence;
- c) Performance (quality of work);
- d) Where an employee is demoted as a result of organisational restructuring (or any other legitimate reason) without a reduction in pay and his salary remains the same until the remuneration of his co-employees in the same job category reaches his level (red-circling);
- e) Where a person is employed temporarily for the purpose of gaining experience (training) and as a result thereof receives different remuneration;
- f) Skills scarcity; and
- g) Any other relevant factor.<sup>22</sup>

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<sup>18</sup> Section 6(2)(a)-(b).

<sup>19</sup> Ch 2, paras 2.4.1 – 2.4.2. It is apposite to note that section 6 of the EEAA which amends section 11 of the EEA relating to the burden of proof provides, *inter alia*, that "... 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." Reference to *otherwise justifiable* means that the grounds of justification are extended beyond those of affirmative action and the inherent requirements of the job as contained in section 6(2)(a)-(b) of the EEA.

<sup>20</sup> Section B: Unfair Discrimination, Regulation 5(1)(a)-(g).

<sup>21</sup> See Ch 3, para 3.2.2.

<sup>22</sup> Section B: Unfair Discrimination, Regulation 5(1)(a)-(g) of the withdrawn Draft Regulations.

South African case law recognises all the above grounds of justification except for (d), the so-called red-circling defence and (e) where a person is employed temporarily for the purpose of gaining experience (training).<sup>23</sup> United Kingdom case law recognises the grounds of justification listed in (a)-(d) above.<sup>24</sup> The grounds of justification listed in (a)-(c) and (f)-(g) should be contained under section 6 of the EEA as follows:

“[5(1)] (7) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

- (a) the individuals’ respective seniority or length of service;
- (b) the individuals’ respective qualifications, ability, competence ...;
- (c) the individuals’ respective performance, quantity or quality of work ...;
- [[f)] (d) the existence of a shortage of relevant skills ...;
- [[g)] (e) any other relevant factor that is not unfairly discriminatory in terms of section 6(1).”<sup>25</sup>

The ground of justification listed under (e), whilst being new to equal remuneration claims in South Africa, is self-evident and need not be explored further. The ground of justification listed under (d), red-circling, is new to equal remuneration claims in South African law but is recognised as such in the case law of the United Kingdom.<sup>26</sup> Red-circling protects an employee’s salary even in circumstances where his duties have been lessened.<sup>27</sup> Landman states that red-circling may create a perception of discrimination.<sup>28</sup> Besides this perception, it is suggested that red-circling can be a ground of justification to an equal remuneration claim where the person has been demoted because of organisational needs as the demotion is not of his making but is brought about by legitimate needs of the employer’s business. It would be unfair if other employees were allowed to claim equal remuneration to that of the demoted

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<sup>23</sup> Ch 2, para 2.3.1.

<sup>24</sup> Ch 3, para 3.4.4.2.

<sup>25</sup> Section B: Unfair Discrimination, Regulation 5(1)(a)-(c),(f)-(g) of the withdrawn Draft Regulations. The letters and numbers in square brackets indicate omissions while letters and number underlined indicate insertions.

<sup>26</sup> Ch 3, para 3.4.4.2.

<sup>27</sup> Ch 3, para 3.4.3.2.

<sup>28</sup> Landman A “The Anatomy of Disputes about Equal Pay for Equal Work” (2002) 14 SA Merc LJ 341 at 354 (hereafter referred to as “Landman”).

employee. The grounds of justification in (d)-(e) should be contained under section 6 of the EEA as follows:

“[5(1)] (7) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

[(d)] (f) where an employee is demoted as a result of organisational restructuring or for any 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)] (g) 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.”<sup>29</sup>

South African case law refers to collective bargaining as being a ground of justification to an equal remuneration claim.<sup>30</sup> This ground of justification was not contained in the withdrawn Draft Regulations. It should be noted that collective bargaining is regarded as a ground of justification in the case law of the United Kingdom.<sup>31</sup> There are divergent views regarding the suitability of collective bargaining as a ground of justification to an equal remuneration claim in South African law. In *Heynsen v Armstrong Hydraulics (Pty) Ltd* the Labour Court remarked that collective bargaining not being a ground of justification to pay discrimination is compelling in an ideal society but should not apply rigidly in South African law due to the fact that it was a hard fought right for employees.<sup>32</sup> Grogan asserts that collective bargaining agreements with different unions which result in pay differentials are permissible.<sup>33</sup> In *Jansen van Vuuren v South African Airways (Pty) Ltd*<sup>34</sup> the Labour Court held that a collective agreement cannot justify unfair discrimination.<sup>35</sup> Landman asserts that an employer can attempt to rely on a collective agreement that provides for discriminatory wages as a ground of justification for pay differentials but this

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<sup>29</sup> Section B: Unfair Discrimination, Regulation 5(1)(d)-(e) of the withdrawn Draft Regulations. The letters and numbers in square brackets indicate omissions while letters and number underlined indicate insertions.

<sup>30</sup> Ch 2, para 2.3.1.

<sup>31</sup> Ch 3, para 3.4.4.2.

<sup>32</sup> Ch 2, para 2.2.1.

<sup>33</sup> Grogan J *Employment Rights* (Juta Claremont 2010) at 230.

<sup>34</sup> [2013] 10 BLLR 1004 (LC).

<sup>35</sup> At paras 48-50.

reliance is unlikely to succeed.<sup>36</sup> Landman's view is supported. Collective bargaining should, therefore, not be included as a listed ground of justification in the EEA.

The withdrawn Draft Regulations did not refer to an objective job evaluation method as a ground of justification to an equal remuneration claim, *albeit*, it referred to an objective assessment of the value of the work.<sup>37</sup> This omission was glaring because this ground of justification is specifically mentioned in article 3(3) of the Equal Remuneration Convention.<sup>38</sup> This ground of justification is further mentioned in the South African case law<sup>39</sup> and reference is made thereto in section 131(6)(a)-(b) of the EA. It is submitted that this ground of justification is crucial to equal remuneration claims and should be included in the EEA under section 6. The provision giving effect to this ground of justification should read as follows:

"[5(1)] (7) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

... (h) an objective job evaluation method."<sup>40</sup>

The following are grounds of justification which are not contained in the South African case law and neither contained in the withdrawn Draft Regulations, but have been recognised as such in the United Kingdom's case law:

- a) Financial constraints;
- b) Administrative efficiency; and
- c) Economic grounds (reasons).<sup>41</sup>

With regard to ground (c) above, economic reasons, an employer should be allowed to rely on it as a ground of justification. Van der Walt states that economic grounds can be objective and amount to a ground of justification to pay inequity only to the

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<sup>36</sup> Landman at 351.

<sup>37</sup> Section B: Unfair Discrimination, Regulation 4(1) of the withdrawn Draft Regulations.

<sup>38</sup> No 100 of 1951.

<sup>39</sup> Ch 2, para 2.3.1.

<sup>40</sup> Section B: Unfair Discrimination, Regulation 5(1) of the withdrawn Draft Regulations. The numbers in square brackets indicate omissions while the letter and number underlined indicate insertions.

<sup>41</sup> Chapter 3, para 3.4.4.2.

extent that it meets the real needs of the business.<sup>42</sup> Economic reasons as a ground of fairness (justification) is not unknown in South African law. The Labour Relations Act<sup>43</sup> provides that the employer's operational requirements constitutes a fair reason for dismissal of an employee.<sup>44</sup> Operational requirements in turn are defined as: "... the *economic*, technological, structural or similar needs of an employer."<sup>45</sup>

Notwithstanding the fact that economic reasons are recognised as fair in dismissal law, it should not be included as a listed ground of justification to an equal remuneration claim as it is totally unknown in this regard. This ground of justification should be left to garner meaning from the courts within an equal remuneration claims' matrix when raised. These comments may apply *mutatis mutandis* to both financial constraints and administrative efficiency as listed in (a)-(b) above. This submission is based on the fact that financial constraints and administrative efficiency, like economic reasons, are related to the real needs of the business.

It will be necessary to mention in the EEA that section 6(2)(a)-(b) of the EEA which provides for affirmative action and the inherent requirements of the job as grounds of justification are not applicable to a claim made under the proposed section 6(4) which provides for an equal remuneration claim based on the same/similar work and work of equal value.<sup>46</sup> This should be mentioned under section 6 of the EEA as follows:

"(8) The grounds of justification listed in subsection 2(a)-(b) are not applicable to a claim under subsection 4."<sup>47</sup>

#### **4.1.3 Definition of the same/similar work and work of equal value**

It is important for the concepts of "the same or substantially the same work" and "work of equal value"<sup>48</sup> to be defined in the EEA. Correct definitions are vital in order to provide guidance to claimants on how to prove that their work is of equal value. It should be borne in mind when attempting to provide definitions that work of equal

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<sup>42</sup> Meintjes-Van Der Walt L "Levelling the 'Paying' Fields" (1998) 19 *ILJ* 22 at 32.

<sup>43</sup> 66 of 1995 (hereafter referred to as the "LRA").

<sup>44</sup> Section 188(1)(a)(ii) of the LRA.

<sup>45</sup> Emphasis added. Section 213 of the LRA.

<sup>46</sup> The envisaged section 6(4) is contained in section 3(b) of the EEAA.

<sup>47</sup> The words and number underlined indicate insertions.

<sup>48</sup> Section 3(b) of the EEAA.

value presupposes that the work is different, not the same/similar, but is nevertheless of equal value.

The withdrawn Draft Regulations provides guidance with regard to defining these terms. It is submitted that definitions for both these terms be included in section 1 of the EEA as follows:

“[For the purposes of these regulations]“**Same work or substantially the same work**” means that the work performed by an employee[-] ;

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

(b) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable.”<sup>49</sup>

“[For the purposes of these regulations]“**Work of equal value**” means that the work performed by an employee[-] ;

(a) is of [the same] equal value [as] to the work of another employee of the same employer in a different job, if their respective occupations are accorded [the same] equal value in accordance with [regulations 3 to 5] the criteria for assessing the value of the work.”<sup>50</sup>

## 4.2 Conclusion

It is clear from the entire dissertation that the law relating to equal remuneration claims is complex and not easily understood. An inadequate legal framework exacerbates the complexity, thus the importance of the need for an adequate legal framework. It is only through clear provisions relating to equal pay that claimants will be able to benefit from the remedy. It is hoped that these recommendations contribute to the intended purpose of providing an adequate legal framework for equal remuneration claims in South African law and consequently answers the research questions as posed in chapter 1 *supra*.

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<sup>49</sup> Section B: Unfair Discrimination, Regulation 2(a)-(b) of the withdrawn Draft Regulations. The words in square brackets indicate omissions and words underlined indicate insertions.

<sup>50</sup> Section B: Unfair Discrimination, Regulation 2(c) of the withdrawn Draft Regulations. The words in square brackets indicate omissions and words underlined indicate insertions.

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